COUNTY COURTS IN IRELAND.

THE EDURE

C IS,

56,

Rules and Fees,

ND.

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A TREATISE

ON THE

Supreme Court of Judicature Act

(IRELAND) 1877.

A TREATISE

ON THE

Supreme Court of Judicature Act

(IRELAND) 1877,

WITH

SCHEDULE OF RULES,

ORDERS OF COURT, AND FORMS OF PROCEDURE,

TABLE OF FEES, &c.,

AND

NOTES OF CASES.

BY

WILLIAM DWYER FERGUSON, LL.D.

AND

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DUBLIN:

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1878.

PREFACE.

The principal part of this work—in its bulk at least—namely that which professes to present the reader with a compendious view of the changes introduced into our system of Judicature by the Act of 1877, has been in preparation, as opportunity permitted, since the year 1874, when first the measure began to loom, in what has since proved to be, a somewhat distant future. In the meanwhile the numerous cases which had been decided on the corresponding Act in England, of 1873—the prototype as well as the precursor of our own—were collected and abstracted from the reports, according as they came from the press. The latter part of the work, and probably the more important for immediate practical use, namely, the annotation of the orders of the Supreme Court of Judicature in Ireland, promulgated immediately before the Christmas Holidays, has necessarily been prepared and printed with a rapidity and under a pressure by no means agreeable or convenient, and under cir-

cumstances which, it is to be feared, may have left some traces of haste. Yet, with all its imperfections, it is hoped the work may afford assistance to the reader in his endeavour to comprehend a procedure in many respects novel, and in no small degree perplexing, from the circumstance that it has to be traced through a variety of sources—some more or less appropriate and in places at times little expected—bits of procedure being occasionally embedded in clauses dealing with the constitution of our tribunals, and surrounded by enactments affecting the very substance and body of the law. This odd distribution of procedure between the Statute itself, the Statutory Rules appended to it, and the Orders of the Supreme Court framed in obedience to it, is attributable, doubtless, to the exigencies of Parliamentary lawmaking, but it is not the less embarrassing or inconvenient. And again, the dissociation of the Statutory Rules of Procedure from their kindred Orders was, probably, a necessary and painful operation; but it is calculated to lead, and has actually led to grave misconceptions and misunderstandings as to the exact scope and extent of the change introduced by their combined effect. In order in some degree to mitigate this inconvenience, in the present edition of the Orders, the liberty has been taken of placing the Statutory Rules respectively in immediate juxta position with the Orders upon the subject to which they relate, so that the reader may have presented to his view the entire, and

not a part, of the procedure inaugurated by the Judicature Act.

It has fallen to the lot of one of the present Editors to treat of the Practice and Procedure of our Courts in times long gone by (1840), and again under another phase of procedure in 1853, and in adventuring on a third and still more extensive system, he avails himself of the help of his son, who had the opportunity of witnessing the working of the English Judicature Act, while at Chambers in London.

31st January, 1878.
48, Mountjoy Square.

CONTENTS.

INTRODUCTORY VIEW OF THE JUDICATURE PAST AND PRESENT, p. 1-52.

PART I.

JUDICATORY.

CHAP.		PAGE
I.	The Supreme Court of Judicature, its Rules and Officers	54
II.	High Court of Justice and its Judges	81
III.	Divisions of the High Court	87
IV.	Divisional Courts	90
V.	Commissions of Assize and Nisi Prius	93
VI.	Court Sittings and Vacations	97
VII.	Nisi Prius Sittings in Dublin	99
VIII.	Election Judges	100
IX.	The Court of Appeal	101

PART II.

JURISDICTION.

X.	General Jurisdiction transferred to High Court ...	106
XI.	Not transferred	113
XII.	Lunacy Jurisdiction	115
XIII.	Common Law Jurisdiction of Lord Chancellor ...	134
XIV.	Landed Estates Court Jurisdiction	143
XV.	Probate and Admiralty Jurisdiction	149
XVI.	Criminal Jurisdiction	154
XVII.	Single Judge at Chambers or Nisi Prius	155
XVIII.	Of Court of Appeal	156

PART III.

DISTRIBUTION OF BUSINESS.

XIX.	Distribution of Business	164
XX.	Option of Division and Transfers	176

PART IV.

Concurrent Administration of Law and Equity.

(*Section* 27.)

CHAP.		PAGE
XXI.	Equitable Claims and Replications, Subs. (1). ...	184
XXII.	Equitable Defences to Equitable Claims, Subs. (2). ...	187
XXIII.	Cross-Claims against Plaintiff, Subs. (3).	190
XXIV.	Cross-Claims against Co-defendant or third person, Subs. (3)	199
XXV.	Notice to bind third persons, Subs. (3)	205
XXVI.	Incidental Equities recognised Subs. (4)	211
XXVII.	Equitable Defence in lieu of Injunction, Subs. (5) ...	213
XXVIII.	Stay of Proceedings, Subs. (5)	219
XXIX.	Legal Rights recognized Subs. (6)	222
XXX.	Plenary Relief, Subs. (7)	223

PART V.

Amendment and Declaration of Law.

(*Section* 28.)

XXXI.	Administration of Insolvent Assets	228
XXXII.	Express Trusts and Statute of Limitations	231
XXXIII.	Equitable Waste	240
XXXIV.	Merger of Estates	247
XXXV.	Possessory Actions by Mortgagors	253
XXXVI.	Assignment of Choses in Action	258
XXXVII.	Stipulations not of the essence of Contracts ...	272
XXXVIII.	Mandamus and Injunction	281
XXXIX.	Receivers	295
XL.	Damages for Collision at Sea	303
XLI.	Infant's Custody and Education	305
XLII.	General Prevalence of Equity	324

PART VI.

The New Procedure.

XLIII.	The New Procedure	338
XLIV.	Pending Causes	342
XLV.	Actions	353
XLVI.	Writ of Summons	355
XLVII.	Service of Writ	360

PAGE

XLVIII. Appearance 363
XLIX. Summary Orders before Pleading 366
L. Parties to Actions 367
LI. Pleadings 371
LII. New Rules of Pleading 379
LIII. Incidental Matters between Pleading and Trial ... 389
LIV. Trial and Evidence 391
LV. Judgment and Execution 399
LVI. Costs 402
LVII. Appeals 404-424
LVIII. Final Appeal to House of Lords 425
LIX. Interpleader 426
LX. Remitter of Actions to Civil Bill Court 427

THE SUPREME COURT OF JUDICATURE ACT, IRELAND, 1877.

Arrangement of Clauses 429
Statute 432

Schedule of Rules,

Annexed to Statute.

Form of Action and Summons 494
Writ of Summons 494
Interpleader 495
Appearance 495
Parties 496
Pleading 497
New Trial Motions 499
Appeals 499
Exceptions from Rules 500

RULES OF COURT.

[*N.B.—The Schedule Rules relating to each subject are prefixed to the corresponding Order.*]

No. of Order.

I. Writ of Summons, Form of, &c., Action to be commenced by Writ 501
II. Indorsement of Claim 504
III. Indorsement of Address 508
IV. Writs of Summons, Issuing, Filing, &c. 509
V. Concurrent Writs 511
VI. Disclosure by Solicitors and Plaintiffs 512

No. of Order.		Page
VII.	Renewal of Writ	512
VIII.	Service of Writ of Summons	514
IX.	Substituted Service	515
X.	Service out of the Jurisdiction	517
XI.	Appearance	522
XII.	Default of Appearance	525
XIII.	Leave to Defend where Writ specially indorsed ...	529
XIV.	Application for Account where Writ indorsed under Order II., Rule 5	533
XV.	Parties and Notice Parties	534
XVI.	Joinder of Causes of Action	546
XVII.	Actions by and against Lunatics and Persons of Unsound Mind	549
XVIII.	Pleading Generally	550
XIX.	Pleading Matters arising pending the Action ...	561
XX.	Statement of Claim	562
XXI.	Defence	564
XXII.	Discontinuance	568
XXIII.	Reply and Subsequent Pleadings	570
XXIV.	Close of Pleadings	571
XXV.	Issues	571
XXVI.	Amendment of Pleadings	572
XXVII.	Demurrer	577
XXVIII.	Default of Pleading	583
XXIX.	Service of Notices, &c.	588
XXX.	Payment into Court in Satisfaction	590
XXXI.	Discovery and Inspection	593
	1. Interrogatories	593
	2. Production of Documents	604
XXXII.	Admissions	612
XXXIII.	Inquiries and Accounts	613
XXXIV.	Questions of Law	614
XXXV.	Trial	617
XXXVI.	Evidence generally	627
XXXVII.	Evidence by Affidavit	629
XXXVIII.	New Trial	631
XXXIX.	Motion for Judgment	633
XL.	Entry of Judgment	637
XLI.	Execution	638
XLII.	Writs of Fieri Facias and Elegit	645
XLIII.	Attachment	645
XLIV.	Attachment of Debts	647
XLV.	Charging of Stock or Shares, and Distringas ...	651
XLVI.	Writ of Sequestration	652
XLVII.	Writ of Possession	654

No. of Order.		Page
XLVIII.	Writ of Delivery	654
XLIX.	Change of Parties by Death, &c.	654
L.	Transfers and Consolidation	660
LI.	Interlocutory Orders as to Injunctions or Interim Preservation of Property	662
LII.	Motions and other Applications	665
LIII.	Sittings at Chambers	667
LIV.	Nisi Prius Sittings in Dublin	671
LV.	Security for Costs	672
LVI.	Notices and Paper, &c.	672
LVII.	Time	673
LVIII.	Appeals	675
LIX.	Effect of Non-compliance	679
LX.	Sittings and Vacations	679
LXI.	Short-hand Reporting	681
LXII.	Applications for remitting Ejectments for Non-payment of Rent to Civil Bill Courts	682
LXIII.	Appeals from Recorder and Chairman of Dublin ...	682
LXIV.	Courts of Probate or Court for Matrimonial Causes, &c.	682
LXV.	Interpretation of Terms	683

APPENDIX A.

PART I.

WRITS OF SUMMONS.

Form.		
1.	Forms of Writ of Summons, &c.	684
2.	Writ of Summons (Summary Bills of Exchange Acts) ...	685
3.	Writ for Service out of the Jurisdiction, or where notice in lieu of service is to be given out of the Jurisdiction	686
4.	Notice of Writ in lieu of Service to be given out of the Jurisdiction	687
5.	Form of Memorandum for Renewed Writ	688
6.	Memorandum of Appearance	688
7.	Notice to Limit Defence as required by Order XI., 9 ...	688

PART II.

SECTION I.—GENERAL ENDORSEMENTS.—In matters assigned by the 36th section of the Act to the Chancery Division:—

1.	Creditor to Administer Estate	689
2.	Legatee to Administer Estate	689
3.	Partnership	689

SECTION I.—*continued.*	PAGE
4. By Mortgagee	689
5. By Mortgagor	689
6. Raising Portions	689
7. Execution of Trusts	689
8. Cancellation or Rectification of Deeds, &c.	690
9. Specific Performance	690
SECTION II. Money Claims where no special Indorsement under Order II., Rule 3	690
SECTION III. Indorsement for Costs, &c.	692
SECTION IV. Damages and other Claims	693
Recovery of Land (*a*) or (*b*)	694
SECTION V. Special Indorsements under Order II., Rule 3 ...	697
SECTION VI. Indorsements of Character of Parties	698

APPENDIX B.

Form.	
1. Notice by Defendant to Third Party	699
2. Confession of Defence	700
3. Indorsement—Statement of Claim	701
4. Notice of Counterclaim to third party	701
5. Notice of Payment into Court	701
6. Acceptance of Sum paid into Court	701
7. Interrogatories	702
8. Answer to Interrogatories	702
9. Affidavit as to Documents	702
10. Notice to Produce Documents referred to in Pleadings	703
11. Notice to Inspect Documents	704
12. Notice to Admit Documents	704
13. Setting Down Special Case	705
14. Notice of Trial	706
15. Certificate of Officer after Trial by a Jury	706

APPENDIX C.

PLEADINGS.

Form.	
1. Account Stated—Statement of Claim	706
2. Administration of an Estate—(Claim where no will) ...	707
Statement of Defence—Reply	708
3. Administration of an Estate—(Claim where will)	709
Statement of Defence—Reply	710
4. Administration of an Estate—(Claim where breach of trust) ...	711
Statement of Defence—Reply	714
5. Agent—Statement of Claim	716
Statement of Defence—Reply	717

Form. PAGE
6. Bill of Exchange—Claim 718
Statement of Defence—Reply 718
7. Bill of Exchange and Consideration of Claim 720
8. Charter-Party—Statement of Claim 721
Statement of Defence—Reply 722
Joinder of Issue... 724
9. False Imprisonment—Statement of Claim 724
Statement of Defence—Reply 725
10. Foreclosure—Statement of Claim 726
The Defence and Counter-claim 727
The Reply of the Plaintiff 731
11. Fraudulent Misrepresentation—Statement of Claim 732
Statement of Defence—Reply 733
12. Guarantee—Statement of Claim 734
13. Recovery of Land, Rent, &c.—Statement of Claim 735
14. Negligence—Statement of Claim 736
Statement of Defence—Reply 737
15. Promissory Note—Statement of Claim 737
Statement of Defence—Reply 738
16. Recovery of Land and Mesne Profits—Statement of Claim ... 738
Defence and Counter-claim 739
Joinder of Issue 740
17. Recovery of Land and Mesne Profits—Statement of Claim ... 740
Statement of Defence—Reply 741
18. Trespass—Statement of Claim 742
Statement of Defence—Reply 743
19. Statement of Claim (the Vessel "Ida") 743
Statement of Defence—Reply 745
20. Demurrer 745
21. Memorandum of Entry of Demurrer for Argument 745

APPENDIX D.

Judgments.

Forms of Judgment:

1. Default of Appearance and Defence in case of Liquidated Demand 746
2. Judgment in Default of Appearance in Action for Recovery of Land 746
3. Judgment in Default of Appearance and Defence after Assessment of Damages 746
4. Judgment at Trial by Judge without a Jury 747
5. Judgment after Trial by a Jury 747
6. Judgment upon Motion for Judgment 748

APPENDIX E.

Execution.

Forms of Præcipe:

1. Fieri Facias 748
2. Elegit 749
3. Venditioni Exponas 749
4. Writ of Sequestration 749
5. Writ of Possession 750
6. Writ of Delivery 750
7. Writ of Attachment 750

APPENDIX F.

Forms of Writs:

1. Writ of Fieri Facias 751
2. Writ of Venditioni Exponas 752
3. Writ of Possession 753
4. Writ of Delivery 753
5. Writ of Attachment 754
6. Writ of Sequestration 755

APPENDIX G.

Form.

1. Cause Book 756
2. General Summons in Chambers by Judge 757

Schedule of Court Fees, &c. 758

PENDING PROCEEDINGS.

ORDER

IN

CHANCERY DIVISION.

THE Master of the Rolls directs that, subject to any Special Order which may be made in any Cause, Matter, or Proceeding pending in his Court on the 1st of January, 1878, the following course of procedure shall be adopted:—

That all Causes, Matters, and Proceedings, except Causes in which neither Notice of Motion for a Decree has been served, nor Replication has been filed, before the 1st January, 1878, shall, so far as relates to the form and manner of procedure, be continued and concluded in the same manner as they would have been in the High Court of Chancery.

That all such pending Causes in which up to the 1st January, 1878, no Notice of Motion for a Decree has been served, or Replication filed, shall be continued in the same manner as they would have been continued in the High Court of Chancery up to the time at which such Notice of Motion or Replication could have been served or filed, and shall from that period be continued according to the ordinary course of the High Court of Justice.

That any party to a pending Cause may apply by Motion on Notice, that for special reasons a direction may be given for continuing such Cause according to the ordinary course of the High Court of Justice.

[An Order in identical terms has been made by the Vice-Chancellor.]

Order in Common Law Division.

The Queen's Bench order is as follows :—

"In order to avoid the expense and inconvenience of separate applications for directions as to the form and manner of procedure in actions commenced before the 1st January, instant, it is ordered that, in the absence of a special order to the contrary in any particular case, actions commenced before the 1st January instant, shall be continued as follows, viz. :—

(*a*). Actions in which judgment shall be entered for default of pleading shall be prosecuted and carried on according to the practice of the late Court of Queen's Bench.

(*b*). Actions in which defence has been (or shall be) taken, but in which the abstract of the pleadings and issues in fact has not been already lodged, shall be continued according to the practice of the late Court of Queen's Bench until the filing of the last pleading; but all subsequent proceedings shall be taken according to the practice of the High Court of Justice, as if such action had been commenced therein, and as if the pleadings herein had been closed (within the meaning of Rule XXIV. of the said High Court) at the time of the filing of such last pleading.

(*c*). Actions in which the abstract of the pleadings and issues in fact has been already lodged shall be continued according to the practice of the late Court of Queen's Bench."

[An Order similar to the above, *mutatis mutandis*, and alike in effect, have been made in the Common Pleas and Exchequer Divisions.]

TABLE A.

OF SECTIONS OF IRISH JUDICATURE ACT, SHOWING THE CORRESPONDING SECTIONS OF THE ENGLISH JUDICATURE ACTS, 1873 & 1875.

IRISH JUDICATURE ACT. 1877. Section.	ENGLISH. 1873. Section.	ENGLISH. 1875. Section.
1. Short Title	1	
2. Commencement of Act	2	
3. Interpretation of Terms	100	
4. One Supreme Court	3	
5. Division of Supreme Court	4	
6. Constitution of High Court	5	
7. Judges of Landed Estates Court		
8. Judges of Court of Bankruptcy		
9. Judges of Court of Admiralty		
10. Constitution of Court of Appeal	...	4
11. Vacancies by Judges' Resignation, &c. ...	7	
12. Qualification of Judges	8	
13. Tenure of Office of Judges	...	5
14. Precedence of Judges	...	6
15. Rights of existing Judges	11	
16. Extraordinary Duties of Judge	12	
17. Salaries of existing Judges	11	
18. Salaries of future Judges	13	
19. Pensions of future Judges	14	
20. Salaries and Pensions, how paid	15	
21. Jurisdiction of High Court	16	
22. Jurisdiction not transferred to High Court ...	17	
23. Jurisdiction transferred to Court of Appeal ...	18	
24. Appeals from High Court	19	
25. Transfer of Pending Business	22	
26. Rules as to exercise of Jurisdiction ...	23	
27. Law and Equity to be concurrently administrated	24	
28. Rules of Law on certain points	25	10
29. Abolition of Terms	26	
30. Vacation	27	
31. Sittings in Vacation	28	
32. Jurisdiction of Judges of High Court on Circuit	29	
33. Trial by Jury in Dublin	30	
34. Divisions of High Court	31	
35. Rules of Court for Distribution of Business ..	33	
36. Assignment of Business to Divisions ...	34	
37. Option of Plaintiff to Choose Divisions ...	...	11
38. Power of Transfer	36	
39. Procedure Before Land Judges		
40. Application to Extend Receiver		
41. Sittings in Dublin and on Circuit	37	

TABLE A.—*continued.*

IRISH JUDICATURE ACT.	ENGLISH.	
1877.	1873.	1875.
Section.	Section.	Section.
42. Provisions under Chancery Amendment Act, 1858		
43. Rota of Judges for Election Petitions ...	38	
44. Power of One or More Judges	39	
45. Divisional Courts	40	
46. Divisional Courts for Business of Q.B. C.P. Ex. D.'s	41	
47. Business of Judges of Chancery and Probate Divisions	42	
48. Cases Reserved for Divisional Courts and Court of Appeal	46	
49. Land Cases Reserved		
50. Provision for Crown Cases Reserved ...	47	
51. Motions for New Trial to be heard by Divisional Courts	48	
52. What Orders shall not be Subject to Appeal ...	49	
53. Costs		
54. Discharging Orders Made in Chambers ...	50	
55. Provision for the Absence of a Judge ...	51	
56. Power of Single Judge in Court of Appeal ...	52	12
57. Constitution of Court of Appeal	...	4
58. Arrangement of Business of Court of Appeal ...	55	
59. Assessors	56	
60. Provisions as to Arbitration		
61. As to making Rules of Court before or after Act	68	17
62. Circuits and Assizes	...	23
63. Winter Assizes		
64. Rules of Court of Probate to be Rules of High Court	...	18
65. Criminal Procedure	...	19
66. Act not to Effect Rules of Evidence ...	...	20
67. Saving existing Procedure when not inconsistent	...	21
68. Additional Power as to Regulation of Procedure	...	24
69. Orders and Rules to be laid before Parliament ...	...	25
70. Councils of Judges to consider Procedure ...	75	
71. Acts of Parliament to be read as applying ...	76	
72. Transfer of existing Officers	77–81	
73. Appointment of future Officers	84	34
74. Commissioners to Administer Oaths ...	82	
75. Receiver Master		
76. Salaries and Pensions of Officers	85	
77. Clerks of Assize and Nisi Prius		
78. Solicitors and Attorneys	87	
79. Rules of law to apply to inferior Courts ...	91	
80. Transfer of Books and Papers to Court of Judicature	92	
81. Saving as to Circuits	93	
82. Saving as to Lord Chancellor	94	
83. Great Seal in Commission	98	
84. Fixing and Collection of Fees	...	26
85. Unclaimed Dividends in Bankruptcy ...	...	32

TABLE B.

OF SECTIONS OF THE ENGLISH JUDICATURE ACTS 1873 AND 1875, SHOWING THE CORRESPONDING SECTIONS OF THE IRISH JUDICATURE ACT, 1877.

J. A. 1873. Section	J. A. 1877. Section
1. Short Title	1
2. Commencement of Act	2
3. Union of existing Courts	4
4. Division of Supreme Court	5
5. Constitution of High Court	6
6. Repealed	
7. Vacancies by Judges	11
8. Qualifications of Judges	12
9. Repealed	
10. Repealed	
11. Saving Rights of Judges	15 & 17
12. Extraordinary Duties of Judges	16
13. Salaries of future Judges	18
14. Retiring Pensions of future Judges	19
15. Salaries and Pensions, how paid	20
16. Jurisdiction of High Court	21
17. Jurisdiction not transferred	22
18. Jurisdiction transferred to Court of Appeal	23
19. Appeals from High Court	24
20. Repealed	
21. Repealed	
22. Transfer of Pending Business	25
23. Rules as to exercise of Jurisdiction	26
24. Law and Equity, concurrent administration of	27
25. Rules of Law upon certain points	28
26. Abolition of Terms	29
27. Vacation	30
28. Sittings in Vacation	31
29. Jurisdiction of Judges on Circuit	32
30. Sitting for Trials in London and Middlesex	33
31. Divisions of High Court of Justice	34
32. Power to Alter Divisions	
33. Distribution of Business—Rules of Court	35
34. Assignment of Business to Division	36
36. Power of Transfer	38
37. Sittings in London and Westminster and on Circuit	41
38. Rota of Judges for Election Purposes	43
39. Power of One or More Judges	44
40. Divisional Courts of High Court	45
41. Divisional Courts, Cases Reserved for,	46

TABLE B.—*continued.*

J. A. 1873. Section	J. A. 1877. Section
42. Distribution of Business of Chancery and Probate Division	47
45. Appeals from Inferior Courts	
46. Cases Reserved for Divisional Courts	48
47. Provision for Crown Cases Reserved	50
48. Motions for New Trials Before Divisional Courts ...	51
49. Orders not Subject to Appeal	52
50. Discharging Orders made at Chambers	54
51. Provision for Absence of Judge...	55
52. Power of Single Judge in Court of Appeal	56
55. Arrangement of Business of Appeal	58
56. Referees and Assessors	59
75. Council of Judges as to Procedure	70
76. Acts of Parliament to former Courts	71
77. Transfer of Officers to Supreme Court	72
81. Doubts as to Status	72 & 13
82. Commissioners to Administer Oaths	74
84. Duties, Appointment, and Removal of Officers ...	74
85. Salaries and Pensions of Officers	76
86. Patronage not provided for	
87. Solicitors and Attorneys	78
91. Rules of Law to apply to Inferior Courts	79
92. Transfer of Books and Papers	80
93. Saving as to Circuits	81
94. Saving as to Lord Chancellor	82
J. A. 1875.	J. A. 1877.
4. Constitution of Court of Appeal	10 & 57
5. Tenure of Office of Judges, &c.	5 & 13
6. Precedence of Judges	14
10. Rules of Law on Certain Points	27
11. Option of Division	37
12. Sittings of Court of Appeal	56
17. Provisions for Making Rules of Court	61
18. Rules of Court of Probate	64
19. Criminal Procedure	65
20. Rules of Evidence	66
21. Saving of Existing Procedure	67
22. Right to have Issues Submitted to Jury	48 & 2
23. Circuits and Assizes	62
24. Regulation of Procedure Rules...	68
25. Orders and Rules laid before Parliament	69
26. Fees, Fixing and Collecting	84
32. Unclaimed Dividends in Bankruptcy	85
34. Vacancies in Offices	

TABLE C.

ORDERS OF THE SUPREME COURT OF JUDICATURE IN ENGLAND AND IRELAND, SHOWING THE CORRESPONDING ORDER IN EACH CASE RESPECTIVELY.

English Order.	TITLE.	Irish Order.
1.	Form and Commencement of Action (Schedule, Rule 1.)	
2.	Writ of Summons and Procedure	Order 1
3.	Indorsements of Claim	2
4.	Indorsement of Address	3
5.	Issue of Writ of Summons	4
6.	Concurrent Writs	5
7.	Disclosure by Solicitors and Plaintiff	6
8.	Renewal of Writ	7
9.	Service of Writ of Summons	8
10.	Substituted Service	9
11.	Service out of Jurisdiction	10
12.	Appearance	11
13.	Default of Appearance	12
14.	Leave to defend specially indorsed Writ	13
15.	Account, application for	14
16.	Parties	15
17.	Joinder of Causes of Action	16
18.	Actions by and against Lunatics	17
19.	Pleading generally	18
20.	Pleading matter arising, pending Action	19
21.	Statement of Claim	20
22.	Defence	21
23.	Discontinuance	22
24.	Reply and subsequent Pleadings	23
25.	Close of Pleadings	24
26.	Issues	25
27.	Amendment of Pleadings	26
28.	Demurrer	27
29.	Default of Pleading	28
—	Service	29
30.	Payment into Court	30
31.	Discovery and Inspection	31
32.	Admissions	32
33.	Inquiries and Accounts	33
34.	Questions of Law	34
35.	District Registries	
36.	Trial	35
37.	Evidence Generally	36
38.	Evidence by Affidavit	37
39.	Motion for New Trial	38

TABLE C.—*continued.*

English Order.	TITLE.	Irish Order.
40.	Motion for Judgment	39
41.	Entry of Judgment	40
42.	Execution	41
43.	Fieri Facias and Elegit	42
44.	Attachment	43
45.	Attachment of Debts	44
46.	Charging Stock and Distringas	45
47.	Writ of Sequestration	46
48.	Writ of Possession	47
49.	Writ of Delivery of Property	48
50.	Change of Parties by Death, &c.	49
51.	Transfers and Consolidation	50
52.	Interlocutory Orders as to Mandamus, &c. ...	51
53.	Motions and Other Applications	52
54.	Applications at Chambers	53
—	Nisi Prius, Dublin...	54
55.	Costs	
—	Security for Costs	55
56.	Notices and Papers	56
57.	Time	57
57A	Divisional and Other Courts	
58.	Appeals	58
59.	Effect of Non-Compliance	59
60.	Officers ... ... J.A. 1877, s. 72	
61.	Sittings and Vacations	60
—	Shorthand Reporting	61
—	Remitter of Ejectments	62
—	Appeals from Recorder and Chairman of Dublin ...	63
62.	Exceptions from Orders	64
63.	Interpretation of Terms	65

TIME TABLE

FOR ALL PROCEEDINGS TO BE TAKEN UNDER THE JUDICATURE ACT AND RULES.

		Order and Rule.
ACCOUNT, summary order for	Application for may be *at any time* after time for entering appearance expired	ORD. XIV. R. 2.
AFFIDAVITS, by plaintiff by way of evidence on trial	*Within* 14 *days* (in the absence of special agreement or order) after order for evidence to be taken . .	ORD. XXXVII. R. 1.
by defendant	*Within* 14 *days* after delivery of plaintiff's list (in absence of special agreement or order)	ORD. XXXVI R. 2.
by plaintiff in reply .	*Within* 7 *days* after expiration of said 14 (in absence of special agreement or order)	ORD. XXXVII. R. 3.
AMENDMENT, statement of claim	Once, without leave *before expiration of time limited for reply* (3 weeks), or if no defence be delivered within 4 weeks of last appearance . . .	ORD. XXVI. R. 1.
copy of amendment .	Copy of amended statement to be delivered to new defendant, *at the time when he is served* with writ of summons, or afterwards within 4 days after his appearance	ORD. XV. R. 16.
of counter claim or set off	May amend without leave *any time before expiration of time allowed defendant for pleading to the reply* (3 weeks); if no reply before expiration of 28 days from filing defence	ORD. XXVI. R. 2.
application to disallow, amendment . . .	After amendment under above, opposite party may *within* 8 *days* from delivery of amended Pleading, apply to have such disallowed either entirely or in part	ORD. XXVI. R. 3.

. . . . . .

AMENDMENT—*con.*		
when leave to amend ceases	If leave to amend obtained, and party does not amend within time allowed, or if no time limited, *within* **14** *days from leave, such order is void*	ORD. XXVI. R. 6.
of writ of summons .	*At any time* by leave of Court or Judge	ORD. XXVI. R. 10.
APPEAL, from Chambers .	To Queen's Bench, Common Pleas, and Exchequer Divisions, *within* **8** *days after the decision* appealed against	ORD. LIII. R. 7.
from interlocutory orders	*Within* **21** *days from date of order*	ORD. LVIII. R. 11.
from final order . . .	Within *one year*	
from winding-up order, or order in Bankruptcy, or other matter	*Within* **21** *days from date of order* except by leave	ORD. LVIII. R. 5.
from exparte application refused . . .	*Within* **4** *days* from date of refusal, *or within such enlarged time* as Court may allow	ORD. LVIII. R. 6.
notice of, from judgment	Must be *a* **14** *days' notice*	ORD. LVIII. R. 2.
from interlocutory order	Must be *a* **4** *days' notice*	ORD. LVIII. R. 2.
notice by respondent in appeal from final judgment	Subject to special order, respondent must give an **8** *days' notice* . . .	ORD. LVIII. R. 3.
like from interlocutory order	*Must be a* **2** *days' notice*	ORD. LVIII. R. 3.
APPEAL to House of Lords	*Within* **1** *year* from date of last decree, order, or judgment; appealed from *House of Lords' Standing Orders.—I. November*, 1876.	
in case of disability .	*Within* **1** *year* after the removal of the same.—H. L. S. O. I. . . .	
in case of absence . .	*Not* longer *than* **5** *years* from date of last decree.—L. S. O. I.	
APPEARANCE within the jurisdiction . . .	Must be entered by Defendant *within* **8** *days* of service of writ.—App. A. Part I., Form **1**	

APPEARANCE—*con.*		
when not within the jurisdiction . . .	Within the time limited in the order giving leave to serve writ out of jurisdiction	ORD. X. R. 3.
when third person served with notice under Ord. XV. R. 18	*Within* 8 *days* from service . . .	ORD. XV. R. 20.
notice of appearance . .	On the day of appearance give notice to plaintiff's solicitor	ORD. XI. R. 1.
default of	When the claim is for liquidated demand and writ is specially indorsed, plaintiff may on filing affidavit of service, immediately enter final judgment	ORD. XII. R. 2
	When not indorsed, on filing affidavit of particulars, and after expiration of 8 *days*, he may enter final judgment	ORD. XII. R. 3 and R. 5.
limit of time for appearing	A defendant may appear at any time before judgment (save as provided by ORD. XII. R. 8.)	ORD. XI. R. 7.
BILL OF EXCHANGE, leave to defend . .	Under Bills of Exchange Act application to be made *within* **12** *days* from service of writ.—24 & 25 Vic. ch. 43, s. 2	ORD. I. R. 2.
CHAMBERS—Common Law Division . . .	Appeals from decisions to the said Courts shall be by motion made	
appeal from	*within* **8** *days* after decision appealed against	ORD. LIII. R. 7.
CHANGE of parties . .	Where an order is made to carry on proceedings under ORD. XLIX. R.	
discharge of order . .	4, application to discharge or vary same must be made *within* **12** *days* from service thereof	ORD. XLIX. R. 6.
	Any person under disability, and not represented, may apply to discharge or vary such order *within* **12** *days* after the appointment of a guardian	
CLAIM, statement of, time for delivery . . .	or guardian *ad litem*	ORD. XLIX. R. 7.
	Within **6** *weeks* from the time of the defendant's entering appearance .	ORD. XX. R. 1.
amendment of . . .	Plaintiff may amend without leave *before the expiration of the time limited for reply*, or where no defence is delivered *within* **4** *weeks* from last appearance	ORD. XXVI. R. 1.

CLAIM—*con.*		
copy of amended statement, delivery of .	Shall be delivered to new defendant *at the time* when he is served with the writ of summons or notice, or afterwards, *within* 4 *days* after his appearance	ORD. XV. R. 16.
COSTS, payment into Court	Where accepted in full satisfaction of claim, *costs* to be paid *within* 48 *hours* after taxation	ORD. XXX. R. 4.
CROSS-EXAMINATION, notice for, after evidence taken by affidavit	Must be served *within* 14 *days* after time allowed for filing affidavits in reply, or within such time as may be appointed	ORD. XXXVII. R. 4.
DEFENCE, statement of, delivery in Chancery Division	*Within* 14 *days* from delivery of statement of claim	
in Common law Division	*Within* 8 *days* from delivery of statement of claim, or from the time limited for appearance, unless such time be extended	ORD. XXI. R. 1.
where no statement of claim required . .	At any time *within* 8 *days* after appearance	ORD. XXI. R. 2.
where writ specially indorsed under ORD. XIII.	Within such time as shall be limited by order, or if no time is thereby limited, *within* 8 *days* after the order	ORD. XXI. R. 3.
further defence or reply arising pending action, and after party has pleaded already or let time to close expire	Further defence or reply arising, pending action, may be delivered by leave *within* 8 *days* after its arising	ORD. XIX. R. 2.
amendment of defence	Where a set-off or counter claim is pleaded, amendment thereof may be made *at any time* (and without leave) before the expiration of the time for pleading to the reply (and before pleading thereto) or if no reply, *within* 28 *days* from the filing of his defence	ORD. XXVI. R. 2.

DEFENCE—*con.* limited to part . . .	In action for the recovery of land defence may be limited to a part by serving notice to that effect *within* 4 *days* after appearance	ORD. XI. R. 9.
DEMURRER, time for delivery	Within the same time as any other pleading in the action, viz. 8 *days* to statement of claim; 3 *weeks* to a defence, 4 *days* to reply	ORD. XXVII. R. 3.
time for entry for argument	If the demurrer be not entered for argument, and notice thereof given *within* 10 *days* after delivery (and if the pleading demurred to is not amended) the demurrer shall be held sufficient	ORD. XXVII. R. 6.
DISCOVERY, time for delivery of interrogatories	Either parties before close of pleading may *once* without order, or *at any time* by leave deliver interrogatories	ORD. XXXI. R. 1.
application to strike out	Any party called upon to answer interrogatories may *within* 4 *days* after service apply to strike out any interrogatory as scandalous, irrelevant, or not bona fide	ORD. XXXI R. 5.
answer to	By affidavit to be filed *within* 10 *days* or other time allowed	ORD. XXXI. R. 6.
DISMISSAL for want of prosecution . . .	A defendant instead of giving notice of trial may apply to have the action dismissed for want of prosecution (See Trial)	ORD. XXXV. R. 4.
default of delivery of statement of claim .	Where the plaintiff is bound to deliver and does not do so *within the time allowed*, the defendant may apply *at the expiration of* 6 *weeks from appearance or other time allowed*) to dismiss action with costs for want of prosecution . . .	ORD. XXVIII. R. 1. and ORD. XX. R. 1.
default of answering interrogatories, &c. .	Within time limited in order, if a plaintiff, his action may be dismissed; if a defendant the defence struck out, and the defendant placed in same position as if he had not pleaded .	ORD. XXXI. R. 19.
ENTRY of Action for trial in Dublin	By one or other party, must be made *within* 6 *days* after notice of trial .	ORD. XXXV. R. 11.

ENTRY—*con.*		
for trial	When party giving notice of trial for Dublin or the County of Dublin omits to enter action for trial, the party receiving the notice may (unless countermanded) enter it *within* 4 *days*	ORD. XXXV. R. 15.
of judgment, date of .	Entry of judgment when pronounced in Court shall be dated as of the *day on which judgment is pronounced* .	ORD. XL. R. 2.
	And in all other cases entry shall be dated as of the day on which the requisite documents are left with the proper officer	ORD. XL. R. 3.
EXECUTION, writs of, when issued . . .	Where money or costs are payable under a judgment, the person entitled may *immediately after entry* sue out a writ of fieri facias, or elegit	ORD. XLI. R. 15.
where payment ordered within a period mentioned	Then no writ till after expiration of such period, but leave may be given to issue execution before, or to stay execution until any time after the expiration of the period	ORD. XLI. R. 15.
duration of writ . .	1 *year from issue*, unless renewed .	ORD. XLI. R. 16.
after what time may be issued	As between original parties to a judgment, at any time *within* 6 *years* from judgment	ORD. XLI. R. 18.
after 6 years	*After* 6 *years or any change* in the parties, leave must be obtained . .	ORD. XLI. R. 19.
FINAL JUDGMENT, default of appearance .	See Appearance	
under Ord. XIII. R. 1, on specially indorsed writ	Application must be made by motion (a motion requires 2 *clear days* between service and hearing) . .	ORD. XIII. R. 2.
appeal from	Within a year	ORD. LVIII. R. 11.
notice to vary . . .	Notice by a respondent of intention to contend that the decision of the Court should be varied, must subject to special order, be *an* 8 *days' notice*	ORD. LVIII. R. 3.

GUARDIAN *ad litem* to appoint.	Notice of application for a guardian *ad litem* to be appointed to a defendant who has not appeared, must be served at least **6** *clear days* before day named in notice for hearing application	ORD. XII. R. 1.
to discharge order to bind	Where served with order under ORD. XLIX. R. 3, may apply to have same discharged or varied *within* **12** *days* of service	ORD. XLIX. R. 6.
	Where persons being under disability, and not having had a guardian *ad litem* appointed in the action, is served with an order under ORD. XLIX. R. 3, he may apply to have such order discharged or varied *within* **12** *days* after appointment of such guardian	ORD. XLIX. R. 7.
INSPECTION, notice to .	Inspection of documents referred to in pleadings or affidavits can be applied for by notice in writing *at any time before or at the hearing*	ORD. XXXI. R. 13.
notice that documents can be inspected . .	Party receiving such notice shall *within* **2** *days*, if all documents referred to therein have been set out in pleadings or affidavits, or if not *within* **4** *days*, give notice that *within* **3** *days* from delivery thereof the documents can be inspected by the opposite party	ORD. XXXI. R. 15.
INTERPLEADER . . .	Application to be made by a defendant *at any time after* service of writ summons, and *before delivering* a defence	SCH. R. 12.
INTERROGATORIES, time for delivering .	Either party may before close of pleadings may *once* without order, or *at any time* by leave. (For application to strike out, &c., see Discovery)	ORD. XXXI. R. 1.
application to strike out		
JUDGMENT for costs where payment into Court is accepted in full satisfaction . . .	Plaintiff may sign judgment for costs, **48** *hours* after taxation, where he accepts the payment and has given notice to that effect to the defendant	ORD. XXX. R. 4.

JUDGMENT—*con.*		
where one party does not appear at the trial setting aside . . .	May be set aside on terms on application made *within* 6 *days* after trial .	ORD. XXXV. R. 21.
JUDGMENT, direction to enter, subject to leave to move, time for setting down action on motion for judgment	Notice thereof must be given within time limited, or if no time has been limited, *within* 10 *days* after trial .	ORD. XXXIX. R. 2.
when no direction for entry of	The plaintiff must set down action on motion for judgment, and give notice thereof *within* 10 *days* after trial, otherwise any defendant may do so	ORD. XXXIX. R. 3.
where issues and questions of fact ordered to be determined . .	Plaintiff may set down action on motion for judgment as soon as issues have been determined; if he does not *within* 10 *days* after his right has arisen, and give notice thereof, then any defendant may do so and give notice thereof	ORD. XXXIX. R. 5.
extent of time allowed for motion . . .	No action shall, except by leave, be set down on motion for judgment after the *expiration of* 1 *year* from the time when the party became entitled so to do	ORD. XXXIX. R. 7.
entry of	Entry of judgment when given in Court shall be dated *as of the day on which such judgment is pronounced*	ORD. XL. R. 2.
	In all other cases, entry as of day on which the requisite documents are left with proper officer	ORD. XL. R. 3.
MOTION, notice of . . .	Must be served, except by special leave, 2 *clear days* before the day named therein for hearing . . .	ORD. LII. R. 3.
NEW TRIAL, application to Divisional Court .	If the trial has taken place in Dublin, shall be made *within* 4 *days after the trial, or on first* subsequent day that the Court sits to hear motions .	ORD. XXXVIII. R. 1.
	If the trial has taken place elsewhere than in Dublin, the motion shall be made *within the first* 4 *days* of the next following sittings	ORD. XXXVIII. R. 1.

NEW TRIAL—*con.*		
service, copy of order to show cause . . .	Must be served *within* 4 *days* after being made	ORD. XXXVIII. R. 2.
showing cause . . .	The opposite party must show cause at the expiration of 8 *days* from the date of the order, or as soon after as the case can be heard . . .	ORD. XXXVIII. R. 1.
NOTICES of appeal from judgment	*Shall be a* 14 *days' notice*	ORD. LVIII. R. 2.
appeal from interlocutory judgment order	Shall be a 4 *days' notice*	ORD. LVIII. R. 2.
by a respondent to vary final judgment and interlocutory order	8 *days,* if final, 4 *days* if interlocutory	ORD. LVIII. R. 3.
of appearance . . .	The defendant on entering an appearance, shall on the same day give notice thereof.	ORD. XI. R. 1.
for cross-examination when evidence taken by affidavit . . .	Must be served *within* 14 *days* after time for filing affidavits in reply, or within such time as is appointed, on the party to be cross-examined at the trial	ORD. XXXVII. R. 4.
of limited defence to action for recovery of land	Within 4 *days* after appearance . .	ORD. XI. R. 9.
of entry of demurrer for argument	*Within* 10 *days* after delivery . . .	ORD. XXVII. R 6.
of application for guardian	See Guardian	
for inspection of documents	See Inspection	
of motion for judgment where leave reserved. Where no direction. Where issues of fact are ordered to be tried	See Judgment	
of motion	Must be served (except by special leave) 2 *clear days* before day named therein for hearing. . . .	ORD. LII. R. 3.
of payment into Court in satisfaction . .	See payment into Court	
of trial	See Trial	

PARTIES, application to strike out or substitute	May be made *at any time before trial* by motion or summons; or at the trial in a summary manner . . .	ORD. XV. R. 14.
application to discharge or vary order adding a party	Where an order is made under ORD. XLIX. R. 4, application to vary or discharge, same must be made *within* 12 *days* from service thereof.	ORD. XLIX. R. 6.
where person is under a disability . . .	And not represented may apply to discharge or vary order *within* 12 *days* after appointment of guardian.	ORD. XLIX. R. 7.
PAYMENT into Court in satisfaction . . .	If such payment be made before delivering his defence, the defendant shall *thereupon* serve notice to the plaintiff thereof	ORD. XXX. R. 2.
of acceptance of payment before defence delivered	If payment is made before delivery of a defence, the plaintiff may *within* 4 *days* after receipt of notice, or if payment is stated in a defence, then *before reply*, accept the same, and must give notice to defendant thereof; and in case it is accepted in satisfaction of entire claim, he may tax his costs, and in case of non-payment *within* 48 *hours* sign judgment for his costs so taxed . .	ORD. XXX. R. 4.
after		
satisfaction of whole claim		
PLEADINGS, statement of claim, delivery of .	*Within* 6 *weeks* from time of defendant entering appearance	ORD. XX. R. 1.
Defence	See Defence	
Demurrer	See Demurrer	
Reply	See Reply	
REPLY, and subsequent pleading	The plaintiff must deliver his reply *within* 3 *weeks* after the defence, unless time extended	ORD. XXIII. R. 1.
further arising pending action	*Within* 8 *days* after such ground of defence has arisen	ORD. XIX. R. 2.

REPLY—*con.*		
subsequent pleading .	Subject to ORD. XXIII. R. 2, every subsequent reply shall be delivered *within* 4 *days* after the delivery of previous pleading, unless time be extended	ORD. XXIII.
STATEMENT OF CLAIM	See Claim	
TIME, months	Months unless expressed to be lunar, mean calendar	ORD. LVII. R. 1.
Sundays	Where any limited time *less than* 6 *days* is allowed, Sunday, Christmas, and Good Friday are excluded . .	ORD. LVII. R. 2.
holidays	When time expires on a holiday, it is extended to the day on which office is next open	ORD. LVII. R. 3.
long vacation . . .	Long Vacation is not reckoned in time allowed (unless by order) for filing, amending, and delivering pleadings	ORD. LVII. R. 5.
TRIAL, notice of, by jury .	May be given by Plaintiff with his reply, or at any time after the close of pleadings	ORD. XXXV. R. 2.
notice by defendant .	If the Plaintiff shall not *within* 6 *weeks* after the close of pleadings, or extended time, give such notice, then the defendant may	ORD. XXXV. R. 2.
notice of application to direct mode of, by plaintiff or defendant	May be given by plaintiff with his reply, or at any time after close of pleadings. And if plaintiff does not give such notice *within* 6 *weeks* after the close of pleadings, the defendant may	ORD. XXXV. R. 3.
order by Court of Judge	May in any action, *at any time*, order questions to be tried by different modes of trial	ORD. XXXV. R. 5.
notice of trial by the plaintiff	The plaintiff may, *with his reply*, or at any time after the close of the pleadings, give notice of trial, and specify mode and place of trial. If the plaintiff do not give notice *within* 6 *weeks* after close of pleadings (unless the time is extended), defendant may give such notice .	ORD. XXXV. R. 3.
by defendant		
notice, time of . . .	Notice of trial must be a 10 *days' notice*, unless parties agree to a short notice, which is a 4 *days' notice* . .	ORD. XXXV. R. 9.

TRIAL—*con.*		
where party gives notice of trial for Dublin, but omits to enter the action for trial on same or next day .	The party receiving the notice for trial (in the absence of countermand), may *within* **4** *days* enter the action for trial	ORD. XXXV. R. 15.
TRANSFER OF ACTIONS	Order may be made *at any stage* of the proceedings	ORD. L. R. 3.
WRIT of summons . . .	Only in force *for* **12** *months* from date thereof	ORD. VII. R. 1.
concurrent	May be issued *within* **12** *months* after the issuing of the original . . .	ORD. V. R. 1.
indorsement of date .	On which writ was served must be made by person serving the same *within* **3** *days*	ORD. VIII. R. 2.
renewal	Writ may be renewed by leave *for* **6** *months* from date of such renewal, and so from time to time during the currency of the renewed writ . .	ORD. VII. R. 1.
of execution	See execution	
duration of writ . . .	If unexecuted writs remain in force *for* **1** *year* only from its issue, unless renewed	ORD. XLI. R. 16.

TABLE OF CASES.

A. B. *v.* Attorney General, 150
Acheson *v.* Henry, 600
Acktie *v.* Bolaget Eckmans, 520
Adams *v.* Davison, 508
Adams *v.* O'Brien, 508
Adcock *v.* Peters, 356, 374
Aderis *v.* Thrigley, 381
Ainsworth *v.* Starkie, 354, 595
Allan *v.* Donnelly, 173
Allan *v.* United Kingdom Electric Telegraph Co., 405
Allen *v.* Kennet, 548
Allenborough *v.* Thompson, 508
Allertson *v.* Chichester, 268
Allgood *v.* Gibson, 632
Alwood *v.* Miller or Milman, 197
Amies *v.* Clark, 91
Ammerman *v.* Digges, 674
Amos *v.* Chadwick, 662
Anderson *v.* Bank of British Columbia, 602
Andrew *v.* Raeburn, 98, 670
Andrews *v.* Salt, 172, 311, 314, 319
Andrews *v.* Stewart, 531
Anglo-Italian Bank *v.* Wells, 531
Apothecaries, Society of, *v.* Nottingham, 602
Archbold *v.* Rice, 110
Armitage *v.* Fitzwilliam, 597
Armstrong *v.* Crawley, 538
Armstrong *v.* Waterford Railway Co., 285
Ashby *v.* Ashby, 329, 548
Ashworth *v.* Browne, 173
Ashworth *v.* Outram, 6
Askew *v.* North Eastern Railway Co., 385, 387, 556, 574
Astley *v.* Weldon, 277
Aston *v.* North Western Railway Co., 519
Atkins *v.* Taylor, 532, 565, 584
Atkinson *v.* Ellison, 196
Atkinson *v.* Newcastle Waterworks Co., 280
Attorney-General *v.* Barrett, 656
Attorney-General *v.* London and North Western Railway Co., 586
Attorney-General *v.* Pagham Harbour Co., 627
Attorney-General *v.* Moas, 673
Attorney-General *v.* Pasley, 114
Attorney-General *v.* Ray, 28
Attorney-General *v.* Wiltshire, 250, 251
Austin *v.* Austin, 311
Ayles *v.* Cox, 275
Aynsley *v.* Glover, 286

Back *v.* Hay, 619
Bacon *v.* Bacon, 602
Bagnell *v.* Carlton, 651
Bagnell *v.* Edwards, 19
Baigent *v.* Baigent, 647
Baker *v.* Newton, 599
Baker *v.* Oakes, 402
Baltic Co. (Limited) *v.* Simpson, 626
Banahan *v.* Wallice, 571
Bannicot *v.* Harris, 595, 599
Baring *v.* Stanton, 407
Barnicott *v.* Hann, 380
Barker *v.* Wood, 564
Barlow *v.* Bartery, 663
Barr *v.* Barr, 181, 300
Barron *v.* Cooke, 380
Barry *v.* Barry, 366, 308
Barry *v.* Grogan, 556
Barry *v.* M'Grath, 591
Barry *v.* Scully, 605
Bartholomew *v.* Rawlings, 196, 201, 566, 600
Bartlam *v.* Yates, 349, 405
Bartlett *v.* Bartlett, 266
Bartlett *v.* Lewis, 329, 601
Bartlett *v.* Roche, 380
Barton *v.* Sampson, 419
Bataod *v.* Hawes, 329
Batley *v.* Kynock, 663
Baxter *v.* West, 167

Beall *v.* Smith, 120, 550
Beauchamp, Earl of, *v.* Winn, 334, 659
Beaufort, Duke of, *v.* Berty, 238
Beavan *v.* Countess of Mornington, 422
Beddington *v.* Beddington, 511, 520
Bell *v.* Hazlerigg, 629
Bell *v.* Lowe, 508, 533
Bell *v.* O'Reilly, 21
Benecke *v.* Frost, 206, 208, 545, 546
Benjamen *v.* Sanley, 608
Bennett *v.* Gamgee, 657
Bennett *v.* Griffiths, 664
Bennett *v.* Moore, 636
Benson *v.* Paul, 283
Berdan *v.* Birmingham Small Arms Co., 410
Beresford *v.* Browning, 331
Bergin *v.* Burke, 364
Berkly *v.* Sewell, 297
Berridge *v.* Roberts, 531
Berry or Berkly *v.* Sewell, 297, 299
Berry *v.* Exchange Trading Co., 666
Best *v.* Pembroke, 648
Betham *v.* Fernie, 519
Bibby *v.* Naylor, 656
Biekford *v.* Davey, 602
Bigsby *v.* Dickenson, 418, 422
Binks *v.* Wharton, 565
Birch *v.* Williams, 623
Blackburne Union *v.* Brook, 628
Blackmore *v.* Smith, 657
Blair *v.* Massey, 610
Blake *v.* Albion Life Assurance Co., 573
Boake *v.* M'Cracken, 555
Boddy *v.* Wall, 587
Boilan *v.* Dublin and Belfast Railway Co., 664
Bolivia, Republic of, *v.* National Bolivian Navigation Co., 406, 615, 636
Bolton *v.* Corporation of Liverpool, 602
Booth *v.* Briscoe, 367
Booth *v.* Taylor, 294
Bostock *v.* North Staffordshire Railway Co., 632
Bottomley *v.* Brooke, 202
Bouck *v.* Bouck, 547
Bourke *v.* Murray, 371
Bournes *v.* Bournes, 419
Bowdidge *v.* Slaney, 507
Bowen *v.* Bowen, 536
Bower *v.* Hartley, 206, 211
Boyce *v.* Rossborough, 151
Boyce *v.* Simpson, 648
Boyes *v.* Cook, 563
Boys *v.* Ancell, 278
Bradley *v.* James, 266, 267
Bradshaw *v.* Lancashire Railway Co., 655
Brady *v.* Fitzgerald, 297
Bramwell *v.* Halcomb, 293
Brand *v.* Matson, 301
Bredin *v.* Corcoran, 570
Brereton *v.* Hutchinson, 233
Breslawer *v.* Barwick, 555, 556
Breton *v.* Mockett, 563
Bridge *v.* Grand Junction Railway Co., 303
Bridgeman *v.* Gill, 233
Bridson *v.* Budding, 586
Bridson *v.* M'Alpine, 293
Bridson *v.* Smith, 636
Bright *v.* Legerton, 239
British Empire Shipping Co. *v.* Somes, 595
British Mutual Investment Co. *v.* Cobbold, 18
British Mutual Investment Co. *v.* Smart, 170
Brittlebank *v.* Goodwin, 232
Broadhurst *v.* Willey, 593
Broughton *v.* Hutt, 334
Brown *v.* Brown, 414
Browne *v.* Fullarton, 369
Brunter *v.* Robertson, 520
Bruntoff *v.* Doyle, 515
Bubb *v.* Yelverton, 243, 246
Buchanan *v.* Jack, 640
Buchanan *v.* Taylor, 600
Budding *v.* Murdock, 342, 573
Bull *v.* Clarke, 610
Burdick *v.* Garrick, 239
Burford, Corporation of, *v.* Lenthall, 117
Burne *v.* Robinson, 233, 652
Burns *v.* Irving, 651
Burrell *v.* Cartwright, 619, 662
Burrowes *v.* Gore, 233
Bush *v.* Beavan, 283
Bustros *v.* White, 329, 602, 603
Butler *v.* Carter, 232
Butterworth *v.* Tee and Wife, 358, 506, 538
Byrd *v.* Nunn, 557
Byrne *v.* Elliott, 632
Byrne *v.* Hutchinson, 642
Byrne *v.* Martin, 585

Cahill *v.* M'Dowall, 548
Calcraft *v.* West, 284

Caldwell *v.* Board of Works, 40, 174
Caldwell *v.* Pagham Harbour Co., 359, 535
Calvert *v.* Gasen, 242
Calvert *v.* Power, 624
Callaghan *v.* Callaghan, 422
Callan *v.* Marum, 555
Campbell *v.* Im Thurn, 503, 658
Campbell *v.* Mackey, 547
Cannot *v.* Morgan, 180
Cantwell *v.* Cannock, 546
Cappelaus *v.* Brown, 193, 197, 199, 348
Capps *v.* Capps, 659
Carey *v.* Cuthbert, 239
Cargill *v.* Bower, 575
Carne *v.* Meilins, 369
Carnegie *v.* Baird, 538
Carr *v.* Boyce, 118
Carr *v.* Morice, 294
Carroll *v.* Hargreave, 233
Carron Iron Co. *v.* Maclaren, 516
Carter *v.* Dean of Ely, 274
Carter *v.* Dunne, 517
Carter *v.* *Leeds Daily News*, 595, 598, 602
Carter *v.* Uniake, 295
Casey *v.* Arnott, 518, 520
Cashin *v.* Craddock, 596, 605
Cassin *v.* Shortall, 648
Castro *v.* Murray, 135
Catling *v.* King, 556, 579
Cave *v.* Mackenzie, 407
Cavendish *v.* Mundy, 246
Chamberlaine *v.* Drumgoole, 655
Chapman *v.* Chapman, 18
Chatfield *v.* Bertchtold, 618
Chatterton *v.* White, 240
Cheese *v.* Lovejoy, 396, 398, 404
Chester *v.* Phillips, 540
Chesterfield and Boythorpe Colliery Co. *v.* Black, 599, 603
Child *v.* Stenning, 372, 535, 536, 553
Cholmondeley *v.* Clinton, 255
Chowne *v.* Baylis, 264
Clark *v.* Beaumont, 612
Clarke *v.* Bowman, 326
Clarke *v.* Callow, 556
Clarke *v.* Cockburn, 626
Clarke *v.* Cookson, 626
Clarke *v.* Cost, 191
Clarke *v.* Roche, 646
Clarkson *v.* British and Foreign Marine Insurance Co., 370
Clowes *v.* Hillard, 370
Coates *v.* Sandy, 513
Cochrane *v.* Camack, 217
Cochrane *v.* Willis, 332
Colebourne *v.* Colebourne, 294, 301, 358, 505
Collis *v.* Prendergast, 217
Collins *v.* Thompson, 650
Colonial Assurance Corporation *v.* Prosser, 564
Colonial Bank of Australia *v.* Willan, 136
Colyer *v.* Lee, 417
Comerford *v.* Watson, 135
Commissioners of Charitable Donations *v.* Wybrants, 234, 235
Commissioners of Sewers *v.* Gellatby, 354
Commissioners of Waterford *v.* Neale, 545
Conduit *v.* Soane, 118
Concha *v.* Murietta, 662
Conolly *v.* Luscombe, 659
Conolly *v.* Teeling, 527
Cook *v.* Dey, 516, 560
Cook *v.* Enchmarch, 548
Cook *v.* Hall, 173
Cooke *v.* Oceanic Steam Co., 605
Cooper *v.* Blissett, 356, 374, 505
Cooper *v.* Castle, 407
Cooper *v.* Cooper, 403, 424
Cooper *v.* Ince Hall Co., 664
Cooper *v.* Phipps, 332, 334
Cope *v.* De la Warr, 405
Copinger *v.* Quirk, 364, 548
Coppinger *v.* Gubbins, 240, 242
Cormack *v.* Grofrian, 370
Cornwall *v.* Hudson, 564
Corsellis *v.* Corsellis, 312
Cosby *v.* Robinson, 360
Costa Rica *v.* Erlanger, 341, 394, 646
Cotching *v.* Hancock, 595
Cotton *v.* Horseman, 564
Courtois *v.* Vincent, 312
Courtown, Lord, *v.* Ward, 240
Cowles *v.* Gale, 274
Cox *v.* Barker, 173, 354, 369, 416
Crane *v.* Jullion, 364, 516
Crane *v.* Loftus, 351, 654
Crawford *v.* Crawford, 238
Crawford *v.* Horsea Steam Brick and Tile Co., 417
Credit Foncier Association *v.* Adair, 352
Creen *v.* Wright, 338, 632
Cremen *v.* Hawkes, 297
Crichton *v.* Collery, 557
Croft *v.* Goldsmid, 278
Crofton *v.* Ormsby, 274
Croly *v.* Mathew, 241

Crosbie *v.* Thompson, 385
Crosse *v.* Smith, 326
Crowe *v.* Barnicott, 553
Cruikshank *v.* the Floating Swimming Baths Co., 348
Cruse *v.* Kuttingall, 515
Cullen *v.* Moran, 506
Culley *v.* Buttifant, 352, 584, 611, 646
Culverhouse *v.* Wilkens, 650
Cuming *v.* Montgomery, 548
Cummings *v.* Herron, 410
Curriers' Co. *v.* Corbett, 286
Curry *v.* Johnson, 508
Cuthbert *v.* Hornsby, 659

Daly *v.* Coghlan, 559
Daly *v.* Nolan, 570
Daniel *v.* Freeman, 260, 266
Daniel *v.* M'Carthy, 217, 648
Danson *v.* La Capelain, 516
Darcy *v.* Whittaker, 353
Darnley, Lord, *v.* London, Chatham, and Dover Railway Co., 573
Daubney *v.* Shuttleworth, 666, 679
Davenport *v.* Davenport, 291
Davey *v.* Whittaker, 654
Davies *v.* Maellenry, 135
Davis *v.* Davis, 317, 321
Davis *v.* Garland, 513
Davis *v.* Hone, 273
Davis *v.* Spence, 532
Davy Brothers *v.* Garrett, 382
Dawes *v.* Thornton, 207
Dawkins *v.* Lord Penrhyn, 235, 556, 579
Dawson *v.* Mailey, 648
Day *v.* Ratcliffe, 537
Deane *v.* Sandford, 519
Dearle *v.* Hall, 260, 265
Debenham *v.* Lacey, 662
Dee *v.* Dee, 571
Dear *v.* Sworder, 201
Defries *v.* Stewart, 569, 590
De Hart *v.* Stevenson, 540
Delaseaux *v.* Barling, 506
Dempster *v.* Vernon, 508
Denison *v.* Franklyn, 359, 507, 529
Dennison *v.* Keatinge, 136
Deposit Life Assurance Co. *v.* Ayscough, 194
Devonshire, Duke of, *v.* Foot, 140
Dickenson *v.* Teasdale, 234
Dickson *v.* Capes, 513
Dixon *v.* Neath Co., 648
Dillon *v.* Cruise, 233
Dimmock *v.* Hallett, 275
Dinwiddie *v.* Bailey, 168
Disney *v.* Longbourne, 596
Doe *v.* Gibbs, 255
Doherty *v.* Allman, 242
Doherty *v.* M'Daid, 649
Donaldson *v.* Donaldson, 265
Doran *v.* Carroll, 242
Douglas *v.* Cowden, 590
Downshire, Marquis of, *v.* Sandys, 244
Doyle *v.* Kaufman, 514
Drake's Patent Concrete *v.* Demer, 294
Drake *v.* Whiteley, 595
Drewitt *v.* Edwards, 646
Drogheda, Marquis of, *v.* Hanlon, 374
Druiff *v.* Lord Parker, 332, 333
Drummond *v.* Drummond, 518
Dymonds *v.* Croft, 515
Dublin, Archbishop of, *v.* Trimblestou, 328
Duckett *v.* Gover, 370, 371
Duncan *v.* Vereker, 573
Dundas *v.* Blake, 233
Dunne *v.* Doran, 232
Dunraven *v.* Adare Coal and Iron Co., 420
Durbing *v.* Lawrence, 576, 587
Dutch *v.* Power, 631
Dymocks *v.* Croft, 560, 634
Dymond *v.* Croft, 525, 528, 666

Eade *v.* Jacobs, 601
Early *v.* Smith, 564
Earp *v.* Faulkner, 342, 631
Earp *v.* Henderson, 378
East Assam Co. *v.* Roche, 531
Ede *v.* Vyse, 535
Edmunds *v.* Greenwood, 601
Edwards *v.* Abrey, 119
Edwards *v.* Lowther, 371
Edwards *v.* Noble, 180, 214, 342
Edwards *v.* Warden, 362
Eldridge *v.* Bargess, 657
Eldridge *v.* Croucher, 119
Ellice *v.* Roupell, 173
Ellis *v.* Ambler, 597
Ellis *v.* Munson, 561, 562
Emma, The, 605
Emmanuel *v.* Bridger, 649
English *v.* Tottie, 329, 600, 603
English *v.* Vestry of Camberwell, 293
Ennor *v.* Barwell, 663
Etheringlon *v.* Wilson, 407
Etty *v.* Bridges, 269
Eustace *v.* Lloyd, 216
Evans *v.* Buck, 535, 544
Evans *v.* Gann, 194

Evans *v.* Jones, 513
Evenett *v.* Laurence, 411
Eyre *v.* Cox, 356, 374, 505, 513
Eyre *v.* Smith, 25

Ex parte.—
Carpenter, Smith and Batty, 137
Cohen, 215
Coker, 216
Collie, 208
Coroner West Riding of Cork, 114
Cowan, 139
Devonshire, Duke of, 139
Dillon, 115
Domville, a Bankrupt, 26
Fernandez, Jose Luis, 2, 154
Finn *in re* Curtis, 311
Gillebrand, 417
Guerin, 110
Higgins, 137
Hinton, 409
Hodgekinson, 230
Horsford, *in re* Smith, 530
Hughes, 215
Leonard, 26
Lynch, 140
National Bank, 51
Pannell, 26
Parnell, 114
Pearson, 422
Pennell, 215
Price, 192
Reusbury, 259
Rocke *in re* Hall, 230
Rowe, 135
Sawyer, 418
Smith *in re* Collie, 209
Smith and Hopwood, 215
South, 270
Stirling, 421
Union Bank of Manchester, 260
White, 119
Williams, 139

Farmer *v.* Fottrell, 593
Farran *v.* Mercer, 419
Fay *v.* Fay, 297
Fayle *v.* Kingstown Waterworks Co., 517
Fenner *v.* Bedford, 294
Fenner *v.* Dempsey, 645
Fenney *v.* Forward, 601
Fenwick *v.* Johnson, 595
Ferguson *v.* Wilson, 419, 539
Fernie *v.* Young, 422
Ferrard *v.* Arbuthnot, 569
Field *v.* Field, 182, 661
Fievet *v.* Manby, 19, 29
Financial Corporation *v.* Price, 648
Finlay *v.* Barton, 518
Finlay *v.* Lindsey, 602
Fisher *v.* Cox, 513
Fisher *v.* Hughes, 611
Fisher *v.* Val de Travers Asphalte Co., 90, 104
Fitzsimon *v.* Lyons, 135
Fleming *v.* Fleming, 152
Fletcher *v.* Egan, 651
Fletcher *v.* Fletcher, 263
Flight *v.* Bolland, 539
Flight *v.* Booth, 275
Flood *v.* Sulton, 110
Flower *v.* Gedye, 623
Flower *v.* Lloyd, 161, 173, 354, 415, 424, 610, 664
Foley *v.* Hill, 168
Foot *v.* Duke of Devonshire, 140
Foot *v.* Lea, 285
Forbes *v.* Carney, 280
Forbes *v.* Moffat, 252
Ford *v.* Tynte, 243
Fortescue *v.* Fortescue, 607
Foss *v.* Foss, 302
Foster *v.* Gamgee, 562
Fotherby *v.* Metropolitan Railway Co., 283
Fottrell *v.* Kavanagh, 229
Fowler *v.* Fowler, 170
Fowler *v.* Knoop and London Banking Association, 210
Fowler *v.* Zewry, 347
Fox *v.* Bulkley, 330, 332
Fox *v.* Wallis, 671
Foxwell *v.* Webster, 173
Frazer *v.* Burrows, 605
Frederici *v.* Vanderzee, 530
Freeman *v.* Lomax, 191
French *v.* Lear, 530
French *v.* Macale, 279, 280
French *v.* Mulligan, 360
Frew *v.* Stone, 519
Friend *v.* London and Chatham Railway Co., 603
Fryer *v.* Royle, 356, 374, 505
Fryer *v.* Wiseman, 339, 539, 612, 627
Fulton *v.* Creagh, 250
Furlong *v.* Scanlon, 328
Furness *v.* Booth, 202, 207

Garbutt *v.* Fancus, 218, 221
Gardiner *v.* Hardy, 352, 528
Garling *v.* Royds, 350, 619, 647
Garnett *v.* Bradley, 402

Garth *v.* Cotton, 243, 244, 246
Gaskell *v.* Chambers, 517
General Steam Navigation Co. *v.* London and Edinburgh Shipping Company, 181, 304, 403
Geraghty *v.* Sharkey, 648
German Bank of London *v.* Schmidt, 532
Gerrard *v.* O'Reilly, 277
Gibbons *v.* M'Evilly, 662
Gilbert *v.* Smith, 614, 637
Gillot *v.* Ker, 586, 587, 637
Glover *v.* Danberry, 418
Gilmour *v.* Simpson, 647
Glover *v.* Greenbank Alkali Co., 160
Goddard *v.* Macauley, 110
Goddard *v.* Poole, 658
Goff *v.* Finlan, 515
Golding *v.* Wharton Salt Works, 407, 575
Good *v.* Allen, 569
Gorman *v.* Hinks, 276
Goss *v.* Lord Nugent, 332
Gosset *v.* Campbell, 584, 558
Gourley *v.* Plimsoll, 599
Governors of Christ's Hospital, Brecknock *v.* Martin, 98
Grady *v.* Hunt, 539
Grant *v.* Banque Franco Egyptienne, 414, 636
Graves *v.* Chamney, 119
Gray *v.* Lawder, 618
Great Australian Mining Co. *v.* Martin, 519
Great Western Insurance *v.* Cunliffe, 17
Green *v.* Browning, 519
Green *v.* Colby, 563
Green *v.* Pledger 204
Greene *v.* Greene, 656
Greene *v.* Le Clerk, 408
Greenought *v.* Gaskell, 602
Gregory *v.* Wilson, 278
Griffin *v.* Hamilton, 405
Griffin *v.* Morgan, 655
Griffiths *v.* Taylor, 423
Grocers' Co. *v.* Coll, 618
Guilfoyle *v.* Hutchinson, 630

Habershon *v.* Gill, 298
Habgood *v.* Paul, 557
Haigh *v.* Jagger, 290
Hall *v.* Blackwell, 640
Hall *v.* Eve, 378, 384, 554, 557
Hall *v.* Hall, 167
Hall *v.* Pritchett, 648
Hall *v.* Rhynd, 514
Hall *v.* Smith, 411
Hall *v.* Snelling, 586
Halliday *v.* Harris, 215
Hallum *v.* Hill, 671
Halsey *v.* Grant, 275
Hamil *v.* White, 170
Hamilton *v.* Hector, 311, 316, 319
Hammersmith Skating Rink Co. *v.* Dublin Skating Rink Co., 288
Hammond *v.* Hammond, 22
Hammond *v.* Messenger, 263
Hanbury *v.* Noone, 30, 218, 661
Hancock *v.* De Niceville, 349, 538
Hancock *v.* Macnamara, 194
Hanley *v.* M'Dermott, 335
Hanmer, Lord, *v.* Flight, 386, 531, 532, 533
Hansard *v.* Robinson, 326
Hardman *v.* Leech, 21
Hare *v.* Hare, 615
Harkin *v.* Montgomery, 135
Harold *v.* Smith, 593
Harold *v.* Whitaker, 257
Harpur *v.* Pedder, 659
Harris *v.* Aaron, 413
Harris *v. Franconia*, Owners of, 519
Harris *v.* Gamble, 200, 202, 203, 204, 210, 553, 560
Harris *v.* Newton, 409
Harris *v.* Pepperell, 171
Harrison *v.* Markins, 347
Hartley *v.* Owen, 611
Harvy or Harvey *v.* Davey, 373
Hastie v. Hastie, 4, 405
Hastings, Corporation of, *v.* Ivall, 293
Hate *v.* Snelling, 586
Hawes *v.* Paveley, 32, 139, 141
Hawksworth *v.* Hawksworth, 319, 321.
Hawley *v.* Reade, 597
Haxall *v.* Hodgson, 533
Hay *v.* Le Nave, 303
Hayden *v.* Shearman, 645
Hayes *v.* Price, 142
Hazell *v.* Currie, 662
Head *v.* Ryde, 619
Heap *v.* Marris, 383
Hennessy *v.* Bohman, 664
Henry *v.* Rankin, 110
Herbert *v.* Greene, 298
Herring *v.* Bischoffsheim, 558
Heslop *v.* Baker, 266
Hewetson *v.* Whittington Life Insurance Co., 594
Hewson *v.* Guinness, 119
Higginbotham *v.* Aynsley, 583
Higgs *v.* Northern Assam Tea Co., 270

Hill *v.* Andus, 304
Hill *v.* Campbell, 601
Hill *v.* Hibbet, 173
Hillman *v.* Mayhew, 31, 178, 182, 553, 587, 661
Hills *v.* Rowland, 278
Hime *v.* Campbell, 411
Hirschfield *v.* London General Omnibus Co., 210
Hitchen *v.* Birks, 299, 300
Hobhouse *v.* Courtney, 362
Hobson *v.* Bell, 265
Hodgens *v.* Hodgens, 547, 651
Hodges *v.* Hodges, 558, 565, 579, 581
Hodsoll *v.* Taylor, 600, 601
Hodson *v.* Midland Great Western Railway Co., 632
Hogan *v.* Healy, 170, 330
Holloway *v.* York, 179
Holmes *v.* Harvey, 181
Holroyd *v.* Marshall, 213, 327
Holt *v.* Dewell, 267, 268
Honahan *v.* Ahern, 585
Honduras Oceanic Railway Co. *v.* Le Fevre Tucker, 371, 537
Horne *v.* Hough, 600
Honywood *v.* Honeywood, 244
Hooper *v.* Giles, 376, 565, 584
Hope *v.* Banks, 386
Hope *v.* Hope, 306, 315
Hope *v.* Threlfall, 419
Hopewell *v.* Barnes, 32
Hopkinson *v.* Owens, 270
Horsley *v.* Cox, 649
Horwell *v.* London General Omnibus Co., 210
Houghton *v.* London and County Assurance Co., 608
Howard *v.* Bank of England, 336
Huddersfield, Corporation of, *v.* Jacomb, 97
Hudson *v.* Temple, 273
Hughes *v.* Guinness, 593
Hughes *v.* Metropolitan Railway Co., 219, 279
Humphreys *v.* Edwards, 30, 661
Hunt *v.* Bateman, 233
Hunt *v.* Browne, 241
Hunt *v.* City of London Real Property, 662
Hunt *v.* Hodges, 241
Hunter *v.* Hunter, 412, 539, 553
Hutchinson *v.* Baslam, 25
Hutchinson *v.* Glover, 603
Hutchinson *v.* Hartmont, 646

Imperial Mercantile Credit Association *v.* Huntingdon, 604
Ingate *v.* Lloyd Australian Co., 285
Ingham *v.* Waskett, 656
International Finance Society *v.* City of Moscow Gas Company, 411
Irish Society *v.* Crommelin, 574, 605
Isaac *v.* Grant, 152
Isenberg *v.* East India House Estate Co., 285
Ivory *v.* Cruikshank, 527, 639

Jackson *v.* North Eastern Railway Co., 657
Jackson *v.* Spittal, 519
Jacobs *v.* Brett, 139
James *v.* South Western Railway Co., 24
Jaquot *v.* Bourna, 507
Jebbs *v.* Lewis, 204, 210
Jefferey *v.* Lysaght, 555
Jeffryes *v.* Drysdale, 124
Jenkins *v.* Davies, 555, 637
Jenney *v.* Bell, 553
Jennings *v.* Bond, 270
Johnasson *v.* Bonhole, 578
Johnson *v.* Midland Great Western Railway Co., 418, 419
Johnson *v.* Moffat, 182, 363
Johnson *v.* Smith, 607
Jones *v.* Ham, 110
Jones *v.* Mackie, 590
Jones *v.* Turner, 385
Jones *v.* Victoria Graving Dock, 406
Judd *v.* Green, 415
Jurtings *v.* Conn, 241
Justice *v.* Mersey Steel and Iron Co., 420, 426
Justice *v.* Wynne, 271

Keany *v.* Tottenham, 553
Kearney *v.* Kearney, 168
Kearney *v.* Ryan, 645
Kearney Ryland *v.* London & Brighton Railway Co., 325
Keays *v.* Lane, 203
Kelly *v.* Dixon, 518
Kelly *v.* Kelly, 233
Kelly *v.* Slator, 591
Kelly *v.* Solari, 334
Kelly *v.* Staunton, 297
Kelsey *v.* Kelsey, 297
Kemble *v.* Farren, 276
Kennedy *v.* Grace, 364
Keogh *v.* Keogh, 204, 252
Kisbey *v.* Holyhead Railway Co., 519

Kevan *v.* Crawford, 421
Kevil *v.* Lynch, 150
Kelt *v.* Robinson, 519
Keyland *v.* Corporation of Belfast, 189
Kimberley *v.* Dick, 168
Kinahan *v.* Bolton, 285
King *v.* Corke, 342, 572
King *v.* King-Harman, 170
King, The, *v.* Islay, 309
King, The, *v.* Moses Soper, 312
Kingchurch *v.* the People's Gardens Co., 37, 108, 220
Kino *v.* Rudkin, 17, 287, 658, 662
Kirwan *v.* Burchall, 559
Kitching *v.* Kitching, 548
Knatchbull *v.* Fowle, 339, 539, 627
Knight *v.* Lynch, 580
Knott *v.* Fitzgibbon, 136
Knowlman *v.* Bluett, 335
Knox *v.* Kelly, 233
Knox *v.* Walters, 118
Kyne *v.* Murphy, 515

Laird *v.* Murray, 285
Lake *v.* Gibson, 331
Lake *v.* Pooley, 609
Lamb *v.* Arton, 419
Lane *v.* Eve, 624
Lane *v.* Hone. 553
Langridge *v.* Campbell, 592
Large *v.* Large, 359
Larkin *v.* Lawder, 564
Lascelles *v.* Butt, 621
Lawless *v.* Lawless, 152
Lawrenson *v.* Dublin Metropolitan Junction Railway Co., 516
Lea *v.* Whitaker, 277
Leake *v.* Noble, 648
Leathley *v.* MacAndrew, 540
Leaver *v.* Fielder, 333
Ledwidge *v.* Lynch, 347
Lee *v.* Colyer, 197
Lefroy *v.* Gore, 329
Leitrim, Earl of, *v.* Maddison, 655
Leonard *v.* Leonard, 334
Lereculey *v.* Harrison, 373
Lessee of Ashtown *v.* White, 277
Lewer *v.* Barnett, 646
Ley *v.* Marshall, 606
Liberia, Republic of, *v.* Roze, 611
Life Insurance Association of Scotland *v.* M'Blain, 21
Liffard *v.* Quinn, 293
Light *v.* Light, 118
Lindsey *v.* Condy, 632, 634
Lindsay *v.* Lynch, 559
Little *v.* Stewart, 119
Litton *v.* Litton, 570
Liverpool, Brazil Steam Navigation Co. *v.* London and St. Katherine's Steam Navigation Co., 621
Livesay *v.* Harding, 268
Lloyd's Banking Co. *v.* Ogle, 532
Lloyd *v.* Lewis, 633.
Lloyd *v.* Rossmore, 539
Lloyd *v.* Lord Trimbleston, 290
London, City of, *v.* Pugh, 279
London *v.* Roffey, 633
London & South Western Railway Co. *v.* James, 188
Long *v.* Littledale, 641
Longfield *v.* Cashman, 295
Loscombe *v.* Russell, 167
Lovell *v.* Holland, 373
Loveridge *v.* Cooper, 260
Lows, *ex parte*, 676
Lowe *v.* Lucey, 293
Lowndes *v.* Beetle, 289, 291
Lowndes *v.* Thomas, 586
Lowther *v.* Bellairs, 347
Luscher *v.* Comptoir d' Escomptè de Paris, 663
Lydale *v.* Martinson, 625, 656
Lynch *v.* Oversall Coal Co., 540
Lyons *v.* Bleakin Jacob, 315, 317, 321

Macartney *v.* Corry, 100, 174
Macdonald *v.* Bode, 197, 202, 212, 543
Mackin *v.* Salkeld, 119
Macken *v.* Ellis, 518, 519
Mackenzie *v.* Shepperd, 520
Mackey *v.* Scottish Widow's Fund Co., 286
Mackley *v.* Chillingworth, 336
Maclean *v.* Naughton, 423, 424
Maclean *v.* Vaughan, 404
MacNamara *v.* Church, 170
Macnamara *v.* Lynch, 656
Madeley *v.* Booth, 275
Magdalen Hospital, *v.* Knotts, 607.
Magee *v.* Lavelle, 277, 278
Maguire *v.* Gardiner, 516
Maguire *v.* Monahan, 508
Mahony *v.* Lewis, 656
Major *v.* Barton, 136
Makin *v.* Barrow, 292
Malins in Phosphate Sewage Co. *v.* Hartmont, 18
Mallinson *v.* Mallinson, 310
Manchester and Sheffield Railway Co. *v.* Brooks, 194, 195, 537

Manisty *v.* Kenealy, 548, 580
Mansell *v.* Feeny, 381
Mansfield *v.* Childerhouse, 590
Mansfield *v.* Crawford, 240
Mape *v.* London and North Western Railway Co., 517
Marcus *v.* General Steam Navigation Co., 407
Mare *v.* Lewis, 238
Margate Pier and Harbour Co. *v.* Perry, 532, 565
Marsh *v.* Dunlop, 372, 537
Marsh *v.* Mayor of Pontefract, 387, 574
Martin *v.* Gregg, 641
Martin *v.* Hemming, 612
Marston *v.* Smith, 214, 336
Martin *v.* Williams, 362
Mason *v.* Bogg, 229
Martin *v.* Kelly, 648
Mathews *v.* Brise, 238
Mattock *v.* Heath, 594, 607, 638
Mavro *v.* Olean, 328
Maxwell *v.* Mitchell, 279
M'Anulty *v.* Nanties, 385
M'Cartney *v.* Simonton, 110
M'Corquodale *v.* Bell, 600, 602, 603
M'Craith *v.* Quinn, 298
M'Dermott *v.* Caldwell, 537
M'Dermott *v.* Sullivan, 506
M'Donnell *v.* Murray, 326
M'Donnell *v.* White, 232
M'Fadden *v.* Jenkins, 270
M'Gillicuddy *v.* Galway, 217
M'Kenney *v.* Reynolds, 674
M'Kenzie *v.* Hesketh, 274
M'Lester *v.* Fagan, 580
M'Mahon *v.* Burchell, 385
M'Mahon *v.* Ellis, 656
M'Namara *v.* Arthur, 189
M'Namara *v.* Waterford and Limerick Railway Co., 517
M'Swiney *v.* Haynes, 285
Meakin *v.* Sykes, 586
Measurer *v.* Thomas, 207, 208
Megaw *v.* De Lizordi, 568
Mellor *v.* Sidebottom, 407, 637
Meluish *v.* Milton, 29, 31, 301
Menhinick *v.* Turner, 574
Menton *v.* Metcalf, 528
Menzies *v.* Lord Grantley, 302
Mercantile Mutual Insurance Co. *v.* Shoesmith, 596
Mercantile River Plate Bank *v.* Isaac, 503, 535
Mercier *v.* Cotton, 596
Metropolitan Board of Works, *v.* New River Co., 615
Metropolitan Railway Co. *v.* Defries, 179, 582, 386, 408
Meux *v.* Bell, 268, 269
Meyrick *v.* James, 630
Michell *v.* Lee, 648
Mitchell *v.* Wilson, 624, 674
Middleton *v.* Pollock, 191, 656
Miles *v.* Murphy, 256
Miller *v.* O'Brien, 516
Miller *v.* Ship *Virgo*, 419
Miller *v.* Mynn, 648
Minet *v.* Moran, 602, 608
Molloy *v.* French, 268, 270
Molony *v.* Quail, 280
Montgomery *v.* Blair, 139
Montgomery *v.* Cunningham, 240
Montgomery *v.* Montgomery, 371
Montreal, Bank of, *v.* Cameron, 530
Moore *v.* Belfast and Ballymena Railway Co., 517
Moore *v.* Browne, 656
Moore *v.* City and County Bank, 221
Moore *v.* Elliot, 538
Moore *v.* Kempton, 17
Moorhead *v.* Moorhead, 120
Moorhouse *v.* Colville, 574
Moran *v.* Moran, 151
Mordaunt *v.* Ryan, 506, 507
Morgan *v.* Elford, 426
Morgan *v.* Lariviere, 18
Morley *v.* Morley, 253
Morrell *v.* Cowan, 173
Morris *v.* Grant, 286
Morris *v.* Livie, 170
Mortimer *v.* Shortall, 170
Moseley *v.* Blake, 262
Moseley *v.* M'Mullen, 555
Mostyn, New, *v.* West Mostyn Coal Co., 29, 37, 171, 179, 195, 218, 332, 594, 606
Mounsey *v.* Earl of Lonsdale, 535
Moylan *v.* Healy, 568
Mulligan *v.* Chute, 570
Mullin *v.* Bonger, 513
Mulville *v.* Fallon, 293
Murr *v.* Cooke, 408
Murray *v.* Simpson, 648
Murphy *v.* Daly, 241
Murphy *v.* Nugent, 571
Mutlow *v.* Bigg, 238

Naish *v.* Macken, 326
Nagle *v.* O'Donnell, 538

Nagle-Gilman *v.* Christopher, 98
Nash *v.* Dickenson, 641
Nathan *v.* Batchelor, 578
National Provincial Bank of England *v.* Bradley Bridge Co., 206, 209, 546
National Steamship Co. *v.* Owners of "City of Berlin," 421
Naughten *v.* Midland Great Western Railway Co., 594
Needham *v.* River Protection Co., 221
Needham *v.* Smith, 420
Newby *v.* Oppen, 516
Newell *v.* National Provincial Bank, 194, 566
Newenham *v.* Cahill, 242
Newington *v.* Levey, 562
Newland *v.* Arthur, 518
New Westminster Brewery Co. *v.* Hannah, 627
Nichols *v.* Marsland, 325
Nicholson *v.* Dracachis, 31
Nicholson *v.* Jackson, 198
Niger Merchants Co. *v.* Capper, 9
Nixon *v.* Potts, 419
Nolan *v.* Fitzgerald, 517
Norris *v.* Beazley, 346, 373, 503
Norris *v.* Irish Land Co., 283
Norton & Cannock Coal Co. *v.* Merriman, 195, 347
Norton *v.* Gover, 301
Nugent *v.* Piers, 110

Obee *v.* Bishop, 232
O'Brien *v.* Cecil, 570
O'Brien *v.* Lemas, 508
O'Brien *v.* Taggart, 574
Ochse *v.* Redfern, 372, 538
O'Connell *v.* Barry, 600
O'Connor *v.* Spaight, 168
O'Donnell *v.* Reilly, 574
O'Ferrall *v.* Burke, 362
Oger *v.* Bradnum, 503, 516
O'Hanlon *v.* Unthank, 655
O'Kelly *v.* Browne, 151
Oldfield *v.* Cobbett, 136
O'Neill *v.* Browne, 24
Onge *v.* Truelock, 328
Oram *v.* Breary, 139
Original Hartlepool Co. *v.* Gibb, 195, 561
O'Riordan *v.* O'Riordan, 592
Orr *v.* Cooper, 656
Orr *v.* Draper, 374, 595
Osborn *v.* Gillett, 655
Osborn *v.* London Dock Co., 329, 601
Owen *v.* Pritchard, 646
Owens *v.* Steam Coal Co., 221

Pacey *v.* London Tramways Co., 90, 157
Padwick *v.* Scott, 178, 198
Padwick *v.* Stanley, 168
Page *v.* Williams, 137
Paget *v.* Ede, 510
Palin *v.* Brookes, 351
Parham *v.* Vincent, 505
Parker *v.* Cathcart, 631
Parker *v.* Siddons, 299, 300
Parnell *v.* Great Western Railway Co., 632
Parson *v.* Smith, 357, 506
Parsons *v.* Harris, 589, 636
Parsons *v.* Tinling, 402
Patrick *v.* Milner, 273
Patterson *v.* Gaslight and Coke Co., 626
Patterson *v.* Wooler, 627
Pattison *v.* Dooler, 351
Pattison *v.* Gilford, 173
Paxton *v.* Bell, 672
Peachey, *v.* Somerset, Duke of, 273, 275
Pearce *v.* Spicket, 586
Pearson *v.* Lane, 543
Pease *v.* Fletcher, 298
Peck *v.* Gurney, 326
Peck *v.* Nolan, 601
Peek *v.* Dear, 370
Peek *v.* Tunsmaran Iron Co., 298
Pemberton *v.* Barnes, 172
Penarth Harbour and Railway Co. *v.* Cardiff Waterworks Co., 609
Pentland *v.* Sommerville, 243, 244
Perkins *v.* Slater, 351
Perry *v.* Moore, 371
Peru, Republic of, *v.* Weguelin, 423, 598
Peters *v.* Vivian, 289
Petre *v.* Petre, 234
Peyton *v.* Harting, 603
Phelps *v.* Prothero, 21
Phillips *v.* Barron, 600
Phillips *v.* Harris, 531
Phillips *v.* M'Evoy, 539
Phillips *v.* Munnings, 236
Phillips *v.* Phillips, 168, 169, 249
Philips *v.* Pennefeather, 605
Philpott *v.* Lehain, 193, 644
Phosphate Sewage Co. *v.* Hartmount, 18, 410, 414, 646
Pike *v.* Frank Keene, 540, 611
Pilley *v.* Baylis, 180

Pinney *v.* Hunt, 30
Pitten *v.* Chattenburg, 595, 607
Plant *v.* Bristowe, 406
Plimpton *v.* Malcomson, 417
Plimpton *v.* Spiller, 569
Plum *v.* Normanton Iron and Slate Works, 596
Plumer *v.* Gregory, 536
Plunket *v.* Doyle, 539
Pollock *v.* Campbell, 360, 503, 516
Ponsonby *v.* Flynn, 539
Pooley *v.* Driver, 180, 615
Popham *v.* Eyre, 274
Powell *v.* Atlantic Steam Navigation Co., 519
Powell *v.* Smith, 333
Power *v.* College of Physicians, 559
Power *v.* Cook, 538
Powys *v.* Blagrane, 244
Preston *v.* Daniel, 276
Preston *v.* Lamont, 519, 521, 553
Price *v.* Price, 416
Prosser *v.* Edmonds, 262
Proudly *v.* Fielder, 263
Provident Permanent Building Co. *v.* Greenhill, 352
Prudential Assurance Co. *v.* Knott, 288
Pullen *v.* Ready, 333
Purcell *v.* Harding, 168
Purnell *v.* Great Western Railway Co., 674
Pym *v.* Campbell, 332
Pyne *v.* Kinna, 648

Queen, The, *v.* Chantrell, 136
Queen *v.* Clarke, 313
Queen *v.* Fletcher, 406
Queen *v.* Howes, 307, 310
Queen *v.* Hussey, 136
Queen *v.* Justices of Kilkenny, 136
Queen *v.* Marsten, 309
Queen *v.* Riall, 137
Queen *v.* Scott, 510
Quilligan *v.* Quilligan, 655
Quin *v.* O'Keeffe, 640

Raby *v.* Ridehalgh, 203
Raeburn *v.* Andrews, 672
Ramsden *v.* Brearley, 336, 346, 602
Ranson *v.* Boyd, 645
Raphael *v.* Ongley, 510
Rastell *v.* Steward, 564
Rawley *v.* Rawley, 194
Rawson *v.* Samuel, 191
Read *v.* M'Gennett, 600
Redmond *v.* Butler, 387
Regina *v.* Clarke, 307, 316
Regina *v.* Eastern Archipelago Co., 141
Regina *v.* Race, Alicia, 310, 312, 113, 116, 118, 323
Regina *v.* Upper Mersey Dock Trustees, 404
Reiner *v.* Marquis of Salisbury, 595
Rendall *v.* Gardner, 646
Republic of Costa Rica, *v.* Erlanger, 341, 598, 646, 672
Republic of Peru *v.* Weguelin, 598
Restall *v.* Stuart, 574
Rex *v.* Corneforth, 308
Rex *v.* Dolphin, 140
Rex *v.* Greenhill, 313
Rex *v.* Islay, 309, 310, 312, 314
Reynold *v.* Bloomfield, 603, 611
Rice *v.* O'Connor, 559
Rice *v.* Rice, 271
Rich *v.* Anderson, 139, 140
Richards *v.* Bayly, 189
Richards *v.* Goddard, 630
Richards *v.* Kitchen, 647
Richards *v.* Richards, 253
Richards *v.* Truell, 172
Richardson *v.* Corcoran, 619
Richardson *v.* Elmit, 648
Riordan *v.* Cooper, 574
Riordan *v.* Walsh, 538
Robb *v.* Connor, 416
Roberts *v.* Guest, 531, 532
Robinson *v.* Bannister, 632
Robinson *v.* Byron, Lord, 292
Rochard *v.* Fulton, 260
Roche *v.* Wilson, 508
Rochford *v.* Ely, 117
Rochford *v.* Sedley, 613
Roe *v.* Davis, 342, 573
Roffey *v.* Miller, 351
Rogers *v.* Burke, 515
Rolfe *v.* M'Claren, 195, 567, 614, 637
Ronayne *v.* Perrin, 539
Rooney *v.* Farrell, 641
Rooper *v.* Harrison, 223
Rose *v.* Clarke, 263
Roseingrave *v.* Burke, 667
Ross *v.* Gibbs, 564
Roupell *v.* Parsons, 586
Row *v.* Jacob, 619
Rowliffe *v.* Leigh, 601, 610
Rowe *v.* Gray, 172
Rumsey *v.* Reade, 614
Runnacles *v.* Misquita, 529, 531, 532

Russell *v.* Ferguson, 648
Ryan *v.* Horgan, 591

Re—
Andrews, Mary Allen, 309, 310, 312, 313, 318
Ardfort Presentment, 136
Arrowsmith, 124
Australian Steam Navigation Co., 221
Aylward, 137
Baillie's Trust, 408
Bargent, 665
Barry, 116
Bateman, 138, 148
Batty Estate, 145
Belfast and Ulster Brewery Co., 221
Berry, 118
Blakely Ordnance Co., 651
Bloomer, 125
Biddulph, 119
Biela, The, 595
Bonelli's Electric Telegraph Co., 521
Boyce, 121, 129
Boyd's Trust, 666
British Imperial Corporation, 521
Brown's Trusts, 267
Browne, 315, 318, 319, 321
Brownes, minors, 320
Burke, 118, 119
Burton, 122
Butterworth's Trusts, 123
Byrnes, infants, 309
Caerphilly Collieries Co., 422
Carson Estate, 148
Civil Service Co-operative Society, 628
Coal Economising Gas Co., 419
Cody, 137
Connor, William, an infant, 306, 307, 309, 313
Cormacks, minors, 296, 311, 316
Costelloe, 116
Crossley's City of Glascow Assurance Co., 541
Cuming, 125
Curtis, 316
Cuthbert Estate, 148
Dalgleish, 124
Darceys, infants, 316
Davies, 132
Dawson Barker *v.* Dawson, 128
Day's Estate, 331
Devonshire, Duke of, 140

Re—continued.
Driver's Settlement, 123
Dundas' Trusts, 538
Dunraven Adair Coal Co., East, 121
Everard, *ex parte* Fitzgerald, 137
Fitzgerald, 116, 117
Foster, 139
Fynns, infants, 311, 312 316, 323
Gethin, minor, 521
Gilbert, 674
Goldsworthy, 322
Good Intent Society, 122
Goods of Cartwright, 647, 666
Goods of Chamberlayne, 504, 521
Goods, minors, 309
Grimes, an infant, 314, 317, 319, 320
Haney's Trusts, 520
Haycock's Policy, 272
Heli, 116
Herricks, minors, 143
Hewitt's Estate, 132
Hodson, 121
Hoskin's Trusts, 407
Humphrey's Estate, 121
Hunt, 307, 308
Huntley, 660
Imperial Land Co. of Marseilles, 407
Jones, 123, 127
Kaye, 308, 311
Lambert, 407
Lamotte, 132
Lanesborough, Lord Beatty, 117
Lawler, 116
Lewer, *ex parte* Garrand, 63, 409
Llangynog Lead Mining Co., 672
Lloyd, 312
London and Provincial Insurance Co., 597
Lowther, Sherrard *v.* Cuffe, 125
M'Aleece, Daniel. 2, 154
Macfarlane, 119
Madden, 137
Mason, 129
M'Collock *v.* Drury, 309
M'Donaghs, minors, 329
Meades, minors, 321, 323, 321
Meteor, The, 303, 304
Molyneux, 125
Moore, an infant, 313, 316, 318

Re—continued.
Moorehead *v.* Moorhead, 125
Morgan's Patent, 114
Morris' Estate, 335
Morris' Settlement, 123
Mundel's Trusts, 123
Natal Investment Co., 270
National Funds Assurance Co., 340, 410, 416, 606
Newman, *ex parte* Copper, 277 278
Norbury, Lord, a minor, 308
Northern Assam Co., 270
Ormerod's Will, 122
Owen, 129
Paris Skating Rink, 656
Pearson, a lunatic, 123, 124, 130
People's Garden Co., 220
Peppitt's Estate, 540
Percy *v.* Kelly, 672
Persee, 117
Phillip's Arbitration, 666
Phillips, Robert, and Brooke Gill, 354
Plant, deceased, 533
Porter's Will, 129
Race, Alicia, 310, 312, 313, 316, 318, 323
Rio Grande do Sul Ship Co., 406
Roe, 138
Royal Marine Life Insurance Co., 350
Shanahan, a minor, 310
Shorrock's Trusts, 122
Smith, 519
Smith *v.* Hopwood, 215
Smith's Trusts, 124
Sparrow, 121
Springall *v.* Goldsack's Contract, 629
Stewart, 131
Suche, Joseph, & Co. *ex parte* National Bank, 51, 341
Swan's Estate, 328
Swifts, minors, 309
Tait's Trusts, 131
Tayler, 119
Taylor, 311
Teas Bottle Company, 413, 414
Tichener, 268
Tottenham's Estate, 145
Vale of Neath Colliery Co., 559
Vickers, 121, 122, 123, 124
Vincent, Parham, *v.* Vincent, 505
Re—continued.
Walker, 122
Walsh Estate, 145
Walton, *ex parte* Reddish, 415
Warnock Estate, 148
Westbourne Grove Drapery Co., 230
White, 130
Wiltshire Iron Works Co., 418
Wortley, 542

Sainter *v.* Ferguson, 278
Salkeld *v.* Abbott, 328
Salter *v.* Cavanagh, 235
Salvidge *v.* Hyde, 536
Sampson *v.* Seaton Railway Co., 649
Sanders *v.* Heathfield, 335
Sanders *v.* Lord Lisle, 302
Sandys *v.* Murray, 291
Sargent *v.* Read, 294, 300
Saull *v.* Browne, 23
Saunders *v.* Bournford, 239, 250
Saunders *v.* Miller, 666
Saunderson *v.* Claggett, 143
Scarth *v.* General Steam Navigation Co., 632
Schomberg *v.* Zoebelli, 564
Scott *v.* Hastings, Lord, 264
Scott *v.* Jones, 236
Scott *v.* Midland Great Western Railway Co., 332
Scott *v.* Royal Wax Candle Co., 520, 525
Scottish Amicable Life Insurance Co, *v.* Barker, 298
Scottish Amicable Society *v.* Fuller, 21
Scutt *v.* Freeman, 633
Segrave *v.* Barber, 381
Segrave *v.* Duffy, 589
Seligman *v.* Hutt, 193, 194
Seligman *v.* Mansfield, 206, 208
Senior *v.* Hereford, 587
Seton *v.* Slade, 275
Shaw *v.* Shaw, 309
Shaw *v.* Warmington, 517
Sheffield Waterworks *v.* Yeomans, 173
Shelley *v.* Westbrooke, 311
Shepherd *v.* Beane, 202, 560
Sherwin *v.* Shakespear, 421
Shirreff *v.* Hastings, 327
Shortall *v.* Farrell, 527
Sickles *v.* Norris, 417, 614
Simmons *v.* Norton, 241, 242
Sinnott *v.* The People's Provident Insurance Co., 597

Skate *v.* Bishop Storlford Local Board, 628
Slater *v.* Slater, 564
Sleight *v.* Lawson, 572
Slevin *v.* Manders, 585
Sloman *v.* Governor of New Zealand, 517
Sloper *v.* Cottrell, 186
Smith *v.* Berry, 602
Smith *v.* Daniel, 602
Smith *v.* Haseltine, 537
Smith *v.* Kay, 557
Smith *v.* Peters, 663
Smith *v.* Smith, 286, 287, 539
Smith *v.* West, 386
Smith *v.* Whichard. 662
Sneesby *v.* Lancashire and Yorkshire Railway Co., 415
Snow *v.* Sherwell, 215
Society of Apothecaries *v.* Nottingham, 602
Sollory *v.* Seaven, 297
South Eastern Railway Co. *v.* Martin, 169
Sowerby *v.* Brooks, 267
Sparkes *v.* Blacquire, 564
Sparks *v.* Younge, 648
Sparrow *v.* Paris, 278
Spencer *v.* Peek, 173
Spickernell *v.* Holtham Kay, 233
Spurr *v.* Hall, 591
Stackpoole *v.* Parkinson, 256, 257
Standford *v.* Hurlstone, 295
Stanley, Lady of Anderly, *v.* Earl of Shrewsbnry, 285, 286
Staples *v.* Smith, 328
Staples *v.* Young, 195, 403
Steele *v.* Cobham, 296
Stern *v.* Sevastopnld, 601
Sterne *v.* Beck, 276
Stevelly *v.* Murphy, 297
Stevens *v.* Phillips, 327
Stevins *v.* Maunders, 582
Stewart *v.* Bank of England, 504
Stewart *v.* Cockerell, 368
Stewart *v.* Robinson, 574
Stewart *v.* Smith, 601
Stewart *v.* Stewart, 334
Stokes *v.* Hartnell, 574
Stokes *v.* Russell, 257
Stone *v.* Stone, 232
Stourton *v.* Stourton, 321
Street *v.* Gover, 204, 210
Strong *v.* Tappin, 595
Stubber *v.* Roe, 371
Stuart *v.* Marquis of Bute, 173
Studdert *v.* Leary, 515
Sturla *v.* Freccia, 407
Sugden *v.* St. Leonards, 405
Sullivan *v.* Mason, 548
Sullivan *v.* National Shipping Co., 624
Sultan of Turkey *v.* Union Bank of London, 665
Summers *v.* City Bank, 336
Sutton *v.* Huggins, 587
Swansea Shipping Co. *v.* Duncan, 206, 519, 544, 545
Swifte *v.* Swifte, 319
Swindell *v.* Birmingham Syndicate, 410
Swiney *v.* Enniskillen and Bundoran Railway Co., 650
Swire *v.* Redman, 597
Sykes *v.* Firth, 619

Taff Vale Railway Co. *v.* Nixon, 169
Talbot, Earl, *v.* Hope Scott, 290, 291, 299
Tawell *v.* Slate Co., 540
Taylor *v.* Dowla, 407
Taylor *v.* Duckett, 563
Taylor *v.* Eckersley, 299, 500
Taylor *v.* Jones, 674
Taylor *v.* Oliver, 607
Taylor *v.* Taylor, 192
Tebbs *v.* Lewis, 204, 210, 545
Tennant *v.* Walton, 347
Thomas *v.* Buxton, 657
Thomas *v.* Elsom, 670
Thomas *v.* The Queen, 196, 347
Thomas *v.* Thomas, 238
Thompson *v.* Bennett, 336
Thompson *v.* Eastwood, 233, 239, 334
Thompson *v.* Hudson, 275
Thompson *v.* Thompson, 276
Thompson *v.* Wynne, 597
Thorncloe *v.* Skoines, 294
Thorp *v.* Holdworth, 379, 557
Tibbitts *v.* George, 270
Tichborne *v.* Tichborne, 300
Tildersley *v.* Harper, 370, 537
Tilley *v.* Thomas, 274
Tisdall *v.* Humpireys, 312
Tom *v.* Nagle, 508
Toole *v.* Duffey, 135
Torrance *v.* Bolton, 332
Tozer *v.* Walford, 295
Tracey *v.* Open Stock Exchange, 135
Traill *v.* Jackson, 410
Trelcaven *v.* Bray, 200, 203, 209, 211
Trent *v.* Hunt, 257

Trevena *v.* Watts, 348
Tudor *v.* Furlong, 590
Tullett *v.* Armstrong, 335
Turkey, Sultan of, *v.* Union Bank of London, 665
Turner *v.* M'Auley, 217
Turner *v.* Robinson, 285
Turner *v.* Samson, 581
Turner *v.* Wright, 242, 244, 245
Turquand *v.* Wilson, 613, 614
Twinbarrow *v.* Braid, 662
Twycroft *v.* Grant, 611
Tyne Alkali Co. *v.* Lawson, 625

Umfreville *v.* Johnson, 368
Underwood *v.* Darracott, 621, 624

Vagg *v.* Shippey, 20
Vallance *v.* Birmingham and Midland Land Company, 374
Vandeleur *v.* Smith, 515
Vane, Earl, *v.* Rigden, 335
Vaughan *v.* Wilson, 515
Vane *v.* Vane, 119, 354, 550
Vennall *v.* Garner, 303
Vibant *v.* Vibant, 656
Vignoles *v.* Bowen, 275
Viner *v.* Vaughan, 240
Volans *v.* Carr, 118
Voysey *v.* Cox, 599

Wahlberg *v.* Young, 188
Wake *v.* Harrop, 332
Wakelee *v.* Davis, 556
Waldron *v.* Parrott, 651
Walke *v.* Fanderbeide, 140
Walker *v.* Balfour, 210, 211
Walker *v.* Banagher Distillery Co., 220
Walker *v.* Bartlett, 421
Walker *v.* Bennett, 629
Walker *v.* Blackmore, 658
Walker *v.* Hicks, 507
Wall *v.* Dunne, 413
Wallace *v.* Allan, 141
Wallice *v.* Great Southern and Western Railway Co., 631
Wallice *v.* M'Cann, 651
Walsh *v.* Bishop of Lincoln, 407
Walsh *v.* Wilson, 136
Ward *v.* Sittingbourne and Sheerness Railway Co., 547
Warde *v.* Warde, 323
Ware *v.* Gwynne, 348
Ware *v.* Ware, 240
Waring *v.* Lacey, 629, 631
Warne *v.* Bell, 167, 169
Warner *v.* Murdock, 626
Warner *v.* Twining, 202, 208
Warwick *v.* Queen's College, 173
Waterford, Commissioners of, *v.* Veale, 545
Waterpark, Lord, *v.* Austin, 240
Watson *v.* Atlantic Steam Navigation Co., 519
Watson *v.* Hawkins, 577, 578, 579
Watson *v.* Rodwell, 383, 384, 407
Watts *v.* Hyde, 572
Watts *v.* Symes, 421
Watts *v.* Watts, 31, 663
Webb *v.* Fitzgerald, 667
Webb *v.* Mansel, 416
Webster *v.* Thorne, 537
Wedderburn *v.* Wedderburn, 232
Weir *v.* Barnett, 558
Wellesley *v.* Duke of Beaufort, 172, 306, 313, 314, 315
Wellesley *v.* Wellesley, 311
West of England Bank *v.* Canton Insurance Co.
Westman *v.* Aktie Bolaget Sekmans, 517
Whateley *v.* Crowter, 601
Whetstone *v.* Dewy, 30, 548
Whistler *v.* Handcock, 638
Whitaker *v.* Forbes, 618
Whitaker *v.* Thurston, 560
White *v.* Mainwaring, 633
White *v.* Mansfield, 206
White *v.* Seaver, 364
White *v.* Tudor, 306
White *v.* Tyrrell, 674
White *v.* Witt, 410
Whitehaven, Bank of, *v.* Thompson, 516
Whitley *v.* Honeywell, 516
Whittle *v.* Henning, 249
Whyte *v.* Hill, 519
Widgery *v.* Tepper, 651
Wilcocks *v.* Carter, 23
Wilkinson *v.* Letch, 119
Williams *v.* Andrews, 331, 348, 372
Williams *v.* Cardwell, 589, 634
Wills *v.* Harris, 581
Wilson *v.* Dundas, 212, 327, 647
Wilson *v.* Smith, 344
Wilton *v.* Brignell, 590
Wingood *v.* Cox, 564
Winters *v.* Dabbs, 599
Witt *v.* Corcoran, 407
Witt *v.* Parker, 404

Witty *v.* Marshall, 319
Wolfe *v.* Wolfe, 550
Wood *v.* Anglo Italian Bank, 553, 610
Wood *v.* Browne, 402
Woodhouse *v.* Woodhouse, 232
Woodley *v.* Metropolitan District Railway Co., 417
Woolf *v.* Pemberton, 538
Woollam *v.* Hearn, 333
Woolstan *v.* Raines, 531
Worraker *v.* Pryer, 356
Worthington *v.* Jeffries, 140
Wright *v.* Cattell, 143
Wright *v.* Goodlake, 600
Wright *v.* Maidstone, 326
Wrixon *v.* Condran, 291

Young *v.* Brassey, 204, 210 504, 594
Young *v.* King, 181
Young *v.* Wilton, 233

Zychlenski *v.* Maltby, 601

ADDENDA.

Page 17—Note *n*, *Kino* v. *Rudkin*, now reported in L. R. 6 Chan. D. 160. add *White* v. *Boby*, 26 W. R. 133, A. C.

,, 23—Note *b*, add see *Kerr* v. *Corporation of Preston*, L. R. 6 Chan. D. 463.

,, 25—Note *g*, add *Eyre* v. *Smith*, L. R. 2 C. P. D. 435, where fraud was alleged.

,, 26—Note *h*, *Ex parte Pannell*, now reported, L. R. 6 Chan. D. 335.

,, 30—Note *s*, *Pinney* v. *Hunt*, now reported in L. R. 6 Chan. D. 98.

,, 32—Note *a*, *Hopewell* v. *Barnes*, now reported in L. R. 1 Chan. D. 630.

,, 48—Line 9 from bottom, after "*to*" insert "*the*".

,, 49—Line 8 from bottom, before "*certain*" insert "to".

,, 63—Note *a*, *In re Lewer*, now reported, L. R. 5 Chan. D. 61.

,, 98—Note *d*, *Governors of Christ's Hospital* v. *Martin*, now reported in L. R. 3 Q. B. D. 16.

,, 104—Note *u*, *Fisher* v. *Val de Travers Co.*, now reported, L. R. 1 C. P. D. 259.

,, 114—Note *d*, *Ex parte Pannell*, reported in L. R. 6 Chan. D. 335, A. C.

,, 135—Note *e*, *for* "L. K.", *read* "L. R".

,, 136—Note *q*, *for* "2 Chan. Rep.", *read* "2 Irish Chan. Rep."

,, 139—Note *c*, line 2, *for* "I. R.", *read* "L. R."

,, 142—After line 8, add, "unless Order 58, R. 1, infra has impliedly abolished the Writ, together with the Bill of Exceptions".

,, 161—Note *n*, *Flower* v. *Lloyd*, now reported in L. R. 6 Chan. D. 297.

,, 172—Note *g*, before "1 Chan. D." insert "L. R."

,, 178—Note *k*, *Padwick* v. *Scott*, now reported, L. R. 2 Chan. D. 70.

,, 179—Note *l*, *for* "east" *read* "west."

,, 181—Note *v*. *for* "60" *read* "80."

,, 195—Note *rr*, add *Ellis* v. *Munsen*, W. N., 1876, 253 A. C.

,, 201—Note *d*, *for* "Deer," *read* "Dear".

,, 202—Note *g*, *for* "Deane," *read* "Beane".

,, 208—Note *l*, *for* "Benecker" *read* "Benecke".

,, 209—Note *l*, *Horwell* v. *London Omnibus Co.*, now reported, L. R. 2, Ex. D. 365.

Page 221—Note *i*, add, "see *Masbach* v. *Anderson*," W. N. 1877, 252, 26 W. R., 100 Ex. D.

,, 235—Line 15-16, dele words "by the terms of the will."

,, 240—Line 5, from bottom, *for* "by" *read* "for".

,, 241—Note *k*, add, "see *Maunsell.* v. *Hort*," Ir. Rep., 11 Eq. 478, M. R.

,, 246—Note *l*, add, "see *Lowndes* v. *Norton*," L. R. 6 Chan. D. 139, V. C. M. "as to proceeds of timber cut and sold by tenant for life impeachable of waste".

,, 287—Note *b*, *for* "Kind" *read* "Kino".

,, 288—Note *d*, add "but see *Hinricks* v. *Berndes*," W. N., 1878, 11, M. R. *Thorley's Cattle Food Co.* v. *Massam*," L. R. 6 Chan. D. 582.

,, 300—Note *y*, *Taylor* v. *Eckersley*, now reported, L. R. 2 Chan. D. 302.

,, 304—Note *g*, *General Steam Navigation Co., &c.*, now reported, L. R., 2 Prob. D. 187, A. C.

,, 338—Note *a*, *for* "254" *read* "354".

,, 355—Section 434, add, "Order 1 R. 3 infra, requires leave of the Court to issue a writ to be served out of the jurisdiction", see p. 504 infra.

,, 382—Note *o*, add *Davy Brothers* v. *Garrett*, reversed, W. N. 1878-7, 26 W. R. 225, 22 "Sol. Jour." 224, A. C. Statement of Claim, prolix and embarrassing, and introducing evidences set aside.

,, 402—Note *b*, *General Steam Navigation Co., &c.*, now reported, L. R. 2 Ex. D. 467.

,, 410—Note *y*, *Berdan* v. *Birmingham Small Arms Co.*, now reported, L. R. 7 Chan. D. 24.

,, 503—Note *b*, add "see *Kirwan* v. *Roche*," 12 Ir. Law Times, 59 Ex. D. after leave given to appear and defend an application for summary judgment under Ord. 13 R. 1, refused.

,, 503—Note *c*, add "and see *Smith* v. *Smith*, 12 Ir. Law Times, 46 Barry, J."

,, 504—After Rule 3 add "Service out of the jurisdiction" has been interpreted in some cases to include "substitution of service" on an agent in Ireland—see *Wood* v. *Hesmondal*, 12 "Ir. Law Times," 22; *Stephens* v. *Black*, ib. 24; *Jury* v. *Live Stock Insurance Co.*, ib. 36. If so, the above Rule seems, in so far, scarcely compatible with Rule 10 in Schedule to Act (*ante* p. 495 and p. 514 *infra*), or in conformity with the previous practice of the Courts of Common Law in Ireland. A writ to be actually served within a foreign or other territorial jurisdiction may possibly, from the comity of nations, require to be guarded as to its issue by the personal discretion of the judge, but for service at home, and in a mode to be prescribed by the judge it seems unnecessary and purposeless. In *Wright*

v. *Drapers Co., London*, 12 Ir. Law Times, 58, Mr. Justice Fitzgerald is stated to have taken this view, and in another Division (C. P.) the Lord Chief Justice intimated the Rule would probably undergo an early revision.

Page 504—Note *i*, add, In some cases (mentioned above) it seems to have been considered necessary or expedient to have separate orders, one to issue and the other to serve the writ. The Vice-Chancellor of Ireland is reported to entertain a different opinion, and to follow the English practice, which is less expensive, and English Judges of the Chancery Division, in order further to save expense, have directed application for leave to issue a writ out of the jurisdiction, to be made by leaving the unsealed writ at Chambers, with an affidavit when required, the judge's leave to be written on the writ thus: "Let this writ be issued," "A. B., Chief Clerk," and this to be followed by directions as to service if necessary—see 22 "Sol. Jour.," p. 245.

,, 510—To Comment on this Rule, add "If the copy writ be not lodged with officer within two days it may be refused," see "*Dixon* v. *Russell*," 12 Ir. Law Times, 23. Dowse B.

,, 520—Note *vv*, add, see "*Wood* v. *Hesmondalgh*," 12 Ir. Law Times, 22, *coram* Dowse B.

,, 521—Note c, add, "see *Drapers Co.* v. *M'Cann*," 12 Ir. Law Times, 46 V.C. "service of an originating summons under Vendor and P. Act, 1874".

,, 524—Note *d*, "see *Hennessy* v. *Hennessy*," 12 Ir. Law Times, 49; ejectment for rent.

,, 531—Note *g*, add "S. C. W. N. 1878, 10 A. C".

,, 535—Note *z*, after "*Child* v. *Stenning*," add "see final hearing of S. C.". 22 "Sol. Jour. 246." Fry J.

,, 601—Note *nn*, add, "see *Saunders* v. *Jones*, 26 W. R. 226 A. C.

,, 606—Note *e*, add, *Kavanagh* v. *Gabbett*, 12 Irish Law Times, 47; Barry, J.

,, 624—Note *l*, no proof of service of notice of trial necessary, "see *James* v. *Crowe*, 26 W. R., 236; Fry, J., following *Robson* v. *Robson*, 22, Sols. Jour. 70, *ex parte Lows*, 26, W. R. 229, and overruling *Cockle* v. *Joyce*, L.R. 7 Chan. D. 56 26 W. R. 41; Fry, J. and dismissed notwithstanding plaintiff's Bankruptcy, *Eldridge* v. *Burgess* W. N. 1848, 14; Fry, J.

,, 648—Note *i*, *for* "Wynn" *read* "Mynn".

AN

INTRODUCTORY VIEW

OF THE

PAST AND PRESENT

JUDICATURE.

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1. Supreme Court of Judicature and its Constituents, p. 1.
2. Aula Regis, 4.
3. Equitable Jurisdiction of the Chancellors, 5.
4. Equity the Development of Law, 8.
5. Conflict between Equity and Law, 9.
6. Diversity of Courts, 11.
7. Advantages of Special Tribunals, 13.
8. Uncertainty of the Forum, 16.
9. Competition of the Forum, 20.
10. Insufficiency of the Forum, 21.
11. Collision of the Forum, 23.
12. Modern enlargement of Jurisdiction, 24.
13. One Court of Plenary Jurisdiction, 26.
14. Fusion of Law and Equity, 33.
15. Concurrent Administration of, 33.
16. Fusion of Judicatures, 34.
17. Separate Administration in Divisions, 36.
18. Redistribution of Business, 37.
19. Option of Division and Transfer, 40.
20. Abolition of Terms, 41.
21. Single Court of Intermediate Appeal, 43.
22. Final Appeal to House of Lords, 44.
23. County Court Judicature, 45.
24. Amendment of Law, 50.

Supreme Court of Judicature and its constituents.

(1.) "The Supreme Court of Judicature (Ireland), Act, 1877," has united and consolidated into one great court, all the superior courts of law and equity in the kingdom. This new court, "The Supreme Court of Judicature in Ireland," is invested with almost every part of the jurisdiction possessed by each and every of the superior courts; and, moreover, with the jurisdiction exercised by certain occasional courts, extemporized under Commissions of Assize, Oyer and

Introductory View.

Supreme Court of Judicature and its constituents.

Terminer and Gaol Delivery, Courts which ranked as Superior, though "less principal" Courts of Record(*a*).

The Supreme Court is further to embrace the jurisdiction belonging to a class of courts originally in the rank of inferior courts, but in recent times advanced into the grade—not of superior courts—but of Principal Courts of Record, and which though of subordinate rank, had been entrusted with large and independent powers over certain limited spheres, subject only to the review of the Court of Appeal in Chancery and of the House of Lords.

These modern Courts of Record may be shortly described as follows:—

1st. The Court of Probate, the statutable representative of the ecclesiastical courts, as regards their testamentary jurisdiction, and constituted a Court of Record by the Act 20 & 21 Vic., c. 79 (A.D. 1857).

2nd. The still more recent Court for Matrimonial Causes and Matters, created a Court of Record by the Act 33 & 34 Vic., c. 110 (A.D. 1870).

3rd. The Landed Estates Court, representing the Court of the Commissioners for Sale of Incumbered Estates in Ireland, created a Court of Record by the Act 12 & 13 Vic., c. 77 (A.D. 1849), and invested with a jurisdiction for sale and transfer of landed estates, and for the administration of the proceeds, a jurisdiction abstracted from the Court of Chancery, but armed in its new hands with an authority infinitely more transcendent than the Court of Chancery ever possessed, viz., that of giving to the purchaser an unchallengeable title to the land. This court had been afterwards reconstituted with an enlarged sphere of jurisdiction under the name of

(*a*) See *Ex parte* Jose Luis Fernandez, 10 C. B. N. S. S. C. 3, 6 H. & N. 726. *In re* Daniel M'Aleece. Ir. Rep., 7 C. L. 146, Q. B.

the "Landed Estates Court in Ireland" by Act 21 & 22 Vic., c. 72 (A.D. 1858).

The above-mentioned courts are, presently, annexed to the Supreme Court of Judicature, but in addition to these, there is one other court which it is proposed shall be absorbed into the Supreme Court, on the occurrence of a vacancy in the office of the Judge who at present presides over it. This is—

4th. The High Court of Admiralty, constituted a Court of Record by the Act 30 & 31 Vic., c. 114 (A.D. 1867), and which is to be united and consolidated with the Supreme Court of Judicature, when the existing Judge of the Court of Admiralty shall die, resign, or otherwise vacate his office, and its jurisdiction is to be exercised provisionally by some Judge of the High Court of Justice, until the filling up of the vacancy next ensuing in the office of Judge of the Probate and Matrimonial Division of the High Court (*b*).

The idea originally entertained of uniting and consolidating the Court of Bankruptcy with the Supreme Court of Judicature, has been, for reasons obviously sufficient, abandoned both in England (*c*) and in Ireland. Its Judges and its jurisdiction remain as they were before, but appeals from its orders are attached to the Court of Appeal newly constituted by the Act (*d*).

The Court of Appeal in Chancery is not included by name in the list of courts to be absorbed in the Supreme Court of Judicature. In this respect, our Act follows the Judicature Act of 1873, which treated the English Chancery Appeal Court as identical with or included in the High Court of Chancery, and

(*b*) Judicature Act, 1877, s. 9. (*c*) J. A. 1875, s. 9.
(*d*) J. A. 1877, s 8.

Introductory View.

exercising nothing more than the appellate jurisdiction of the Lord Chancellor. But the Court of Appeal in Chancery in Ireland was something different from this. It had conferred upon it not merely the appellate jurisdiction of the Lord Chancellor over the subordinate branches of his own court, but also the appellate jurisdiction of the Privy Council from orders of the Incumbered Estates Court, and the freshly created jurisdiction of appeal from the Courts of Probate, Matrimonial Causes and Matters, Admiralty, Landed Estates, and Bankruptcy.

However, though not expressly named among the courts to be consolidated with the Supreme Court of Judicature, the Court of Appeal in Chancery is virtually extinguished or absorbed by the operation of sections 5, 10, and 23, transferring its sole permanent Judge and its entire jurisdiction to another court, constituted under the name of Her Majesty's Court of Appeal in Ireland, a court which it is to be observed is essentially distinct from and superior to the High Court of Justice in all its divisions, the Chancery Division included (*e*).

Aula Regis.

(2.) The general conception and plan of the Supreme Court of Judicature, may probably have been taken from the ancient court of *Aula Regis*, in its original unity and entirety, and before its functions had been parcelled amongst the four Superior Courts of Law and Equity. But, with what we must hope, may not prove the foreshadowing of a similar destiny, this attribute of unity with which the new court is so ostentatiously invested at its birth, by the second section, is almost immediately ignored in the seventh, and the "one Supreme Court of Judicature" is divided into two, namely, the High Court of Justice and Her Ma-

(*e*) See Hastie *v.* Hastie, L.R., 2 Chan. D. 304; 20 Sol. Jour. 391, A. C.

jesty's Court of Appeal, while the High Court of Justice in like manner, is afterwards split up into five divisions, which are to all intents and purposes different courts. *Introductory View.*

(3.) The time and manner of the disruption of *Aula Regis*, into the different courts of Westminster Hall, and the distribution of its judicial functions amongst the Superior Courts of Law and Equity, are matters presumably within the knowledge of every student of the law, and require no further notice here; nor need we trace the rise and progress of the separate equitable jurisdiction of the Court of Chancery. It is enough to say that the reports of the Record Commissioners establish, that it was in operation in the reign of Richard II., commencing A.D. 1377, exactly 500 years from the present date. The chief cause and occasion for the equitable interposition of the Chancellors had been expressed almost a century before, in the Statute of Westminster (2nd), A.D. 1285, to the effect "that divers of this realm are disherited by reason that, in many cases where remedy should have been had, there was none provided." The remedy for this so great defect of justice, was also suggested by the same statute, namely, that new writs should be granted as necessity arose, "*Quia in novo casu, novum remedium est apponendum*," in other words, that the common law jurisprudence should be expanded, and its procedure enlarged, to meet the new exigencies of society; and it is almost a matter of certainty, that had new writs been issued, and new actions on the case freely entertained as often as occasion required, there would never have arisen in these countries, the singular distinction between courts of law and courts of equity, and the jurisdiction of the Court of Chancery would have formed

The equitable jurisdiction of the Chancellors.

Introductory View.

part of the ordinary jurisdiction of the courts of law.

But the common law jurisprudence of England had been framed in times when men's relations towards each other were comparatively simple, and its remedies were, doubtless, fairly adequate to their first occasion. When foreign commerce and internal trade increased, with their accompanying wealth, civilization, and complications, new relations sprung up, and new rights and duties arose, unknown to the common law, and the Judges deemed the jurisprudence which they were administering, inapplicable or incapable of expansion or adaptation to the new state of things, or, what is more probable, they found themselves, from defects in their education and training, incapable of conducting the delicate process. From whatever cause, it is stated, that the common law Judges steadily declined to act upon new writs outside their ancient formulæ, or to adapt their forms of pleading or "counting" to them—and thus the common law jurisprudence was prematurely checked in its natural development and chained within the narrow bounds of an artificial system of pleading. For example, the common law Judges absolutely refused to look into the intricate and delicate relations of partners *inter se*, of guardians with their wards, of trustees with their cestui que trusts, or to distinguish between the marital rights of the husband and the separate property of the wife. As expressed by Lord Justice James in a very recent case(*f*):—"In former years, and down to times within our recollection, Judges, of what used to be the common law courts of this realm, delighted in applying rigidly and strictly, a series

(*f*) Ashworth *v.* Outram, L. R., 5 Ch., 941, 25 W. R., at p. 898. 17 May, 1877.

of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million. Amongst these maxims was one, by which a married woman was held incapable of taking a gift either from her husband or from a stranger: that the moment she took it it became her husband's property. But the Court of Chancery invented that blessed word and thing, the separate use of a married woman; and as that Court never allowed itself to be impeded or obstructed by mere technicalities, it provided, that whenever it was necessary to give effect to that separate use of a married woman, the husband should be made a trustee of whatever property came to him in his marital right, which ought to be so held. That is, the legal right was not interfered with, but the husband was made trustee for his wife."

It was on this account, as put by the late Lord Westbury (then Sir Richard Bethel), that "the administration of justice founded upon accident, mistake, fraud in its more subtle and less gross forms, trusts and fiduciary relations, the prevention of injustice by restraining the commission of meditated wrong, the direct and specific performance of contracts, was banished from the established judicature of the country and remitted to another tribunal, presided over by the king's Chancellor, who being commonly an educated ecclesiastic and versed in the Roman civil law, was better qualified to administer a jurisprudence more comprehensive and flexible, more enlightened and just than the rude common law of England." The assumption of the equitable jurisdiction of the Court of Chancery was thus, not so much an invasion of the domain of law, as an occupation of an important field which the

Introductory View.

common law Judges had neglected and allowed to remain sterile and unworked.

Equity the development of law.

(4.) The equitable Jurisprudence administered by the Chancellors, considered in itself, will be found to be nothing more than the natural growth and development which appertains to the common or municipal law of every civilized community; for, as truly as law is the science of human experience, it must enlarge and develop as the society for which it is intended makes progress.

Equity, in the primary and philosophical sense of the term, is presumably the basis of all law, or, as it is expressed by Bracton, is a "quality of law;" for every system of law professes to give expression to the eternal principles of equity and justice. But the term "Equity" in most systems of jurisprudence is used in a secondary and more artificial sense, and as denoting something different from that mere natural justice which is the vital quality or basis of law. It is then used in a relative sense, and has been well described as the handmaid and interpreter of law. Thus, as the positive or written law, however complete and perfect it may have been in its inception, must, when time advances and the community makes progress, fail to meet the new exigencies of society and the enlarged requirements of justice, it must necessarily be supplemented, whether by the direct legislation of the Supreme power, or (as most commonly happens) by the indirect legislation of the Judge who executes it, and who presumably derives his inspiration from the principles of natural justice and equity. In this sense, equity represents the development and enlargement in some directions, and the modification and rectification in others, which the positive or written law requires; and in our own jurisprudence Equity

represents most of those enlightened principles by which the Municipal Law of England has been enabled in some degree to adapt itself to the growth and grandeur of the British empire. *Introductory View.*

To effectuate this gradual development has been hitherto the chief function and duty of our Courts of Equity. As stated by Sir George Jessel recently, (*g*) "Courts must take into account the needs of the time as they arise and accommodate themselves thereto;" and in the application of this principle, we find the Chancery Division of the High Court of Justice, in the case referred to, assuming jurisdiction to restrain an alleged creditor from exercising his statutory right, to present a petition to wind up a public company, there being just grounds for apprehending that, in the assertion of a doubtful right, an irreparable injury might be done to a solvent company. (*h*)

(5.) In neither of the senses of the term Equity, already alluded to—the primary and natural, or the secondary and relative—was there any inherent or necessary antagonism between Equity and Law. Indeed, we should expect the one to be the exact complement of the other. "Each of the two great systems in reality pre-supposes the co-existence of the other. Each, while in appearance counteracting, has really propped up the other."(*i*) Conflict of law and equity.

Nevertheless, it was by no means accurate to say, that as between the systems of jurisprudence actually being administered by our Courts of Law and Equity, there was no antagonism or difference, save merely one of procedure, or of the particular *forum* to be resorted to—a difference expressed by a Scot

(*g*) Niger Merchants Company *v.* Capper, 25 W. R., 365, M. R. 26th January, 1877.

(*h*) Ib.

(*i*) See "The Science of Law," by Sheldon Amos, pp. 380–1.

Introductory View.

tish judge some little time ago, in an address to the Jurisprudence Department of a Social Science Congress, to be "not as to what the right was or what the remedy should be, but solely from what tribunal redress can be given."(*j*) Nor can we take the correction given by a celebrated English judge with a Scottish education (*k*) of what he deemed to be a popular error, to be more sound, when he says:— "It is a more correct description of the Courts of Equity to say, that they deal with questions of law different from those which the Courts of Common Law deal with, than to say that law and equity are different."

Not merely were the actual subjects-matter of the jurisdiction of the Courts of Law and Equity in most cases different, but the same subjects were regarded from almost opposite points of view, and what was a common law right, might have been an equitable wrong. What a court of law looked on as being of the essence and affecting the vital existence of a contract, a Court of Equity might treat as capable of being dispensed with, condoned, or compensated for; whilst, conversely, contracts which a court of law treated as broken and subjects merely for compensation in damages, a Court of Equity would hold to be subsisting so far that they should be carried into full specific execution. Courts of law would feel themselves constrained to hold defences untenable which in the equity courts would be valid, so that a Court of Law was bound to give a judgment in favour of a plaintiff which the Court of Equity would restrain him from executing. Their views upon questions relating to waste, merger of estates, extinguishment of charges, en-

(*j*) Lord Justice Clerk (Moncreiff), Sept. 30, 1874.
(*k*) Lord Brougham's Works, vol. xi., p. 313.

forcement of penalties and clauses of forfeiture, and even respecting the application of the Statute of Frauds, were diverse and conflicting.

Besides all this, their forms of procedure were different in quality and almost opposite in direction. The Common Law offered redress for an injury after it was committed and suffered, as in the case of the ancient remedy by Writ of Estrepement, whilst Equity endeavoured to prevent the commission of the injury beforehand. The common law professed to adopt the maxim :—"*Præstat cautela quam medela,*" but its *brevia anticipantia* were so tardy and inefficient that before the prompt and timely injunction of the Court of Chancery they fell into obsolescence. In the same way, in the face of decrees for actual specific performance of the very thing contracted for, or the delivery of the identical chattel detained, enforced by direct pressure on the person of the delinquent, the remedy by way of damages was found to be wholly inadequate, especially in respect of certain chattels such as family pictures or plate, or other heirlooms and title-deeds, which would be incapable of due estimation or recompense.

Diversity of Courts.

(6.) It seems at least probable that antagonism and divergence, to this extent, could scarcely have developed themselves in English Jurisprudence, had law and equity been associated in a common *forum*, and administered by one and the same tribunal. But when, instead of law and equity travelling together *pari passu*, law stopped short at a certain point, whilst equity was progressing and was being administered in a different court, from the ordinary tribunals of the country, it became inevitable that law and equity should become not merely dissociated and estranged from one another, but that in

Introductory View.

course of time, they would take different and opposite views respecting the same subject-matter, until at length the term "equity" would acquire a signification denoting something entirely different from and, as it were, antagonistic to common law. In the event, equity law became a separate and distinct science from common law, and was as Lord Justice Christian has tersely described it, "the more advanced and beneficent code which had been nurtured by the Chancellors."

The remission of equity to a different tribunal from the ordinary courts of law was, as the reader is aware, a peculiarity of English jurisprudence. In the principal states of Europe, as in Scotland, the administration of law and equity was committed to one and the same tribunal, and there was no absolute reason in the nature of the subjects, why the Judges who administered the common law of England, should not also have recognised and respected, if they did not administer, that department of law which we call equity. Indeed the separation has been accounted for historically, as an accident, or a misadventure, attributable chiefly to the circumstance, that the Roman civil law, *fontes ipsissimi juris*, which had been partially administered in Britain during the 300 years of the Roman occupation, was, after the Norman conquest, and probably in deference to the jealousy and prejudices of the Saxon people, banished from the courts of common law, and driven to take refuge in the universities and the spiritual courts, not, however, before that many of its maxims and principles had become incorporated with the common law.

From this untoward circumstance it happened, that the minds of English common lawyers became estranged from the most important branches of legal

science, and were allowed to waste their energies, for the most part, on the barren study of feudal tenures and special pleading, the latter, a branch of the merest driest technical art rather than of legal science, and their consequent isolation from the broader and larger jurisprudence of the Roman empire, gave occasion for the establishment of a separate court in which the more advanced and enlightened principles of equity might be administered. It also necessitated the establishment of another set of courts and another and distinct order of lawyers, versed in the same civil law, to whom the administration of the law relating to wills, marriage, and divorce, became appropriated ; and lastly, from the same cause, a third, and very important branch of law—a portion of the *Jus Gentium*—was devolved on the Court of Admiralty, and became the inheritance of a separate body of practitioners (*l*).

Advantages of special tribunals.

(7.) The existence of separate courts, with special and distinct jurisdictions, ranging over subjects well defined and clearly distinguished must, when regarded from a certain point of view, be admitted to be a wise and convenient division of labour, involving, doubtless, an extra expenditure of judicial and official power, but amply compensating the loss in that direction, by the superior value of the work done, by the greater accuracy and knowledge and competency with which the particular business entrusted to each tribunal would be dealt with, being disposed of by Judges whose attention was confined to the administration of one branch of the law and not distracted amongst many. In some branches of jurisdiction, the subjects are so special,

(*l*) See Essay on this subject by Lord Westbury, then Sir R. Bethel, read before Law Amendment Society.

Introductory View.

take, for example, Admiralty cases, that "the value can scarcely be overrated of having a Judge to preside, skilled in sea-craft, and habituated to the incidents of navigation and the peculiar turns of thought and speech which characterize seafaring people," and to which ordinary Judges cannot be expected to attain or reasonably asked to acquire. So again, although there may not be any such marked peculiarity or entire specialty in equity jurisprudence as contrasted with law, yet we may presume, that certain judges, being confined to the department of trusts and fiduciary relations, the protection of the interests of married women, infants, &c., the correction of fraud in its more subtle phases and kindred subjects, would develop a higher order of judicial instinct, and a superior habit of moral discrimination, capable of following the faintest traces of misrepresentation or undue influence, or the accidental or acquired dominion of one member of society over another, than would, in all probability, be attained by a Judge, whose mind was as frequently engaged in the hurry and bustle of Nisi Prius or criminal or political trials, as in the hearing of equity causes.

The experiment has already been on its trial in England, of committing the determination of nice questions of equity jurisprudence to Judges trained in other Courts—such, for example, as the amount of independent advice and protection which a purchaser buying property from an inexperienced young man emerging from minority, is, by the principles of equity, bound to establish in proof as having been afforded in order to sustain his purchase-deed when challenged and impeached on the ground of inadequacy of the consideration. The committing of such questions to the determination

of judges, whether in the primary or the appellate courts, exclusively trained in the broader and less exact principles of the common law, must necessarily be attended with no little danger to the interests of society, at least during that stage of transition through which the English courts must have to pass, before their common law judges shall have become familiar with the principles of equity. In the well-known case of Bolinbroke *v.* O'Rorke, which came before the House of Lords on appeal from Ireland, and turning mainly on the nice point of equity law noticed by way of illustration above, three Lords of Parliament, two of whom had their training and practice in Courts of Common Law, and one in the Scotch courts, happened to differ from and overrule the most experienced if not the highest authority on Equity Law in England. They also, of course, differed from the two eminent Judges of the Irish Court of Appeal in Chancery, although supported by the very high authority of the Master of the Rolls in Ireland, a Judge whose experience had been acquired in Courts of Equity as well as in Courts of Law.

However, we are so far fortunate in Ireland, that most of the judges upon the common law bench, have had their more ripened faculties and maturer years employed in Courts of Equity, at times more or less recent, and to them the joint administration of law and equity will not prove to be a trial of so much difficulty or danger as it may be in England. But it seems that neither the great American jurist, Mr. Justice Story, nor Lord Cottenham, probably the most profound lawyer who has been Chancellor since Lord Eldon, were favourable to this union of different jurisdictions in the same judicature. Lord Cottenham, so far from advocating it, declared it as

Introductory View.

the result of long experience to be an evil and an inconvenience, and he preferred not the fusion of jurisdictions, but their separation, and, therefore, carried the Act for abolishing the equity jurisdiction of the Court of Exchequer, and vesting it in the Court of Chancery (*m*).

Uncertainty of the forum.

(8.) But however great and undoubted may have been the advantages offered by a separate administration of distinct branches of jurisdiction, it cannot be denied that it was attended with some considerable drawbacks and inconveniences, which appeal more strongly to the popular mind than any imaginable perfection in the article of justice which the particular tribunal was capable of putting forth. The first and most prominent of these was the occasional uncertainty as to which was the proper tribunal to be resorted to.

When the precise limits of jurisdiction became in any degree uncertain or intermixed, especially where the bounds were approximate or conterminous, but not absolutely the same, much of the special advantage to be derived from the existence of separate Courts was apt to be imperilled or lost; for if the suitor mistook the tribunal which properly had cognizance of his suit, he might fail altogether in his attempt to obtain relief. It was a misfortune, and not unnaturally considered a reproach to justice, that a suitor having good and substantial ground of complaint should encounter difficulty, or danger of mistake, in finding the appropriate tribunal to administer relief.

The series of cases collected in the 2nd volume of Daniel's Chancery Practice, 5th edition, p. 947, in note (*a*), might be cited as examples to illustrate

(*m*) See "Exposition of our Judicial System," by W. F. Finlason, p. 44.

this. In most of the cases enumerated the plaintiff's bill for specific performance of a contract had been dismissed from Chancery, without prejudice to his beginning *de novo* at law. Assuming that his case was true, each plaintiff was plainly entitled to relief either in the shape of specific performance of the contract or at least in damages for its breach. The Court of Chancery could give relief in either form in one class of cases, but it so happened that in the class to which the plaintiff's contention belonged, the Court of Chancery had no option but to decree specific performance, or dismiss the bill if the plaintiff was not entitled to that. Under the Judicature Act the branch of the Court appealed to may in every case either direct an inquiry as to damages or grant the primary relief prayed for, subject, however, to the reasonable qualification, that the plaintiff must make a case for and apprize his adversary that he seeks this alternative relief (*n*).

In suits to recover land if the plaintiff went into a court of law, and his title turned out to be equitable, he was non-suited, if he went into equity and his title proved to be legal his bill was dismissed as an ejectment bill. (*o*) Again if a plaintiff filed a bill in Chancery against his agent for an account, and the result of the evidence was to establish a case involving mainly the element of negligence, he found he had gone to the wrong tribunal, and he was dismissed under circumstances which his legal advisers might not easily have foreseen. (*p*) At one time it was matter of uncertainty whether or not the Court

(*n*) See Kino v. Rudkin, W. N., 1877, p. 170. 21 Sol. Jour. 689. Fry, J.

(*o*) See a recent case of this nature, Moore *v.* Kempton, Ir. Rep. 4 Eq., 306, V. C.

(*p*) See Great Western Insurance *v.* Cunliffe, L. R., 9 Ch., 525.

Introductory View.

of Chancery could give relief against an agent or solicitor for negligence, apart from fraud, or whether a court of law had not the exclusive jurisdiction. Vice-Chancellor Stuart thought the Court of Chancery had jurisdiction, (*q*) later Judges have held that it had not, (*r*) but under the new judicature, the claim can be sustained in the Chancery Division as in any other division, because they are now all one court. (*s*)

Sometimes a plaintiff's claim might lie along the border-land of contract and trust, and as the boundaries were somewhat obscurely marked, the suitor ran considerable risk of finding himself landed in the wrong territory. Thus in one case (*t*) a Vice-Chancellor had held that the facts proved in evidence constituted a trust to be executed in equity, but the House of Lords considered that they amounted to no more than a personal engagement by the defendant in favour of the plaintiff, subject to certain conditions to be performed by him, and that the plaintiff's claim resolved itself into a mere money demand, and was the subject for an action at law. This case had been ingeniously brought into equity as one of trust, to evade the stringent terms of the contract as to time, in respect of which the Court of Chancery happened to hold less strict views than did courts of law, the case thus illustrating at once, the uncertainty of the *forum*, and the different quality of justice which the two tribunals of law and equity were in the habit of administering.

(*q*) Chapman *v.* Chapman, L. R., 9 Eq., 294.

(*r*) Mare *v.* Lewis, Ir. Rep., 4 Eq., 219, V. C. British Mutual Investment Company *v.* Cobbold, L. R., 19 Eq., 627.

(*s*) See *per* V. C. Malins in Phosphate Sewage Company *v.* Hartmont, L. R., 5 Chan. D., at p. 443.

(*t*) Morgan *v.* Lariviere, L. R., 9 H. L. C., 423.

In a recent case in our own courts (*u*) the plaintiff sought the assistance of the Court of Chancery for specific performance of a contract of partnership, a kind of relief exclusively within its jurisdiction. In evidence it turned out that the only breach of the contract established against the defendant was his failure to pay in a certain share of the capital, whereby the other partner, the plaintiff, was constrained to advance his own money to meet current expenses, but this again resolved itself into a mere payment of money entitling the plaintiff to be repaid his advance with interest, and that again was a claim which should properly have been enforced by an action at law, and accordingly the plaintiff's bill was dismissed from Chancery of necessity and with seeming reluctance, as it was dismissed without costs. The consequence of such a mistake as this in many instances was, that the claim though well founded and brought forward originally in good time, was afterwards too late for a fresh action in another court, and would there be defeated by the Statute of Limitations. (*v*)

A remarkable illustration of the nature and value of the change in judicature regarded in this aspect occurred immediately after the English Act came into operation. A cause had been pending in the Court of Chancery, and was transferred to the High Court of Justice. The bill had been demurred to on the ground that the suit should have been by action at law as for a mere money demand, like as in the two cases already cited. The demurrer, for-

(*u*) Bagnell *v.* Edwards, Ir. Rep., 10 Eq., 215, V. C.

(*v*) See a case of this nature in Fievet *v.* Manby, 24 W. R. 699 V. C. M., where the plaintiff's debt was kept alive in the Common Pleas by section 11 of 15 & 16 Vic., c. 76, a writ having been issued in due time, but was nevertheless barred in the Court of Chancery by the Statute of Limitations.

Introductory View.

tunately for the plaintiff, remained over to be argued in the High Court of Justice, and it was at once overruled, on the ground that, though the action was proper for the Common Law division rather than for the Chancery division, yet now, both forming one and the same Court, the action was brought in the proper Court, and could not be dismissed, though it might be transferred. (*w*)

Competition of the forum.

(9.) The uncertainty of the forum was exhibited in a still more aggravating form, where the different tribunals, *ex. gr.* Courts of Law and Equity, happened to exercise a jurisdiction in common or practically concurrent in respect of the same subject-matter. Take, for example, the subject of fraud and misrepresentation, and the case of a policy of life insurance alleged to have been entered into under false representations of the health and habits of life of the assured. An action was brought by the assignee of the policy to recover the amount secured by it. The company might, at the same time or immediately after, file a bill in Chancery to have the same policy declared void, and to restrain the institution of prosecution of the action at law. The one party preferred to have the case tried at law; the other wished to have it determined in equity. The Court of Law had undoubted jurisdiction to entertain the action, and the Court of Chancery had equally undoubted and complete jurisdiction to withdraw the question from the Court of Law, and to restrain the action from proceeding, if, in its discretion, the case appeared to be one more proper to be tried in equity; or, conversely, if it thought it better suited for a jury, it might stay its own proceeding, and permit the action to proceed

(*w*) Vagg *v.* Shippey, 20 Sol. Jour., 131.

Introductory View.

at law. The discretion, doubtless, was a judicial discretion, exercised subject to challenge, and to review, and reversal, if it were not a sound discretion; but no amount of sagacity beforehand on the part of the legal advisers on either side, could insure the suitor how and in what manner "the question of the *forum*" might be determined, or which tribunal would ultimately retain possession of the *lis*. One equity judge might, from the conflict of evidence, consider that the action ought to proceed at law; (*x*) whilst another judge might think the balance of convenience inclined towards withdrawing the question from law to equity, and accordingly would restrain the action.

The Court of Chancery, when it once entertained a suit in relation to any matter, dealt as far as it could with the whole case, and not with a part of it only; (*y*) and from the laudable desire to prevent multiplicity of suits, would not permit any party, without its leave, to bring a complaint touching it before another Court; and it was sometimes disposed to treat the bringing of an action or suit before another tribunal overhauling an account taken before itself, as a contempt of its authority punishable by attachment. (*z*)

Insufficiency of the forum.

(10.) Where the jurisdiction exercised by one of several Courts was neither exclusive nor concurrent, but auxiliary and supplemental to that of another Court, and necessary to enable the latter to do full and complete justice in its own proper department,

(*x*) See Scottish Amicable Society *v.* Fuller, Ir. Rep., 2 Eq., 53; Life Insurance Association of Scotland *v.* M'Blain, Ir. Rep., 9 Eq., 176, M. R.

(*y*) See Phelps *v.* Prothero, 7 De Gex, M. & G., 734, per L. J. Turner.

(*z*) See Bell *v.* O'Reilly, 2 Scho. & Lef., 430; and Hardman *v.* Leech, Ir. Rep., 8 Eq., 400 V. C.

Introductory View.

our jurisprudence was exposed to just criticism on the ground of its insufficiency. It was held forth as a scandal to a judicial system, that any one of its tribunals should, in matters properly within its cognizance, have need of the aid of another tribunal, or that a remedy should be sought partly in one Court and partly in another. Yet in this manner, even in very recent times, Courts of Law used to call in aid the jurisdiction of a Court of Equity, and a Court of Equity the jurisdiction of a Court of Law, or of the Court of Probate, or of Landed Estates, to effectuate and complete their own proper functions, and finally dispose of the contention submitted to them.

A striking instance of this imperfection of jurisdiction is to be found in a recent case in the Court of Probate. (*a*) A dispute arose between three brothers respecting the admission of a certain testamentary paper to probate. The affair was prudently compromised, and an arrangement sanctioned by the judge and embodied in a consent under which the right to probate was conceded to one brother, and a leasehold estate in land belonging to testator, of which another brother had possessed himself, was to be retained by him, on condition that he should execute a mortgage of portion of it to the executor to secure a debt which he had owed to the testator. Nothing remained but that the mortgage should be executed and its terms settled in case the parties differed. The parties did differ, but on a very small point indeed—namely, whether the mortgage should be given to the executor in his personal or in his representative capacity. The Court of Probate felt bound to de-

(*a*) Hammond *v.* Hammond, Ir. Rep., 8 Eq., 322.

cline to make the consent a rule of Court or to enforce its execution, on the ground that it had no jurisdiction or official machinery to settle deeds or administer assets. The result was a suit in Chancery—two years of litigation—costs of the successful party over £76, which he never recovered, while the dispute concerned a sum of £33 6*s.* 8*d.*, the disputed third of the mortgage money. *Introductory View.*

The Court of Chancery, as we have said, when it once entertained a suit dealt with the whole case as far as it could and not with a part of it only; but sometimes in the endeavour to deal with the whole subject-matter of the contention it found that its powers, though otherwise so great and flexible, proved inadequate to do full and complete justice between the parties without the aid of some external tribunal.

(11.) But probably the most anomalous and vexatious feature of our recent judicature, was the jurisdiction exercised by one Court to restrain proceedings in another Court, although co-ordinate in rank with itself, and one over which it had no direct or appellate authority; yet by an order addressed not directly to the judges, but to the suitor, it practically interrupted, modified, or annulled the decision of the Court whose proceedings were restrained. Very frequently the interdicting Court (usually the Court of Chancery), had no jurisdiction in itself to determine the controversy. It might be a case within the exclusive jurisdiction of a Court of Law, or of a Court of Probate, (*b*) or even a Court of Criminal Jurisdiction, (*c*) or relating to the liberty of the subject, upon an application for Collision of the forum.

(*b*) See Wilcocks *v.* Carter, L. R., 10 Chan. 440.
(*c*) See Saull *v.* Browne, L. R, 10 Chan. 64.

Introductory View.

a writ of *habeas corpus*. In these cases, the object of the interposition of the Court of Chancery was to prevent the jurisdiction of another Court of Justice being invoked unjustly, or its procedure fraudulently taken advantage of and abused (*d*). Occasionally one injunction might overlap another, the restraining Court itself being controlled by a third Court, as, for example, the Court of Admiralty restraining an action in the Court of Common Pleas, and itself afterwards counter-restrained by way of prohibition by the Court of Exchequer in the very same matter. (*e*)

A jurisdiction which virtually constituted one Court of Justice *custos morum* of another, controlling and counteracting its procedure and preventing its judgments being converted into instruments of injustice, could scarcely have been tolerated but under a system of judicature, which compelled certain Courts to administer law rigidly, inflexibly, and irrespective of natural justice; while it established other Courts to correct the injustice which they did, and the remedy provided was, at the very best, circuitous and dilatory, alike expensive and vexatious, and eminently calculated to bring the entire administration of justice into disrepute.

Modern enlargement of jurisdiction.

(12.) The policy of modern legislation has been to furnish every court of justice with full and independent powers, adequate for the complete determination of the suit or matter intrusted to it. Upon this principle, the Common Law Procedure Acts had conferred upon the courts of common law some of the most valuable portions of the former jurisdic-

(*d*) See O'Neill *v.* Browne, 9 Ir. Eq. Rep. 131, L. C. Sugden.

(*e*) See The Normandy, L. R., 3 Adm. & Eccl. 152; James *v.* South-Western Railway Company, L. R., 7 Exch. 287.

tion of courts of equity, notably, as regards discovery and production of documents, equitable defences, and injunctions. On the other hand, the Acts for the improvement of the jurisdiction of equity, and those called after Lord Cairns and Sir John Rolt, conferred many of the distinctive powers and duties of courts of common law upon the equity courts. Other statutes have conferred extensive powers on the Court of Probate and the Court of Admiralty, ancillary to their primary jurisdiction. This policy received a remarkable development in the enactments which armed not merely the Court of Bankruptcy, but every County Court in England having bankruptcy jurisdiction, with "all the powers, jurisdiction, and privileges possessed by any Judge of the Court of Chancery, or of the Superior Courts of Common Law," (*f*) and moreover, with powers to determine, as a matter of fact, the expediency or necessity for entertaining and deciding any question whether of fact or law which affects the realization and distribution of the property of the bankrupt, subject only to an appeal to the Court of Appeal in Chancery. So complete and self-contained has this jurisdiction been made, that to a bill filed by an insolvent against his trustee for rectification of a deed and to take accounts, a demurrer was allowed on the ground that the Court of Bankruptcy had jurisdiction to give the plaintiff the relief which he sought, (*g*) and this jurisdiction reaches not only the immediate parties to the proceeding before the court, or persons who intervene and submit to the jurisdiction, but third persons who happen to interfere with its proceed-

(*f*) See corresponding provision in Bankruptcy Act (Ireland), 1872, 35 & 36 Vic., c. 58, s. 6.

(*g*) Hutchinson *v.* Baslam, 25 W. R., 54 V.C.B.

Introductory View.

ings or to obstruct its process. (*h*) On the other hand, the Court of Bankruptcy itself was not subject to be restrained or interfered with in the execution of its powers, save by the action of an appeal to the Chancery Appeal Court and the House of Lords. (*i*).

One Court of plenary jurisdiction

(13.) The Judicature Act carries this modern policy of Parliament to its ultimate possible development, in the union and consolidation of every court of the higher order into one comprehensive Court of Judicature, armed with the powers appertaining to each and every of its constituent members, and of which every division and every single judge is invested with every part of the contentious jurisdiction formerly belonging to all the former courts; whilst all, moving upon identical or parallel lines of procedure, are controlled and regulated by one and the same Court of Intermediate Appeal, and the one Court of Final Appeal in the House of Lords. Whatever may be the merits or defects of the plan, as regards the intrinsic value and perfection of the judicial work to be produced, in quantity or quality, or in cost of time or money, it is at all events a bold step towards terminating the long-fought battle of the *forum*, the controversy between the several courts of the Queen, the uncertainty as to the tribunal to be appealed to, and the occasional insufficiency of its powers to do full justice in the matter of the contention, and, above all, in the removal of the wall of partition which has for 500

(*h*) See *Ex parte* Domville a Bankrupt, Ir. Rep., 9 Eq. 456, Ch. Ap. Ct. and *Ex parte* Leonard, 24 W. R. 182, A. C. However it has been held that the Court of Bankruptcy cannot properly restrain a mortgagee from foreclosing the equity of redemption against the trustees, though they allege the mortgage was a pretence to defeat creditors. See *Ex parte* Pannell, 25 W. R., 188; 21 Sol. Jour. 748, A. C.

(*i*) See Bankruptcy Act (Ireland), 1872, s. 66.

years, more or less, separated the administration of equity from that of law.

The Supreme Court of Judicature, uniting and consolidating the several courts already enumerated, is to consist of two permanent divisions "Her Majesty's High Court of Justice in Ireland," and "Her Majesty's Court of Appeal in Ireland."(*j*) Each of these courts, the primary and the appellate, is constituted "a Superior Court of Record." (*k*) The High Court of Justice has transferred to and vested in it, all the jurisdiction which at the commencement of the Act was vested in or capable of being exercised by all or any of the courts enumerated as being united and consolidated with it. And its duties and those of the Court of Appeal are summarized as follows :—"The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter depending before them respectively, shall have power to grant, *and shall grant*, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to, in respect of any and every legal or equitable claim *properly brought forward by them*, respectively, in such cause or matter, so that as far as possible all matters so in controversy between the said parties, respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." (*l*)

Henceforth, according to the intention of the Act, and subject only to the fallibility that appertains to all human institutions, it is expected that a suitor having a well-founded claim shall not be disap-

(*j*) J. A., 1877, s. 5. (*k*) J. A., 1877, ss. 21 and 23.
(*l*) J. A., 1877, s. 27, subs. (7).

Introductory View.

pointed of the relief or protection to which he is entitled, provided his claim be brought forward within proper time and with reasonable certainty. The formidable question of the *forum* is reduced to the more easily solved question of the division. Every form of action is within the competency of every division, and every judge of the court. The distribution of business and the assignment of certain classes of actions to particular branches of the court, will be matter of internal arrangement and convenience, for the more effective discharge and ready despatch of public business, but opens no question of jurisdiction debarring any suitor from his proper rights or remedies. In what was formerly the exclusive prerogative of the Queen, that she could sue in whatever court she pleased, *ex gr.* seek a money demand by information in the Court of Chancery (*m*), the substantial advantage of this royal prerogative has been placed at the service of every subject of the realm.

The reform in our judicial system (as it has been neatly expressed by a learned Member of Parliament) (*n*), is such that now for the first time in its history, the suitor might feel confident that he would not be turned out of the Temple of Justice because he got in by the wrong door.

In case he mistakes the division to which he should have assigned his action, it is merely matter of transfer ; if he mistakes the form of his claim, it is matter of amendment according to the discretion of the Court. If he commences his action in due time, but in a wrong division, the court is bound, nevertheless, to entertain it, transferring it, if needs be, to a more convenient branch of the same court,

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(*m*) See a recent case, Attorney-General *v.* Ray, L. R. 9 Ch. 404.

(*n*) Mr. Osborne Morgan, H. C., 23 Feb., 1877.

which again is bound to take it up from the stage it had reached, and to continue it without break or interruption to the end, and without the suit encountering the bar of the Statute of Limitations which might have presented itself to a fresh action instituted in another court. (*o*)

The question decided by the House of Lords in Allen *v.* Macpherson (*p*), viz., that the Court of Chancery had no jurisdiction to deal with a question of fraud in obtaining a will of personal estate, and could not, after a particular will had been admitted to probate, declare a legatee to be a mere trustee for another person of the property bequeathed, would, if raised now, present itself in a wholly different aspect; and the judge of the Chancery Division, having theoretically, at least, full power to recall or set aside probate, might, if a case warranting such a step had been established or admitted, act on the assumption that it was recalled (*q*), or in a case less clearly proved, order the claim to be amended as one specifically asking for relief of that nature, and transfer the action to the Probate Division. Of course it is not to be taken for granted that because every Judge of the High Court possesses this almost universal jurisdiction, that he is likely to exercise it lightly, or in all cases in which he is asked. For example, a Chancery Judge in a suit seeking for partition and to establish a will under which the plaintiff claims title, has in the abstract, full jurisdiction to direct

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(*o*) See Fievet *v.* Manby, 24 W. R., 699, V. C. M.

(*p*) 1 H. L. C. 191, followed lately in Meluish *v.* Milton, W. N., 1876, 158; 2 Sol. Jour. 548, A. C.

(*q*) See Mostyn *v.* West Mostyn Coal Company, L. R., 1 C. P. D., 145, 24 W. R. 401, where a Common Law Division acted on the assumption that a deed admitted to be erroneous, had been rectified, and gave effect to a defence or counter-action relying on the error.

Introductory View.

probate of the will, but it does not follow, that it would be a sound exercise of his discretion, or otherwise than highly inconvenient if he were to do so, there being a division specially fitted for dealing with such matters (*r*), but he can stay the action pending an application for probate (*s*).

Again by reason of the unification of the several Courts, it will be competent for the suitor to combine, in one and the same action, claims for relief which, though arising under one and the same instrument, should heretofore have formed the subject of several actions, and in different Courts; as for example, an ejectment to assert title to real estate devised, and an administration suit as to the real and personal estate bequeathed by the same testator and in the same will (*t*), so a claim for payment of a mortgage debt may now be combined with a claim for the possession of the mortgaged estate (*u*). On the other hand as regards parties brought into Court as defendants, whether in the Chancery or in a Common Law Division, what would be a good defence in the former division will be an equally good defence in the latter. Equitable defences which were entertained in actions at law, with great reserve and serious limitations, will now be as free and as effectual in a common law action as in one in the Chancery Division. So from the universal powers conferred on each division and judge of the Court, whatever turn the cause may happen to take, whatever inci-

(*r*) See Humphreys *v.* Edwards, L. R., 4 Ch. D. 112, M. R., a case involving a question of salvage which the Master of the Rolls considered ought to be transferred to the Admiralty Court.

(*s*) See Pinney *v.* Hunt, W. N., 1877, 150, Sir Geo. Jessel, M. R., where this was done.

(*t*) See Whetstone *v.* Dewis, L. R., 1 Ch. D. 99; W. N., 1875, 226; 24 W. R. 93, V. C. H.

(*u*) See Hanbury *v.* Noone, W. N., 1875, 260; 20 Sol. Jour. 161.

dental rights or obligations may arise, the division or judge before whom the action is pending, will be able to deal with it, and to follow and control it. For example, in an action for probate, the judge of the Probate Division can grant an injunction to secure the property of the intestate *pendente lite* (*v*); or in a suit to recall probate or administration, he may grant an injunction to restrain the executor or administrator from dealing with the assets (*w*). Even in a divorce suit, the judge in England may by injunction restrain the husband from selling or incumbering the property settled on his wife and children by a post-nuptial settlement (*x*). In a winding-up matter the Master of the Rolls or a Vice-Chancellor can direct the issue of a writ of *mandamus* to compel the directors of the company to convene a special meeting. (*y*)

Again, although each particular action must be assigned to some particular division as its more proper business, it is, nevertheless, competent for any judge of the High Court to deal with any matter arising incidentally in the action, as though he were a judge of the division to which it stands assigned, a power which doubtless will not be exercised without due considerations of expediency and convenience. Thus a judge at chambers may order an action assigned to one division to be transferred to another, although not a member of either division himself (*z*). So a judge of the Chancery Division may make a stop order on

(*v*) See Melhuish *v.* Milton, 24 W. R. 679; 20 Sol. J. 562, Prob. D.

(*w*) See Nicholson *v.* Dracachis, 24 W. R. 461, Prob. D.

(*x*) See Watts *v.* Watts, 20 Sol. Jour. 412.

(*y*) See Paris Skating Rink Company, W. N., 1877, 168; 25 W. R. 767, V. C. H.

(*z*) See Hillman *v.* Mayhew, L. R., 1 Ex. D. 132.

Introductory View.

funds in Court upon a judgment recovered in a Common Law Division, without the preliminary charging order of the latter Court, which was formerly necessary (*a*), and, indeed, the latter division might have made the stop order on funds in the Chancery Division, if it had been deemed convenient or prudent.

On the other hand the several divisions of the High Court of Justice, although distinct and separate courts for most purposes, being all members nevertheless of one and the same court, it would seem to follow that when an application for a writ of prohibition has been made to one division and refused by it, it cannot be renewed in another division, but the decision of the first division may be reviewed by the Court of Appeal (*b*).

Again, the anomaly of one court of justice interfering with the action of another court of co-ordinate authority is put an end to, at least so far as the several branches of the High Court *inter se* are concerned. It is almost a logical sequence from the unification of the courts, that as a court cannot restrain itself, "no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction, but the matter of equity on which an injunction against the prosecution of the cause or proceeding might be obtained may be relied on by way of defence thereto" (*c*).

Lastly, although as a matter of fact, the instances in which the several jurisdictions have, within recent years, actually clashed, has been inconsiderable compared with the number of cases

(*a*) Hopewell *v.* Barnes, W. N., 1876, 28; 24 W. R. 629, V. C. M.

(*b*) See Hawes *v.* Paveley, L. R., 1 C. P. D., 418; 24 W. R., 895, 20 Sol. Jour., 640 A. C.

(*c*) J. A., 1877, s. 27, Subs. 5; J. A., 1873, s. 23.

in which they have worked smoothly, each in its proper groove, still there can be no doubt of the value of an enactment which sets at rest the occasional rivalry of two systems, and gives to each, some of the remedies which it has either wanted or had been unwilling to adopt. *Introductory View.*

(14.) But although the Judicature Act professes to put an end to the conflict of jurisdictions, and the clashing of courts, which administered opposite systems of law and equity, and to introduce something like harmony and symmetry into English law, it does not pretend to accomplish anything answering to the popular idea of a mysterious fusion of law and equity. Law and equity, as we have already noticed, although perhaps not essentially distinct and separate systems, are different stages of the same system. Equity, might from time to time have been annexed to or incorporated with the body of the law, or law might be advanced to the stage at which its more progressive sister had arrived, and they might abide together for a time, but the continuous growth of equity is "a constant ever-recurring phenomenon," and if its principles were embodied in a code of law, howsoever complete and perfect in itself it might be, equity must in time outgrow the strict limits of its abode, and tend towards a fresh departure. Fusion of law and equity.

In the language of Sir George Jessel, already quoted, courts, meaning Courts of Equity, must take into account the needs of the time, as they arise, and accommodate themselves thereto.

(15.) The idea of a general fusion of law and equity is a delusion, (*d*) though there are a few cases in which incidentally, in the exercise of one jurisdiction, the exercise of another might be desirable, Concurrent administration of law and equity.

(*d*) Lord Brougham.

Introductory View.

and the Judicature Act instead of aiming at an impossible fusion of law and equity, prescribes certain rules (*e*) for what it designates, the concurrent administration of law and equity. These rules are obviously applicable, not to all actions—as the marginal note, "Law and equity to be concurrently administered," would seem to imply—but are from the necessity of the case, limited to occasions, comparatively few in number, in which the combined or conflicting action of law and equity might have been hitherto brought to bear on the same subject-matter. Where the matter before the court is one purely of common law or purely of equity law the preceding section (26 of J. A., 1877) provides that the jurisdiction shall be exercised as it might have been exercised by the court from which the jurisdiction has been transferred, and in such cases the joint administration of law and equity can have no place. Its application is in those mixed cases in which the relief afforded by one court was assisted or supplemented, modified or controlled by the action of another, *ex. gr.* of equity, or *vice versa*, where the action of a Court of Equity was stayed till some legal right was ascertained at law, or where in the progress of a legal claim, equitable estates, rights, or duties incidentally appeared.

Consolidation of judicatures not of jurisdictions.

(16.) It must be obvious, therefore, that the consolidation effected by the Judicature Act, is a consolidation not of jurisdictions, but of judicatures; and that a fusion of judicatures is a totally different thing from a fusion of jurisdictions. Jurisdictions relating to different subjects, whether they be of law or equity, of probate or of admiralty matters, are so far distinct in their nature that they cannot be fused; and though they may be administered

(*e*) J. A., 1877, s. 27; J. A., 1873, s. 24.

together in the same court and by the same judges, yet the administration must be for the most part distinct and separate, and can only be joined on very few occasions in the same proceeding between the same parties and for the same object. There is an association rather than a fusion or blending of jurisdictions. Many very different departments are vested in the same court, and every individual judge is competent to exercise every part of it, whether it be civil or criminal, legal or equitable; but it is not, therefore, intended that the special jurisdiction, say, of the Probate or Landed Estates Court is to be confused with the ordinary administration of law and equity. Each department of jurisdiction remains as distinct and separate as before, and in its complete integrity and full force; and although its administration is committed potentially to every member of the High Court, yet if any division or judge other than the one to whom a particular class of business is, for convenience' sake, assigned, is called upon to exercise functions outside his or its usual routine, the division or judge is required to observe the same principles and rules which would have governed the special court in like matters heretofore; and as regards procedure, is required to apply it "as nearly as may be in the same manner as the same might have been exercised by the respective courts from which the jurisdiction shall have been transferred." (*f*)

Accordingly, the Judicature Act, whilst it brings several kinds of jurisdiction together into one court, takes special care to keep them as distinct and separate as before, and to secure this, and to prevent confusion between them, provides that the High Court shall sit in separate divisions, each division

(*f*) J. A., 1877, s. 26.

Introductory View.

as far as possible exercising a separate jurisdiction peculiarly assigned to itself.

Separate administration by division.

(17.) Indeed, even the fusion of judicature is more or less a convenient fiction, and the combination of seven or eight distinct courts into one court, though complete in theory and in name, has but very little of practical reality about it. The one Supreme Court of Judicature, in its entirety, can scarcely be said to have any existence at all. As a Court of Justice it has none. It can exercise no function, nor can it assemble in bodily shape for any purpose, judicial or ministerial, save to make or unmake rules of Court for carrying the Judicature Act into effect, (*g*) or as a council to inquire into, consider, and report to the Chief Secretary of the Lord Lieutenant what amendments or alterations, if any, it may, in the judgment of the judges present, be expedient to make in the Judicature Act or otherwise in the administration of justice, (*h*) or as a court, in some inconceivable manner to exercise jurisdiction over the solicitors of the Court of Judicature (*i*)—a function, by the way, previously delegated to the Lord Chancellor. (*j*)

Again, as regards the first member of the Supreme Court—namely, the High Court of Justice—it does not seem that its judges can sit as a single court except for the one purpose—of hearing Crown cases reserved—when "the judges of the High Court of Justice, or five of them, &c," (*k*) may sit. In the *Franconia* case fourteen judges sat, and of course all might have sat. Its judges may also assemble for the purpose of making arrangements respecting its Divisional Courts, (*l*) but for all other purposes, and certainly for the administration of justice in civil actions or matters, the High Court of

(*g*) See J. A., 1877, s. 61. (*h*) See s. 70. (*i*) S. 78.
(*j*) S. 73, par. (15). (*k*) J. A., 1877, s. 50. (*l*) S. 46.

Justice has no existence except in contemplation of law. It cannot sit except in separate divisions or by single judges. These divisions, as expressed by Sir Alexander Cockburn, "are virtually different courts;" (*m*) and in each of these divisions, corresponding both in name and in nature with the former distinctive courts, the old jurisdiction is for all practical purposes and subject to occasional transfers exclusively vested. *Introductory View.*

The word "Court" throughout the Judicature Act seems to mean either a Divisional Court or a Single Judge, and even in section 27 (*n*) of our Act the expression, "The High Court of Justice," means the division of the High Court in which the cause is pending. (*o*)

(18.) The High Court of Justice is divided into five separate divisions, each consisting of special judges, but yet not so as to prevent any judge from sitting whenever required in any divisional court, or for any judge of a different division from his own. To each of these five divisions is assigned the special cognizance of some distinct heads of jurisdiction with which the presiding judges have been already familiar. Thus while giving to every division, power to administer all the equities that arise in the course of their ordinary business, as, for example, to the Common Pleas Division when disposing of an action for rent claimed to be due on a lease, to dispose of the equitable right of the defendant, to have the lease cancelled on the ground of fraudulent concealment of material facts; (*p*) to the Chancery Division, are assigned, Re-distribution of business.

(*m*) Kingchurch *v.* The People's Gardens Co., L. R., 1 C. P. D., 45, 24 W. R., 41.

(*n*) J. A., 1873, s. 24.

(*o*) Kingchurch *v.* People's Gardens Co., *ubi ante.*

(*p*) See Mostyn *v.* West Mostyn Coal and Iron Company, L. R. 1 C. P. D., 145, 24 W. R. 401.

Introductory View.

in addition to those matters in which by statute the Court of Chancery and the Landed Estates Court had exclusive jurisdiction, several heads of equitable jurisdiction which were the peculiar heritage of the Court of Chancery in former times. All these are now more distinctly than ever allotted to the Chancery judges as their sole and special business. These consist of the administration of assets of deceased persons, the dissolution of partnerships, or taking of partnership or other accounts, the redemption or foreclosure of mortgages, the raising of portions or other charges on land, the sale and distribution of the proceeds of property subject to any lien or charge, the execution of trusts, charitable or private, the rectification or setting aside or cancellation of deeds or other written instruments, the specific performance of contracts, the partition and sale of estates, and the wardship of infants and the care of their estates. (*q*) The above are subjects which do not often require the ordeal of a trial by jury, and can generally be dealt with more satisfactorily by a single judge through the more perfect machinery of the equity courts. Many subjects of the former equitable jurisdiction in Chancery remain unassigned, but they consist chiefly of matters in which the right was a legal one, and recourse was had to equity only for some assistance such as discovery, the perpetuation of testimony, the appointment of receivers, the restraining infringement of certain legal rights, such as copyrights, patents, trademarks, ancient lights and watercourses, the preservation of timber, fisheries, mines, and the abatement of nuisances. To these may be added, bills of peace, and for declaration of rights.

(*q*) J. A., 1877, s. 30; J. A., 1873, s. 34.

To the Queen's Bench Division are assigned all causes and matters, civil or criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction. This will include all business in the name of the Crown, or of a public nature, not being fiscal, criminal informations, *quo warranto*, and review of the decisions of inferior courts of criminal jurisdiction. As regards civil actions if the language of the statute be taken strictly, it would assign to the Queen's Bench Division actions *vi et armis*, and none other, for such alone were "within its exclusive cognizance in the exercise of its *original* jurisdiction." The term "original" may probably have been used in contra-distinction to the statutable jurisdiction of the Court of Queen's Bench.

To the Common Pleas Division, in like manner, are assigned all causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas, if the Act had not passed. This would formerly have embraced real actions, such as dower (now abolished as a real action), and *quare impedit*, which has become obsolete in Ireland. It still may include the special jurisdiction under the Parliamentary Elections Act (1868), 31 & 32 Vic., c. 125, and under the Local Government Act, 34 & 35 Vic., c. 109. (*r*)

To the Exchequer Division, are assigned all causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court, if the Act had not passed; this would probably include a class of actions which by statute

(*r*) As to appointment of Commissioners for taking Acknowledgments of Married Women under 4 & 5 Wm. IV., c. 92, s. 72, see new J. A., 1877, s. 74.

Introductory View.

were required to be brought in the Court of Exchequer, and by its leave. (*s*)

So in like manner to the Probate and Matrimonial Division are assigned all causes and matters which would hitherto have been peculiar to these branches of the Court.

It is to be observed that the ordinary common law actions are not expressly assigned by the statute, to any particular division, and not even to the three Common Law divisions in common. In England there is nothing to prevent such actions being brought in the Chancery Division, but, doubtless, the last paragraph of section 35 of our Act was drawn with the idea that the ordinary common law actions were to be distributed between the Queen's Bench, Common Pleas, and Exchequer Divisions under the name of "the general business," which was to be divided in some equitable manner, having regard to the special jurisdiction vested in each of these divisions respectively, and so as to apportion the business fairly between them; whereas the rotation of writs in use formerly, supposed to divide the common law actions between the three Courts of Law equally, gave, perhaps, an undue share of business to the Court of Queen's Bench, having regard to its prerogative and criminal jurisdiction.

Option for plaintiff to choose his division and power of transfer.

(19.) Subject to the assignment by statute or by rules of Court of particular actions or business to special divisions, and to the power of transfer vested in the court, the suitor may exercise an option and choose in what division he may think fit to sue, by marking the writ or document by which the proceeding is commenced, with the name of the division which he prefers, giving due notice thereof to the proper officer of the court. If the suitor happen

(*s*) See Caldwell *v.* Board of Works, 1 Ir. Jur., N. S., 106 Ex.

to assign his cause to a division to which it ought not to be assigned, the Court may direct it to be transferred to the proper division, or may retain it where it is, although it be not the proper division; and everything done in the assigned division will be as valid and effectual as if it had been done in the proper division. (*t*) So in like manner the cause may be transferred at any stage from one division to another, or it may be retained, as the Court may deem expedient. To reconcile these respective rights of choice on the part of the suitor, and of transfer on the part of the Court, it seems obviously expedient and convenient that where common law rights are exclusively concerned, the litigation should be committed to the cognizance of the common law divisions, whose judges are more familiar with such questions than the equity judges presumably are, and especially where the verdict of a jury may be called into requisition. On the other hand, where the subject of the action is one dealing with a subject of equitable cognizance and administration —as, for example, where the relief prayed by the writ was to charge the separate estate of a married woman—the cause would probably be transferred from the Common Law to the Chancery division. (*u*)

Terms abolished

(20.) Terms are abolished, and the "ugly" word "sittings" usurps the place of a venerable and "classical" expression. The legal year of the future is to be continuous, with the exception of the Long Vacation and the Short Vacations usually given at Christmas, Easter, and Whitsuntide, which the Lord Lieutenant and Privy Council are authorized, on the recommendation of the judges, to fix. (*v*)

(*t*) J. A., 1877, ss. 37, 38.

(*u*) See Anon., W. N., 1876, 22; 20 Sol. J., 242, Lindley, J., where this was done.

(*v*) J. A., 1873, s. 26; J. A., 1877, s. 29.

Introductory View.

Complaints are still being made in England, at what is called the preposterous length of the Long Vacation—the two and a half months of suspension of legal business, the enforced idleness, and consequent delay of justice. But it would be difficult, if not impossible, to do without it. It might, perhaps, be easy enough to arrange relays of judges and officers, so that the Courts would be in session all the year round, as there are already, in fact, vacation judges to dispose of work which will not brook delay. But the difficulty of maintaining continuous sittings and perpetual litigation throughout the year lies in this, that neither barristers nor solicitors can be found to endure continuously, the strain and toil inseparable from the conduct and prosecution of legal business; whilst, on the other hand, legal business is not, in the main, of such immediate and vital urgency that it cannot be postponed for a season, but must be dealt with and disposed of as it arises, like matters of health, religion, locomotion, or correspondence. Even each one of these in their several degree must have a pause. The doctor and the clergyman will take his holiday, and so railway and post office officials must sometimes intermit, and so must also the leading members of both branches of the legal profession.

It is highly probable that there would be no lack of barristers or solicitors, able and willing to conduct the work of litigation during the months of September and October, whilst the great practitioners are taking their holidays, on the same terms and conditions as substitutes are provided in other professions; but, we believe, that the great body of the public—the suitors—would, except in cases of special emergency, be little satisfied to transfer their business, perhaps *in medio*, from the skilled and trusted advocate and solicitor of their selection, to

a provisional substitute—a stranger. So long as suitors will rush after a few distinguished practitioners, and have none other, the conduct of the business of the Courts must be more or less regulated with reference to the powers of endurance of a strictly limited class; and even in the interest of the suitors themselves, there must be occasional intervals of time between different stages of the legal process, sufficient to allow reasonable opportunity to the parties for the more complete preparation of their cases. (*w*) *Introductory View.*

(21.) The second permanent division of the Supreme Court of Judicature consists of "Her Majesty's Court of Appeal in Ireland." It is constituted a Superior Court of Record, having the appellate jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, of the Court of Exchequer Chamber, of the Court for Land Cases Reserved, and a newly created intermediate jurisdiction by way of writ of error in criminal cases, on appeal from the Queen's Bench Division. (*x*) Its supervision is thus extended, not alone over the departments of law and equity, Probate and Matrimonial, Admiralty, and Bankruptcy matters, but also over land causes, criminal causes, and political causes affecting the right to vote in Parliamentary elections. Single Court of intermediate Appeal.

The sphere of appellate jurisdiction has also been considerably enlarged by extending it to interlocutory as well as to final orders, to orders affecting matters of practice or procedure, as well as orders deciding on the facts and merits of the case. For the first time, and contrary to the analogy of the English Judicature Acts, the intermediate Court of

(*w*) See articles in the *Solicitors' Journal* for 1877, from which much of the above has been taken.

(*x*) J. A. 1873, s. 23.

Introductory View.

Appeal in Ireland has been brought into privity with cases involving questions affecting the delicate relations of Landlord and Tenant, and the political franchise of Parliamentary voters; and highest and most serious of all, affecting the life and liberty of the subject in criminal matters: a programme of business which will give ample occupation to its Judges, and which, it is to be hoped, may not overwhelm the Court that must practically be, in the great majority of cases, the only Court of Appeal for Ireland.

Final appeal to House of Lords.

(22.) The final appeal from all decisions, judgments, decrees, and orders of the Court of Appeal, is to the House of Lords, in the like cases and under the like conditions under which decisions, judgments, decrees, or orders of the Court of Appeal in Chancery, or of the Court of Exchequer Chamber, would have been subject to appeal to the House of Lords, or to the Queen in Council, (*y*) if the Judicature Act had not passed; (*z*) and no direct appeal can henceforth be brought from any judgment, decree, or order of the High Court of Justice, or from any division of it, nor from the Court of Admiralty or Bankruptcy to the House of Lords, but only through the Court of Appeal constituted by the Act. (*a*)

The appellate jurisdiction of the House of Lords (as constituted by the Appellate Jurisdiction Act, 1876), (*b*) is to be exercised by Lords of Appeal, consisting of such peers as have held or hold certain high judicial offices, and two (and eventually four) Lords of Appeal in Ordinary appointed under the Act. (*b*) Not less than three Lords of Appeal must be present to constitute a Court. The Lords of Appeal have authority and power to hear and determine appeals, not merely during the sittings of the

(*y*) *Sic* in the Act. (*z*) J. A. 1877, s. 86. (*a*) Ib.
(*b*) 39 & 40 Vic. c. 59.

House of Lords, but after a prorogation or dissolution of Parliament. The Lords of Appeal in Ordinary are constituted Lords of Parliament *virtute officii*, and while they continue in office, like the Peers Spiritual. *Introductory View.*

(23.) The highest ideal of a complete system of judicature would seem to be one, which would establish a direct connexion and interdependence between all the judicial institutions of the kingdom—reaching from the House of Lords above to the County Courts below. The natural basis of such a structure should be a well-regulated system of local courts, which, although necessarily of an inferior order, might be associated with the Superior Courts in matters of jurisdiction and procedure, and entrusted with authority so far similar and sufficient as to be enabled to assist and lighten the labours of the Superior Courts; to act as Courts of first instance, affiliated both as feeders to, and auxiliaries of, the High Court of Justice, controlled and regulated by the double check of appeal and removal; with power in the superior Court, on the one hand, to remit to the inferior Court cases of small amount and simple character, and, on the other hand, to remove from the inferior into the superior Court cases of difficulty, novelty, or exceptional importance. The County Officers and Courts (Ireland) Act, 1877, (*c*) to a great extent embodies this idea. County Court judicature.

Its professed object is to improve the character and extend the jurisdiction of our principal local Courts, called the Civil Bill Courts, whilst the Judicature Act (*d*) has provided, that the important rules of law which it has enacted and declared respecting legal and equitable rights and principles(*e*) are to be enforced and to receive effect in all Courts, inferior as well as superior, in all matters to which

(*c*) 40 & 41 Vic. c. 56. (*d*) J. A. 1877, s. 79.
(*e*) J. A. 1877, s. 28.

Introductory View.

they relate, so far as they are cognizable in such Courts. And further, it has provided that the Rules of the Supreme Court of Judicature as to Pleading, Practice, and Procedure, may be made applicable to the Recorder's and (*f*) Local Courts of Record in Ireland, by an order of the Lord Lieutenant in Council. (*g*)

The Civil Bill jurisdiction now existing in the thirty-two counties of Ireland was first given by the Act 2 Geo. I., c. 11 (A.D. 1715), to be exercised by the Judges of the Superior Courts of Common Law when going their respective Circuits as Judges of Assize. The jurisdiction was originally limited in amount to the sum of £10, of late Irish currency, in cases of debt or assumpsit, and to £5 in cases of trover, *quantum meruit*, trespass, or detinue of goods, but so as title to land was not involved. By the 1 Geo. II., c. 14, the amount was extended to £20, in respect of specialties, bills of exchange, and promissory notes. Afterwards the entire Civil Bill jurisdiction, with some trifling exceptions, was transferred from the Judges to Chairmen at Quarter Sessions, in a Court created by the 36 Geo. III., c. 25, reserving to the going Judge of Assize for the County an appeal from their decisions. A later Statute, 56 Geo. III., c. 88, conferred jurisdiction in ejectment in cases of deserted tenements, overholding tenants, and for non-payment of rent.

The Statutes did not enable the Civil Bill Court to recognise or assert claims of an equitable nature, although they enabled a defendant to rely upon any defence which he could have in any Court of Equity, and thereby conferred an incidental power of appealing to the plaintiff's oath. (*h*)

(*f*) The word "other" seems to have been omitted.

(*g*) J. A. 1877, s. 79.

(*h*) See Napier on Civil Bills, p. 60—Edition of 1836.

Introductory View.

The statutes 6 & 7 Wm. IV., c. 75, A.D. 1836, enlarged the jurisdiction in amount from £20 Irish to £20 British currency, and extended it to recovery of annuities charged on real estate, legacies charged on same, and to legacies, pecuniary or specific, where the assets did not exceed £200; to replevin between landlord and tenant £50, and for adjusting disputes as to the mere possession of land not involving questions of title, where the rent did not exceed £20 or the fine £50. Further on, in point of time, A.D. 1851, the statute 14 & 15 Vic., c. 57, so far increased the jurisdiction of the Civil Bill Courts as to include all disputes and differences between party and party for any sum, damages, or penalty not exceeding £40, excepting cases of slander, libel, breach of promise of marriage, and criminal conversation. As we have seen before, the tendency of later legislation seems to be to enlarge the jurisdiction of our several judicial tribunals in general, and gradually do away with limitations of pecuniary amount (which, after all, is not a true test either of the difficulty or of the importance of a contention), substituting in its stead the double safeguard of an appeal and a power of removal to a higher Court. Accordingly, the County Officers and Courts (Ireland) Act, 1877, has increased the old common law jurisdiction of the Civil Bill Courts in actions for debt or damages from £40 to £50, (*i*) and in ejectment from £20 to £30 annual value, (*j*) and has conferred a jurisdiction in equitable cases almost entirely new, and of so very extensive a range, that it is all but conterminous as to subjects with that of the old Court of Chancery, embracing administration suits, execution of trusts, foreclosure and redemption of mortgages, specific performance of contracts as to realty, reformation

(*i*) 40 & 41 Vic., c. 56, s. 50. (*j*) S. 53.

Introductory View.

and cancellation of written agreements relating to the same, partnership accounts, partitions of land, prevention of waste between landlord and tenant, maintenance and care of the property of infants, injunctions, proceedings under the Married Women's Property Act, 1870, the Trustee Relief Acts, and the Trustee Acts—in fact everything embraced in the assignment of business to the Chancery Division of the High Court of Justice except the raising of portions and charges on land, and sale of land subject to lien or charge. The above subjects are generally limited in amount by the sum of £500 in cash and £30 per annum of annual value of the property involved in the suit or matter.

The inter-communication between the Civil Bill Courts and the Superior Courts in common law actions, by way of appeal, is still preserved to the Judges of the High Court of Justice on their circuits, or in the Consolidated Nisi Prius Court, as regards the County Court of Dublin; and as regards the newly conferred equitable jurisdiction, an appeal is given to the Lord Chancellor by name, (*k*) but in effect to such of the judges of the Chancery Division as the Lord Chancellor may allot the business to, by General Order.(*l*)

Then, as regards transfer of causes from the lower to higher jurisdiction, it is provided that the Lord Chancellor (*i.e.* such of the Chancery Judges to whom he may allot the business), on the application of any party to the suit or matter, may transfer the suit or matter to the Chancery Division, and the Chairman may, if he finds in the progress of the suit or matter that the subject-matter exceeds in amount the strict limits of his jurisdiction, direct it to be transferred to the Chancery Division of the

(*k*) 40 & 41 Vic., c. 56, s. 43. (*l*) S. 45.

High Court, unless the parties wish to have it retained and so consent by memorandum in writing, in which latter case, the Chairman is authorized to proceed and determine the matter; but if the cause is transferred to the High Court, the error or excess in amount does not affect any decree or order made previously by the Chairman, and the Chancery Judge may either retain the cause and determine it, or direct it to proceed in the inferior court, and his order to that effect confers jurisdiction on the court below.(*m*)

The jurisdiction of the High Court is also made ancillary to that of the Civil Bill Court by permitting any party to a suit or proceeding below, during the intervals between the sittings of the Civil Bill Court, to apply to the proper Judge of the Chancery Division for an injunction in any suit instituted below.(*n*)

On the other hand, when any suit or proceeding is pending in the Chancery Division of the High Court, which might have been commenced in a Civil Bill Court, the Judge before whom it is pending may, on the application of any party to it, or without any application, and of his own accord, transfer the suit to the Civil Bill Court, where it shall be carried on as if it had originated there.(*o*)

The provisions of the Common Law Procedure (Ireland) Act, 1870, (*p*) whereby, in addition, certain actions on contract, actions for malicious prosecution, illegal arrest, illegal assault, false imprisonment, libel, slander, seduction, or other actions of tort brought in one of the Superior Courts, might be remitted for trial in the Civil Bill Division of the county in which a defendant usually resides, where the plaintiff has no visible means of paying

(*m*) 40 & 41 Vic., c 56, s. 37. (*n*) S. 44. (*o*) S. 36.
(*p*) 33 & 34 Vic., c. 109, ss. 5 and 6.

Introductory View.

the costs of the action, in case a verdict should be found for the defendant, and fails to give security for the costs, or, show that he has a cause of action fit to be prosecuted in the Superior Court, are extended to actions of detinue and for breaches of contract where the claim is for unliquidated damages; (*q*) and in all such cases of remitted actions the Civil Bill Court jurisdiction, as to amount of damages to be awarded, is made co-extensive with that of the Superior Court.(*r*)

The County Officers and Courts (Ireland) Act, 1877, further provides for a reduction, in the future, of the number of the County Court Judges, from thirty-three to twenty-one first class district chairmanships, merging nineteen of the present offices, and at the same time uniting with the office of Chairman of the County, the five Recorderships of Dublin, Cork, Londonderry, Belfast, and Galway.(*s*)

The office of Chairman of the Civil Bill Court was usually filled by a barrister, non-resident, and occupied, as to the greater portion of his time, in the pursuit of private practice—circumstances which, though doubtless maintaining and enhancing his general legal knowledge and aptitude for the discharge of judicial functions, were, nevertheless, not specially favourable to the regularity of the procedure of the Civil Bill Courts, or the calm and deliberate consideration of the small but often tangled contentions of country suitors. Under the new *régime*, all Chairmen appointed after the 14th August, 1877, are prohibited from practising at the Bar or being concerned as solicitors (*t*).

Amendment of law.

(24.) The Legislature has taken the occasion of the reconstruction and consolidation of our principal Courts into one Supreme Court of Judicature, to

(*q*) 40 & 41 Vic., c. 56, s. 51. (*r*) S. 52.
(*s*) Secs. 85 and 86. (*t*) S. 93.

amend and declare the law to be hereafter administered in the High Court of Justice, and also in inferior Courts, (*u*) so as to make it uniform in the several divisions of the Court, and elsewhere, and to reconcile different rules on the same subject, where they conflict. The Act (*v*) enumerates ten subjects in respect of which the law is expressly amended or declared, including, (1) the administration of assets of insolvent estates, in which the rule of the Court of Bankruptcy is adopted in preference to the rule of the Court of Chancery; (2) the Statutes of Limitations and their application in cases of express trust; (3) equitable waste; (4) merger by operation of law; (5) possessory actions by mortgagors in their own names and right; (6) assignment of debts and other legal choses in action; (7) stipulations in contracts which are not of the essence of the contract; (8) the right to injunctions and to receivers; (9) the standard for damages in cases of collision between ships, in which the rule of the Court of Admiralty is adopted in preference to that of the common law; (10) the custody and education of infants in which the rules of Courts of Equity are to prevail over those of a Court of Common Law; and finally, Rule 11 enacts that generally in all matters not particularly mentioned, the rules of equity are to prevail over those of a Court of Common Law, where they relate to the same matter and happen to conflict. Sir George Jessel, M.R., has said (*w*) that the 2nd subsection of this section—25th in England and 28th in Ireland—is declaratory of the law as it existed before: whilst all the other subsections

(*u*) J. A., 1873, s. 91; J. A., 1877, s. 79.

(*v*) J. A., 1873, s. 25, and J. A., 1875, s. 10; J. A., 1877, s. 28.

(*w*) *In re* Joseph Suche and Company, Limited, *Ex parte* the National Bank, L. R. 1 Ch. D. 48; 24 W. R., 184; *vide infra*, Part V., chap. 23.

Introductory View.

relate to and involve alterations of the law. They are of very serious importance, and will probably lead to many doubts and decisions, both in the superior and in the inferior courts of justice in which they may be in force. In Part 5 of what follows, an attempt has been made in some degree to explain these subsections, not so much in the hope of very much assisting the reader in the application of them, as to indicate the external bounds and limits of the rules, in regard to subjects which may seem not very germane to an Act on Judicature.

PART I.

JUDICATORY.

CHAPTER I.—THE SUPREME COURT OF JUDICATURE, ITS RULES AND OFFICERS.

" II.—HIGH COURT OF JUSTICE AND ITS JUDGES.

" III.—DIVISIONS OF THE HIGH COURT.

" IV.—DIVISIONAL COURTS.

" V.—COMMISSIONS OF ASSIZE AND NISI PRIUS.

" VI.—COURT SITTINGS AND VACATIONS.

" VII.—NISI PRIUS SITTINGS IN DUBLIN.

" VIII.—ELECTION JUDGES.

" IX.—THE COURT OF APPEAL.

CHAPTER I.

The Supreme Court of Judicature, its Rules and Officers.

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25. The Supreme Court of Judicature, 55.
26. The President, 55.
27. Twofold Division of, 56.
28. Jurisdiction and Functions of, 56.
29. Council of Judges—Annual Report, 57.
30. Preliminary Rules of Court, 58.
31. Future Rules, 60.
32. Regard to English Rules, and Parliamentary Sanction, 61.
33. Schedule Rules, 62.
34. Rules of Probate Court, 62.
35. Rules of other Courts transferred, 63.
36. Rules of Bankruptcy Court, 63.
37. Other Powers as to Rules, 63.
38. Force and Effect of Judicature Rules, 64.
39. Books and Papers transferred to, 64.
40. Transfer of Officers to, 65.
41. Rank and Position retained, 65.
42. Rights of Succession, 66.
43. Officers Attached to Divisions, 66.
44. Personal Officers, 67.
45. Redistribution of Business, 67.
46. Transfer of Officers from Divisions, 67.
47. Present Consolidation of Offices, 68.
48. Future Consolidation of Offices, 68.
49. Officers' Duties not provided for, 69.
50. Analogous Duties, 69.
51. Lord Chancellor may alter Duties and Designation of certain Officers, 69.
52. Officers of Court of Appeal, 70.
53. Retirement of Officers, 72.
54. Consent of existing Officers to, 73.
55. Compensation for Loss, 73.
56. Increase of Salary with Duty, 73.
57. Proximate Reorganization of Offices, 73.
58. Future Vacancies Suspended, 74.
59. Rights of Patronage, 74.
60. Junior Clerkships open to Competition, 75.
61. Appointments in Chancery Division, 75.
62. Other Divisions, 76.
63. Of Personal Officers, 76.
64. Of General Officers by Lord Chancellor, 76.
65. Removal of Officers, 76.
66. Authority of Courts over Officers, how exercised, 77.
67. Salary of Future Officers, 77.
68. Pensions of Future Officers, 77.
69. Solicitors and Attorneys, 78.
70. Jurisdiction over, 78.

71. Apprentices, 78.
72. Commissioners to Administer Oaths, 78.
73. Limit of Place removed, 79.
74. Answers and Affidavits, how taken, 79.
75. Acknowledgment of Deeds, 79.
76. Receiver Master, 80.
77. Officers of Receiver Master, 80.
78. Officers of Land Judges and Local Government Board, 81.

The Supreme Court of Judicature.

(25.) Since the 1st day of January, 1878, the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the Court of Probate, the Court for Matrimonial Causes and Matters, and the Landed Estates Court, have been united and consolidated together, and henceforth constitute one Supreme Court of Judicature in Ireland. (*x*)

The former Courts have ceased to exist, so far that the jurisdiction formerly vested in them can no longer be exercised, and no further appointments can be made to them. (*y*)

The Court of Judicature is designated a "Supreme" Court like its sister in England, which was properly so named by the framers of the original Act, when by its plan the decisions of the Court were to be final and not subject to review in or by any higher Court. Since the change of plan, and return to the House of Lords as the final Court of Appeal, the description of "Supreme" seems to be something of a misnomer, inasmuch as the House of Lords sitting in Parliament seems by usage and by its jurisdiction of appeal, exclusively entitled to the epithet of "Supreme."

The President.

(26.) The statute does not say who is to be the President of the Supreme Court of Judicature, but it may be assumed that the Lord Chancellor, from the nature of his office and from his being intrusted with the duty of fixing the time and convening the

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(*x*) J. A., 1877, s. 4. (*y*) S. 25.

The Supreme Court.

meetings of the Council of the Judges of the Supreme Court of Judicature (with the concurrence of the Lord Chief Justice), (*a*) and having an absolute veto on all rules and orders to be made *after* the commencement of the Act, to alter or annul any rules of Court (although he has no such absolute veto as to orders to be recommended to the Lord Lieutenant between the passing and the commencement of the Act), is intended to act as President of the Supreme Court. (*b*)

Twofold divisions of

(27.) The Supreme Court of Judicature consists of two divisions—one of which, under the name of

I. High Court of Justice.

"Her Majesty's High Court of Justice," is to have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is by the Act afterwards to be mentioned. (*c*) The English statute (*d*) mentions appeals from inferior Courts, such as Petty Sessions and County Courts, and provides for their being brought before a Divisional Court, but no such mention is to be found in our Act, and appeals from Civil Bill Courts must probably be heard before a single Judge of the High Court as heretofore.

II. Court of Appeal.

The other division is "Her Majesty's Court of Appeal in Ireland," having appellate jurisdiction with such original jurisdiction as may be incident to the determination of any appeal. (*e*)

Jurisdiction and functions of Supreme Court.

(28.) No particular jurisdiction is conferred on the Supreme Court of Judicature as such, except a nominal jurisdiction over solicitors, attorneys, and proctors, who are deemed to be its officers, and over whom it may exercise the same jurisdiction as any one of the Superior Courts of Law or Equity might previously have done. (*f*) It is barely conceivable that the Supreme Court might be summoned and

(*a*) J. A., 1877, s. 70. (*b*) S. 61. (*c*) S. 5.
(*d*) J. A., 1873, s. 45. (*e*) S. 5. (*f*) S. 78.

sit to exercise jurisdiction over its delinquent officers, but this duty is delegated to and is to be exercised by the Lord Chancellor, (*g*) otherwise the Supreme Court has no judicial or juridical function except as a consultative body to recommend the making or annulling of rules for the organization of the business of the High Court of Justice and of the Court of Appeal, (*h*) and to report on the operation of the Judicature Act, and the working of the offices connected with it, and on any defects which may appear to exist in the system of procedure, or the administration of the law within its own precincts, or in any other of the courts affiliated to it by way of appeal. (*i*) *The Supreme Court.*

(29.) A council of the Judges of the Supreme Court of Judicature (of which due notice is to be given to all the judges thereof), is required to assemble once at least in every year on such day or days as shall be fixed by the Lord Chancellor (with the concurrence of the Lord Chief Justice), for the purpose of considering the operation of the Judicature Act, and of the Rules for the time being in force, and also the working of the several offices, and the arrangements relative to the duties of the officers of the said courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the High Court of Justice or the Court of Appeal, or in any other court from which any appeal lies to the High Court or any judge of it, or to the Court of Appeal. The council are required to report annually to the Chief Secretary to the Lord Lieutenant of Ireland what (if any) amendments or alterations it would in their judgment be expedient to make in the Judicature Act or *Council of Judges' annual Report.*

(*g*) S. 73., § 15. (*h*) S. 70. (*i*) S. 70.

The Supreme Court.

otherwise relating to the administration of justice, and what other provisions (if any) which cannot be carried into effect without the authority of Parliament it would be expedient to make for the better administration of justice. An extraordinary council of the judges of the Supreme Court may also, at any time, be convened by the Lord Chancellor. (*j*)

It does not appear that the report must necessarily be the unanimous report of the entire body, or even of a majority of the judges; and it would seem that individual members of the council are not precluded from reporting their opinions.

Preliminary rules for the Act.

(30.) The Lord Lieutenant was empowered by an order in Council made at any time before the 1st January, 1878, upon the recommendation of the Lord Chancellor, the Lord Justice of Appeal, the Chief Justice, (*k*) the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron, or any three of them, and of the other judges of the several courts about to be consolidated, or of the majority of such other judges, to make rules to be styled Rules of Court for carrying the Judicature Act into effect generally, and in particular for all or any of the following matters :—

Sittings of the Courts

1. For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any divisional or other courts of the same, and of the Judges of the High Court sitting in Chambers.

Pleading, practice, and procedure.

2. For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal, including all matters connected with writs, forms of actions, parties to actions, evidence and mode and place of trial, and for the reporting

Short-hand reports.

by a competent short-hand writer of the evidence in

(*j*) S. 70. (*k*) *Sic* in the Statute.

all cases of trials by jury whenever it is expedient or desirable so to do. *The Supreme Court.*

3. Generally for regulating any matters relating to the practice and procedure of the courts respectively, or to the duties of the officers of the same, or of the Supreme Court, or to the costs of proceedings in the courts (including the costs to be allowed to solicitors of the Supreme Court in respect of business transacted in or before any of the courts or the offices thereof, or the fees, remuneration, and expenses to be allowed to witnesses, or the fees to be payable to or receivable by Sheriffs for the discharge of any duties under the Act or in obedience to any order of the Supreme Court, or any division or master thereof), or relating to the conduct of civil or criminal business coming within the cognizance of the said courts respectively for which no express provision is made by the Act. Duties of officers. Costs. Remuneration of witnesses. Fees to sheriffs. Conduct of civil or criminal business.

4. For regulating the sittings of judges in chambers, the issuing and hearing of summonses, and the allowance or disallowance of the expense of the attendance of counsel upon such hearings, and generally for the efficient despatch of chamber business under the provisions of the Act. Sittings in chambers.

5. For prescribing, regulating, or doing anything which, under the Judicature Act, may be prescribed, regulated, or done by rules of court. (*l*) General.

6. In addition to these, the Lord Lieutenant in council is authorized in like manner and on like recommendation to make rules before or after the commencement of the Act to make, revoke, or modify orders regulating the vacations to be observed by the High Court of Justice and the Court of Appeal, and in the offices of the said courts respectively. (*m*) Vacations.

(*l*) J. A., 1877, s. 61. (*m*) S. 30.

The Supreme Court.

Vacation judges.

7. Also for the hearing in Dublin during vacation by Judges of the High Court of Justice and the Judges of the Court of Appeal respectively of all such applications as may require to be immediately or promptly heard. (*n*)

Rules of evidence not affected.

(*a.*) There is an express exception to the power by rules to alter the course of procedure, namely, as regards the mode of giving evidence by the oral examination of witnesses in trials by jury; this the court cannot alter or interfere with, save so far that for special reasons it may allow depositions or affidavits to be read. (*o*)

Juries.

(*b.*) So also it is beyond the power of the rules to alter the law relating to jurymen or juries. (*p*)

Statutory provisions may be altered.

Provisions in respect to the practice and procedure of any court whose jurisdiction is transferred, although contained in an Act of Parliament, may be modified by rules of the Court of Judicature to any extent that may be deemed necessary for adapting them to the High Court of Justice and the Court of Appeal. (*q*) And provisions relating to the payment, transfer, or deposit into, or in, or out of court of any money or property, or to the dealing with same, are to be deemed provisions relating to practice and procedure. (*r*)

Relating to payment of money in and out of Court.

Necessary majorities of Judges.

The majorities required of the Chief Judges and of the other judges respectively in recommending these *initiatory* rules is not stated to be a majority of those actually present at a meeting, but would seem to require an absolute majority of all the judges of each order, they being duly convened. (*s*)

Future Rules of Court.

(31.) After the Judicature Act has come into operation, the Lord Lieutenant is empowered—at any time—with the concurrence of a majority of the Judges of the Supreme Court present at any meeting for that

(*n*) J. A., 1877, s. 31. (*o*) S. 66. (*p*) *Ib.*
(*q*) J. A., 1877, s. 68. (*r*) *Ib.* (*s*) S. 61.

purpose held (of which majority the Lord Chancellor must be one) by order in council to alter or annul any rules of court for the time being in force. *The Supreme Court.*

He may also by a like order in council have and exercise the same power of making rules of court as is by the previous part of the section vested in the Lord Lieutenant on the recommendation of the judges in the section already specified before the commencement of the Act. (*t*)

As regards these future rules, and also in case there should happen to be no rules made previous to the 1st January, 1878, it would seem the Lord Lieutenant in council may act on the recommendation of an absolute majority of all the Judges of the High Court, without regard to rank, provided the Lord Chancellor be included in the majority; and it is presumed provided the entire body of the judges have been duly convened for the purpose. The corresponding provision in the English Judicature Act, 1875, (*u*) secures to the Lord Chancellor, as the minister responsible to Parliament for the working of the judicial system, not merely a veto in the making or the altering of the rules of the Court of Judicature, but a preponderating influence, vesting in him the power of selecting the greater number of the members of the limited tribunal.

(32.) The statute imposes as a condition or qualification of the power of making, altering, or annulling rules of court, that regard shall be had to the rules of court for the time being in force in England, under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, so as that the pleading, practice, and procedure in the High Court of Justice and Court of Appeal in Ireland, shall, so far as may be practicable and convenient, having regard to the

Regard to be had to English Rules.

(*t*) S. 61. (*u*) S. 17.

The Supreme Court.

difference of the laws and circumstances of the two countries, be the same as the pleading, practice, and procedure in the High Court of Justice and Court of Appeal in England. (*v*)

Parliamentary sanction.

In addition to this, all rules of court made under the Act must be laid before each House of Parliament within forty days after they are made, if Parliament should be then sitting, or if not, within forty days after the commencement of the next session, and may be annulled on an address from either House within 100 days subsequent, but without prejudice to the validity of proceedings meanwhile taken under them. (*w*)

Schedule Rules.

(33.) Certain rules of procedure are prescribed in the schedule to the Act, thirty-eight in number, and chiefly borrowed from the English rules, and they are to be read and taken as part of the Act, and they are in operation from the 1st day of January, 1878, and so far as they extend regulate the proceedings in the High Court of Justice and Court of Appeal until altered or varied, and although contained in the Act they are mere Rules of Court, capable of being annulled or altered like any other rules (*x*).

Rules of Probate Court adopted.

(34.) All rules and orders which were in force in the Court of Probate, and the Court for Matrimonial Causes and Matters respectively, at the time of the commencement of the Act, except so far as they shall by rules of the Court of Judicature be expressly varied, remain and are in force in the High Court of Justice, and in the Court of Appeal respectively in the same manner as if they had been Rules of Court under the Judicature Act (*y*).

The full force of this reservation, and of the words "expressly varied," is not very clear. The Judicature Act, 1875, (*z*) includes in a similar

(*v*) J. A., 1877, s. 61. (*w*) S. 69 (*x*) S. 61.
(*y*) S. 64. (*z*) S. 18.

category rules in relation to appeal in bankruptcy, a court whose jurisdiction is not transferred to the Supreme Court, though affiliated to it by way of appeal, and its orders as to appeals are subordinate to those made by the High Court where they conflict (*a*). *The Supreme Court.*

(35.) By virtue of another section (*b*) all General Orders and Rules of any court whose jurisdiction is transferred regulating forms and methods of procedure in force, when the Judicature Act came into operation, and which are not inconsistent with the Act and its schedule, are continued, and are in force in the High Court of Justice and the Court of Appeal until otherwise provided by rules of the Court of Judicature, in such and the like cases as those to which they would have been applicable in the Court so transferred if the Act had not passed. Rules of other Courts transferred.

Under these provisions all the pre-existing rules of the particular courts are to be considered as if written into the schedule by way of addition to those already there, and the conjoint effect to be ascertained. But each particular set of rules is to be applied to its appropriate class of proceedings, and in the absence of express variation by the Act and its schedules, or absolute inconsistency, the particular Rules must stand until altered by Rules of the Court of Judicature. The task of construing together the judicature and the particular Rules may not be free from difficulty.

(36.) Rules and Orders of the Court of Bankruptcy for regulating its procedure, and the power to make them are untouched by the Judicature Act. Rules of Court of Bankruptcy

(*a*) See *In re* Lewer, *ex parte* Garrard, 25 W.R., 364; W.N. 1877, 53 A.C.

(*b*) J. A., 1877, s. 67.

The Supreme Court.

Appeals from the orders of its Judges lie in the same manner, and in respect of the same proceedings as heretofore to the Court of Appeal, save so far as the procedure on appeals may be altered by any rules of the Court of Judicature (*c*).

Other powers as to Rules not prejudiced.

(37.) The powers to make Rules of Court contained in section 61 are not to affect special provisions in the Act enabling rules to be made in particular instances, for example, by sections 7 and 39 as to Landed Estates Court business, and section 75 as to receiver business by the Lord Chancellor and the Land Judges, by section 8 as to bankruptcy business, by section 43 as to rota of Judges for election petitions, by section 46 as to direction and superintendence of Divisional Courts, by section 49 as to land cases reserved, and by section 84 as to fees (*d*).

Force and effect of Judicature Rules.

(38.) Rules of Court made in pursuance of the foregoing provisions, if made before the commencement of the Act, come into operation immediately after its commencement, and rules made after the Act come into operation at the time stated in the rules, and thenceforth regulate all matters to which they extend until annulled or altered in pursuance of the Act (*e*).

Books and papers transferred to Court of Judicature.

(39.) All books, documents, papers, and chattels in the possession of any court whose jurisdiction is transferred to the High Court of Justice or the Court of Appeal or of any officer or person attached to any such court as such officer, or by reason of his being so attached, have been transferred to the Supreme Court of Judicature, and are to be dealt with by the officer or person in possession of them in such manner as the High Court of Justice or the Court of Appeal may by order direct. And any person fail-

(*c*) S. 8; and see *In re* Lewer, *ubi supra*.
(*d*) J. A., 1877, s. 61, § 10. (*e*) S. 60, § 9.

ing to comply with any order made for the purpose of giving effect to this transfer, will be guilty of a contempt of the court making the order (*f*). *The Supreme Court.*

(40.) The Judicature Act has attached to the Supreme Court of Judicature from the 1st day of January, 1878, all officers and persons who on that day were connected with any court whose jurisdiction has been transferred to the High Court of Justice or to the Court of Appeal, viz.: Transfer of existing staff of officers to Court of Judicature.

The Receiver Master, the Accountant-General in Chancery—and the Masters of the Courts of Common Law—the Clerk of the Crown and Hanaper—the Clerk of the Crown of the Queen's Bench—the Taxing Masters—Secretaries—Registrars—Clerk of Records and Writs—Examiner in the Court of Chancery—Registrar of the Consolidated Nisi Prius Court—Clerks of the Rules and Pleadings—Record Assistants—Chief and other Clerks—Commissioners to take oaths or affidavits, or the acknowledgment of deeds by married women—Stamp Distributors—Messengers—Court and Office-keepers—Hall porters (*g*)—Tipstaves, Criers, and other officers and assistants, and also all registrars, clerks, officers, and other persons engaged in the preparation of commissions or writs, or in the registration of judgments or any other ministerial duties in aid of or connected with any of the said courts; also all persons who were officers of or connected with the late Masters of the Court of Chancery or their offices. (*h*)

(41.) The officers so attached or transferred to the Court of Judicature, are to retain the same rank and to hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and if entitled to pensions, are entitled to the same pensions as if the Act had not passed. And any Rank and position of officers transferred retained.

(*f*) J. A., 1877, s. 80. (*g*) *Sic.* (*h*) J. A., 1877, s. 72, § 1.

The Supreme Court.

officer who is removable by the court to which he was formerly attached, will henceforth be removable by the court or division to which he is attached under the Act, or by the majority of the judges thereof, and for the same causes as heretofore. (*i*) Specially excluded from the above provision are the existing third assistant in the Writ and Seal Office and the existing clerk of errors, who, as the Act prescribes may cease to be officers of the High Court upon an order of the Lord Chancellor to that effect, and without being entitled to compensation. (*j*)

Succession in Chancery Registrars' and Law Courts offices.

(42.) The existing registrars, assistant registrars, and clerks of the registrars in Chancery, and also the officers of the three law courts, so long as they continue officers of the courts, retain any right of succession secured to them by Act of Parliament, so as to entitle those who are thus secured in their respective offices, or in any substituted offices, to the succession to appointments with duties similar or analogous duties, and with equivalent salaries. (*k*) This provision, however, should be considered in connexion with paragraph 17 of the same section, 72, (*l*) and paragraph 1 of section 73. (*m*)

Officers: how attached to Divisions.

(43.) All officers transferred to the Supreme Court of Judicature are attached to the respective division of the High Court of Justice which corresponds with the special court to which they formerly belonged, viz.:—

Chancery.

(*a.*) Officers formerly attached to the Court of Chancery, or any Judge or Master of it, are now attached to the Chancery Division of the High Court.

Landed Estates Court.

(*a* 1.) Officers of the Landed Estates Court are now attached to the Land Judges of the Chancery Division.

(*i*) J. A., 1877, s. 72, § 2. (*j*) *Ib.* § 3: see *infra* (52). (*k*) S. 72, § 4.
(*l*) *Vide infra* (55). (*m*) *Vide infra* (57).

(*b.*) Officers of the Court of Queen's Bench are attached to the Queen's Bench Division. *The Supreme Court.*

(*c.*) Officers of the Court of Common Pleas are attached to the Common Pleas Division. Queen's Bench.

(*d.*) Officers of the Court of Exchequer are attached to the Exchequer Division. Common Pleas. Exchequer.

(*e.*) Officers of the Court of Probate and the Court for Matrimonial Causes and Matters are attached to the Probate and Matrimonial Division. (*n*) Probate.

(44.) All clerks and other officers attached to any existing judge who becomes a Judge of the High Court of Justice or of the Court of Appeal, will continue attached to such judge, and is bound to perform the same duties as those which he has hitherto performed, or duties analogous thereto, and will have the same rank and hold his office by the same tenure and upon the same terms and conditions, and receive the same salary, and if entitled to a pension, be entitled to the same pension as if the Act had not passed. (*o*) Personal officers of Judge.

(45.) The business to be performed in the respective Divisions of the High Court of Justice is to be distributed among the several officers, &c., attached to each, and the duties to be discharged by them, and any re-arrangement connected therewith is to be regulated, controlled, and directed, by Rules of the Court of Judicature. (*p*) Pending this re-arrangement it is presumed that where any duty is to be discharged under the Act which had heretofore been discharged by any particular officer, such officer shall continue to be proper officer to discharge same. Re-distribution of business.

(46.) Where the services of any officer attached to any division is not required in the division to which he is attached, the Lord Chancellor may, with the concurrence of the other Presidents of Divisions or Transfer of officers from divisions.

(*n*) S. 72, § 5. (*o*) S. 72, § 6. (*p*) S. 72, § 7.

The Supreme Court.

two of them, by order, transfer such officer to some other office of the High Court of Justice, or some Division of it, subject to the conditions imposed as to the nature of the duties that they shall be either the same, or similar, or analogous to his former duties.(*q*)

Consolidation of certain offices.

(47.) Certain offices are to be consolidated at dates to be fixed by the Lord Chancellor, with the concurrence of the Treasury, but within two years from the commencement of the Act, viz.:—

Taxing offices.

(*a.*) The Taxing Offices of the Common Law Courts, and of the Landed Estates Court with the Taxing Office of the Court of Chancery, so as to have but one Taxing Office for the Supreme Court, and the several Courts and Divisions of same.

Accountant.

(*b.*) The Office of Accountant in the Landed Estates Court with the Office of Accountant-General in the Court of Chancery, so as to have but one Accountant Department for the Supreme Court and all Courts and Divisions of same.

Writ and Seal.

(*c.*) The Writ and Seal Office of the Law Courts, with the Record and Writ Office in Chancery, so as to have but one office, out of which all writs and summons to commence proceedings in the High Court or any Division thereof may issue, and in which the records of all proceedings therein may be preserved.

Notice office.

(*d.*) The Notice Office of the Landed Estates Court with the Notice Office of the Court of Chancery.(*r*)

Future consolidation of offices.

(48.) The Lord Chancellor and the three other Chief Judges, or any two of them (the Lord Chancellor being one), with the concurrence of the Treasury, may by order, consolidate any other offices of the Courts whose jurisdiction is transferred

(*q*) J. A., 1877, s. 72, § 8. (*r*) S. 72, § 9.

to the Supreme Court in any cases where the union of existing Courts into one Supreme Court renders it no longer necessary or expedient to retain such offices separate, and the distribution of business in the offices so united and consolidated, and the duties to be discharged by the officers are to be regulated and directed by Rules of Court.(*s*) *The Supreme Court.*

This consolidation and regulation of duties is, however, subject to the provisions of the Act as to tenure and salary of existing officers, and to the discharge by them of analogous duties only.(*t*)

(49.) As to officers and persons attached to the Supreme Court, but whose duties are not otherwise provided for, they shall have their duties defined by the Lord Chancellor.(*u*) Officers' duties are not provided for.

(50.) The re-distribution or change of business amongst officers is subject to this limitation, in favour of existing officers, that an existing officer, whether attached to the Supreme Court generally or to any Court or Division of it, shall not be required to discharge any duties which are not, either the same as, or similar or analogous to those which he performed immediately before the 1st day of January, 1877. And in case of question as to the duties proposed to be imposed upon any officer being similar or analogous, the Lord Chancellor is to decide, having regard to the rank and position previously held by the officer. (*v*) Analogous duties.

(51.) The Lord Chancellor may, with the concurrence of the Treasury, abolish or alter the duties and designation of any officer, whether in the Lunacy Department or attached *to himself*, and fix the salaries of such of them as shall be retained, but so as that no existing officer holding office during good Lord Chancellor may alter duties and designation of certain officers.

(*s*) S. 72, § 10 & 11.
(*t*) *Ib.* § 10.
(*u*) S. 72, § 12.
(*v*) S. *ib* § 13.

The Supreme Court.

behaviour shall receive a less salary than heretofore, or hold office otherwise than as he did. (*w*)

Appeal Court officers.

(52.) The Judicature Act, 1877, has not in terms assigned or attached any officers or clerks for the service of the new Court of Appeal, although it assumes there shall be some such officers in the future. Under the heading "Appointment of future Officers," section 74, par. 10, it enacts that all officers assigned to perform duties with respect to the Court of Appeal, shall be appointed by the Lord Chancellor, and par. 15 of the same section enacts that the authority of the Court of Appeal over any officers attached to it generally, with respect to any duties to be discharged by such officers, may be exercised by the Lord Chancellor. It does not indicate who or what these officers are to be.

The Chancery Appeal Court (Ireland) Act provided no special staff of registrars or clerks for the then newly constituted Court, such as was done in England by the addition of two or three registrars and a corresponding number of clerks, but it enacted that the registrar, secretary, and other officers attached to the Court of the Lord Chancellor should attend the Court of Appeal in Chancery, in the same manner as the English Judicature Act, 1873, s. 77, provides that all the duties with respect to appeals from the Court of Chancery of the County Palatine of Lancaster, which are now performed by the Clerk of the Council, shall be performed by "the Registrars, Taxing Masters, and other officers by whom like duties are discharged in the Supreme Court." There is nothing similar in the Judicature Act, 1877.

In England the service of the two branches of the New Court of Appeal is provided for (*x*) by requiring

(*w*) S. 82. (*x*) Order 60, R. 2.

officers attached to any division to follow the appeals or rehearings from the same division, and to 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 Queen's Bench, Common Pleas, and Exchequer, respectively performed as to appeals heard by the Court of Exchequer Chamber. This left for the two branches of the Court of Appeal, two out of the twelve Registrars of the Chancery Division, and the fifteen Masters attached to the three Common Law Divisions, in addition to the officers of the Probate and Admiralty Division. To these further have been added, two special secretaries, two clerks of Court, and one principal clerk attached to the Court of Appeal. *The Supreme Court.*

In Ireland, the Registrars of the Court of Chancery (including the Registrar hitherto attached to the Court of the Lord Chancellor) are by force of section 72, par. 5, attached to the Chancery Division of the High Court of Justice, and although they may be transferred to another division there seems no power of direct transfer to the Court of Appeal.(*y*) The Clerk of Errors is to cease to be an officer of the High Court on an order of the Lord Chancellor to that effect,(*z*) but this, *i.e.* the High Court, it may be observed is a Court to which the Clerk of Errors does not belong, either by attachment, transfer, or the nature of his former duties, he being simply transferred to the Supreme Court of Judicature by force of section 72, par. 1, and having no relations with or duties to discharge in the High Court of Justice; so that it is difficult to see how he can cease to belong to it. As regards the official

(*y*) *Vide ante* (46), at p. 57. (*z*) *Vide ante* (41), at p. 66.

The Supreme Court.

attendance, preparation, and issue of its orders, the Court of Appeal in its singularly multifarious jurisdiction, of law and equity, Landed Estates Court, probate and matrimonial, and admiralty, and criminal cases, land cases reserved, and registration of voters, no provision seems to be made, for the immediate service of the Court, nor, as matters stand at present, does any seem available beyond the possible escape from threatened extinction of the Clerk of Errors, and the Registrar formerly attached to the Court of the Lord Chancellor who of course can follow the Chancery appeals.

Retirement of officers.

(53.) In case it should appear to the Lord Chancellor that by reason of the consolidation or abolition of officers under the Act, the continuance of the services of any officer holding during good behaviour, or during good behaviour subject to removal for cause by some Court or Judge, is unnecessary, the Lord Chancellor may, with the concurrence of the Treasury, make arrangements for the release of such officer from his duties, and thereupon the Treasury may award to such officer such compensation as having regard to his period of service, to the tenure of the office held by him, the Treasury consider just and reasonable, subject to the limitation following—

That if the officer has served for a period not exceeding fifteen years the annual amount of compensation to be awarded shall not be more than one-half of the salary and emoluments of the office held by him.

For each year of completed service exceeding fifteen years there may be awarded in addition to the one-half, one-thirtieth part of the salary and emoluments of the office, but in no case can the sum exceed three-fourth parts of the salary and emoluments of the office.

If the officer retiring has, by statute, any right of

succession to a position of higher rank and emolument, the Lord Chancellor, with the concurrence of the Treasury, may award to the officer in addition to the ordinary compensation specified above, such further compensation in respect of such rights of succession, as having regard to the circumstances of the case and to the amount awarded as ordinary compensation, may appear just and reasonable. (*r*) In certain cases the Treasury are bound to state their reasons for granting a special compensation, and to submit a copy of same to Parliament. (*s*)

The Supreme Court.

(54.) No officer appointed before the passing of the Judicature Act, and holding during good behaviour, or during good behaviour subject to removal for cause, can be discharged or released without his consent, merely because the continuance of his services may have become unnecessary. (*t*)

Consent of existing officers.

(55.) Any existing officer whose emoluments or statutory rights of promotion or succession are affected by the Act may prefer a claim to the Treasury, and the Treasury, if it considers the claim to be established, may award to such officer such sum either by way of compensation or as an addition to his salary as it thinks just, having regard to the tenure of office by such officer, and to the other circumstances of the case. (*u*)

Compensation for loss of emoluments or rights of succession of existing officers.

(56.) The Lord Chancellor is empowered, with the consent of the Treasury, to increase the salary of any officer who is attached to the Supreme Court, or any court, division, or judge thereof, and whose duties are increased by reason of the passing of the Judicature Act. (*v*)

Increase of salary with duty.

(57.) Within two years from the commencement of the Act, *i.e.*, before 1st January, 1880, the Lord Chancellor and the three Chief Judges, or any two

Proximate reorganization of official staff.

(*r*) J. A., 1877, s. 72, § 15. (*s*) *Ib.* § 16. (*t*) S. 72, § 15.
(*u*) S. 72, § 17. (*v*) S. 72, § 14.

The Supreme Court.

of them (the Lord Chancellor being one), are, with the concurrence of the Treasury, to determine what officers, clerks, or other persons holding subordinate positions requisite for the permanent organization of the official staff of the Supreme Court and every court or division thereof, shall be retained or employed, and may abolish any unnecessary office, or reduce, or in case of additional duties, increase the salary of an office, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing judge. (*w*) This power is subject to the rights of now existing officers as secured by the foregoing provision, and also to the right to compensation to be given to any junior officer for any loss of succession to any office abolished, and in which he had a direct or qualified right of succession secured by the Act, such compensation to be measured by the Lord Chancellor with the concurrence of the Treasury. (*w*)

Future vacancies; appointments suspended.

(58.) When any vacancy has occurred, or shall occur in any office after the 14th of August, 1877, (the passing of the Act), no appointment can be made thereto for the period of one month without the assent of the Lord Chancellor given with the concurrence of the Treasury.

And the Lord Chancellor may, with the concurrence of the Treasury, suspend the making of the appointment to the office for any period not later than the 1st day of December, 1879. He may, if it be necessary, with the like concurrence, make provision in such manner as he thinks fit for the temporary discharge in the meantime of the duties of the office. (*x*)

Rights of patronage: how far preserved.

(59.) All rights of patronage are expressed to be preserved to existing judges, (*y*), but this is after-

(*w*) J. A., 1877, s. 73, § 1. (*x*) S. 73, § 2. (*y*) See s. 15.

wards apparently made subject to the power of suspension of any office vacated between the passing of the Act and the 1st December, 1879. (*z*) Future vacancies in offices not abolished are to be filled up in manner prescribed by the Act, (*a*) but subject to any existing qualification required for appointments to the particular office. (*b*) But all statutory powers enabling any officer to appoint to any office or to employ any persons in duties appertaining to any office, are summarily repealed, and the right of appointing to such offices, if continued is vested in the President of the Division in case of offices attached to divisions, and in other cases in the Lord Chancellor, but no vacancy is to be filled up without the concurrence of the Treasury. (*c*) *The Supreme Court.*

Certain rights of appointment vested in the District Registrars of the Court of Probate are excepted from this enactment, whilst the appointments belonging to the Registrars of the Court of Chancery are taken from them. (*d*) These provisions have, as might be expected, no counterpart in the English Judicature Act.

(60.) All junior clerkships in the High Court of Justice are to be filled up by open competition; but this provision does not apply to any person holding any office or clerkship at the time of the passing of the Act. (*e*) The Lord Chancellor, with the concurrence of the Civil Service Commissioners, is required to make regulations as to the qualifications of candidates and the subjects of examination. (*f*) *Junior clerkships by open competition.*

It would seem that this provision does not override the right of patronage expressed to be preserved to existing judges.

(61.) All officers attached to the High Court of *Divisional officers, Chancery.*

(*z*) S. 73, § 2. (*a*) S. 73, § 3. (*b*) S. 73, § 13.
(*c*) S. 73, § 12. (*d*) *Ib.* (*e*) S. 73, § 4. (*f*) *Ib.* § 5.

The Supreme Court.

Justice, or the Chancery Division of it, who have been heretofore appointed by the Master of the Rolls or Vice-Chancellor, save those to be appointed by public competition, continue, while so attached, to be appointed by the Master of the Rolls and Vice-Chancellor, and their successors respectively in the same manner and on the same conditions and occasions as heretofore. (*g*) All officers of the Chancery Division attached to the land judges heretofore appointed by such judges, or who, under the provisions of the Act, are attached to the land judges, save those to be appointed by competition, are to be appointed by them with such approval as heretofore. (*h*)

Other divisional officers.

(62.) The appointment of all officers attached to any division of the High Court other than those of the Chancery Division heretofore appointed by the Master of the Rolls, or the Vice-Chancellor, or the land judges, belongs to the President of the Division (subject to the provisions as to open competition).

But officers who have been heretofore appointed by the Lord Lieutenant cannot hereafter be appointed without his approval. (*i*)

Personal officers.

(63.) All officers attached to any judge are to be appointed by the judge to whom they are attached. (*j*).

Appointments of general officers by Lord Chancellor.

(64.) The appointment of all officers assigned to perform duties with respect to the Court of Judicature generally, or attached to the High Court of Justice generally, or to the Court of Appeal, and all Commissioners to take oath or affidavits in the Supreme Court of Judicature, belongs to the Lord Chancellor. (*k*)

Removal of officers.

(65.) Any officer of the Supreme Court of Judicature, or of the Court of Appeal, or of the High

(*g*) J. A., 1877, s. 73, § 6. (*h*) S. 73, § 7. (*i*) S. 73, § 11.
(*j*) S. 73, § 9. (*k*) S. 73, § 10.

Court, or of any division or judge other than such officers attached to the person of a judge who may be removed by him at his pleasure, is subject to be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, and for reasons to be assigned in the order of removal. (*l*) Existing officers transferred to the Court of Judicature hold their offices by the same tenure and upon the same terms and conditions as if the Act had not passed. (*m*) *The Supreme Court.*

(66.) The authority of the Supreme Court of Judicature, and of the Court of Appeal, and of the High Court of Justice, over all or any of the officers attached to such courts, or any of them generally with respect to any duties to be discharged by such officers respectively, may be exercised by the Lord Chancellor. (*n*) Authority over officers, how exercised.

As to officers attached to any division of the High Court, the authority with respect to any duties to be discharged by them respectively may be exercised by the President of the Division. (*n*)

(67.) Every salaried officer hereafter appointed in pursuance of the Act is to be paid such salary out of moneys provided by Parliament as shall be determined by the Treasury with the concurrence of the Lord Chancellor. (*o*) Salary of officers appointed under Act.

(68.) Every officer to be appointed in pursuance of the Act (other than an officer attached to the person of a Judge), whose whole time shall be devoted to the duties of his office, is to be deemed to be employed in the permanent Civil Service of Her Majesty, and becomes entitled to a pension or compensation in the same manner and upon the same terms and conditions as the other permanent civil servants of Her Majesty are entitled to pension or Officers entitled to pensions.

(*l*) S. 73, § 14. (*m*) S. 72, § 2. (*n*) S. 73, § 15.
(*o*) S. 76.

The Supreme Court.

compensation. (*p*) But no officer attached to the person of a Judge will be entitled to any pension or compensation in respect of his retirement from or the abolition of his office, except so far as he may be entitled to it independently of the Act. (*q*)

Personal officers not entitled to pension.

Solicitors, Attorneys, and Proctors to be called Solicitors of Court of Judicature.

(69.) All persons admitted as solicitors, attorneys, or proctors of, or by law empowered to practise in any Court whose jurisdiction is transferred, are to be called solicitors of the Court of Judicature, and are entitled to the same privileges and are subject to the same obligations, so far as circumstances will permit, as if the Act had not passed. (*r*)

Jurisdiction over.

(70.) They are to be deemed officers of the Court of Judicature, and that Court as well as the High Court of Justice, and the Court of Appeal, or any division or Judge of the same, may exercise the same jurisdiction in respect of such solicitors or attorneys, as any one of Her Majesty's Superior Courts of Law or Equity might, previously to the passing of the Act, have exercised in respect of any solicitor or attorney admitted to practise therein. (*s*)

Apprentices, &c.

(71.) All persons who, from time to time, if the Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of, or been empowered to practise in any of the Courts transferred, will be entitled to be admitted and called solicitors of the Court of Judicature, and so far as circumstances will permit, will be entitled, as such solicitors, to the same privileges and be subject to the same obligations, as if the Act had not passed. (*t*)

Commissioner to administer oaths.

(72.) Every person who, at the commencement of the Act, was authorized to administer oaths in any of the Courts whose jurisdiction is transferred to the High Court of Justice, has become a commissioner

(*p*) J. A., 1877, s. 76. (*q*) *Ib.* (*r*) S. 78, § 1. (*s*) *Ib.* § 2. (*t*) S. 78, § 1.

to administer oaths in all causes and matters whatsoever which may, from time to time, be depending in the High Court or in the Court of Appeal. (*u*) *The Supreme Court.*

(73.) Every Commissioner of the Supreme Court of Judicature, if a solicitor, is authorized by the statute to exercise his functions as such Commissioner in any part of Ireland, without regard to any limit of place specified in his commission. (*v*) Without limit of place.

(74.) All answers, disclaimers, examinations and affidavits, in causes and matters depending in any of the Courts whose jurisdiction is transferred to the Supreme Court, or in the High Court of Justice or Court of Appeal, may be sworn and taken in England or Scotland, or the Isle of Man, or the Channel Islands, or in any colony, island, plantation, or place, under the dominion of Her Majesty in foreign parts, before any Judge, Court, Notary Public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place, respectively. Answers and affidavits now taken within Queen's dominions.

Also before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions. In foreign parts.

The Judges and other officers of the several divisions of the High Court or Court of Appeal, are required to take judicial notice of the seal or signature, as the case may be, of any such Court, Judge, notary public, person, consul or vice-consul, attached, appended, or subscribed to any such document. (*w*) Judicial notice of.

(75.) So, in like manner, all acknowledgments required for the purpose of enrolling any deed in any of the Courts transferred to the High Court, or affidavits to memorials for the purpose of registering deeds in Ireland, may be sworn and taken by the like class of officials in places within Her Majesty's dominions, and in foreign parts; and the registrar and other Acknowledgments of deeds for enrolment and registry.

(*u*) S. 74. (*v*) *Ib.* (*w*) *Ib.*

The Supreme Court.

officers of the office for the Registry of Deeds in Ireland, are in like manner required to take judicial notice of the seal or signature of the Court or officer. (*x*)

Receiver-Master.

(76.) To the Receiver-Master of the Court of Chancery no successor is to be appointed, and the Lord Lieutenant, with the consent of the Lord Chancellor, may release the existing Receiver-Master from the further discharge of his duties as the Lord Chancellor was empowered to do by the Chancery (Ireland) Act, 1867. (*y*) The Lord Lieutenant, with the consent of the Lord Chancellor, may, if he think fit, release the Receiver-Master immediately after the passing of the Act and before its commencement. (*z*) As to the transfer of the duties hitherto discharged by the Receiver-Master as a Master in Lunacy, see chap. xii.; as a Master in Chancery, see chap. x.; as Receiver-Master generally, see chap. xiv.

Officers in Receiver-Master's office.

(77.) All officers connected with the office of the Receiver-Master are to be transferred and attached to the Land Judges, and the officers so transferred are to be employed in duties similar or analogous to those which they discharged at the time of the passing of the Act; and they are entitled to hold their offices by the same tenure and upon the same terms and conditions, and receive the same salaries, and if entitled to pensions are entitled to the same pensions and chargeable upon and payable out of the same funds as if the Judicature Act had not passed. (*a*) They may also be transferred to the Local Government Board or any other substituted authority, under similar conditions and subject to such control as the Lord Lieutenant in Council may prescribe; (*b*) and they

(*x*) J. A., 1877, s. 74. (*y*) S. 75, § 1. (*z*) S. 75, § 14.
(*a*) S. 75, § 9. (*b*) *Ib.* § 10.

are subject likewise to the provisions as to the re-organization and new arrangement of offices. (*c*) *The Supreme Court.*

(78.) The Lord Lieutenant in Council may, by order, require any of the officers transferred or attached to the Land Judges to give assistance by the discharge of duties similar or analogous to those which they discharged at the time of the passing of the Act, to the Local Government Board or other substituted authority in like manner as is provided in respect to the officers of the Receiver-Master. (*d*) Officers of Land Judges to assist Local Government Board.

CHAPTER II.

High Court of Justice and its Judges.

79. First Judges of, 81.
80. Permanent number of, 82.
81. Style and authority of, 82.
82. Rights and obligations of existing Judges, 83.
83. Office of Lord Chancellor, 83.
84. Chief Judges, 85.
85. The other Judges, 85.
86. Qualification of Judges, 86.
87. Tenure of Office, 86.
88. Incapacities, 86.
89. Precedence, 86.
90. Salaries and Pensions, 86.
91. Resignations, 86.
92. Judges of Appeal may act as Judges of High Court, 87.

(79.) Her Majesty's High Court of Justice is constituted as follows:—Its first Judges are the Lord Chancellor, the Lord Chief Justice (of Ireland), the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the Vice-Chancellor, the three Puisne Justices of the Court of Queen's Bench and the two of the Common Pleas respectively, the three Junior Barons of the Court of Exchequer, the Judge of the Court of Probate and of the Court for Matrimonial Causes *High Court of Justice.* First Judges of.

(*c*) *Ib.* § 11. (*d*) S. 75, § 10.

High Court of Justice.

and Matters, and the two Judges of the Landed Estates Court, except such, if any, of the Judges named as may be appointed an ordinary Judge of the Court of Appeal.(*a*) The Lord Chancellor (or in his absence the Lord Chief Justice) is President of the High Court of Justice. (*aa*)

Permanent number.

(80.) The vacancy already existing in the Court of Common Pleas, and any vacancy in the office of a Junior Baron of the Exchequer, when first such vacancy may occur, are not to be filled up, (*b*) and the first vacancy which may happen in the office of a Judge of the Landed Estates Court is not to be filled up for forty days after a Royal Commission shall have made its report as to whether the business in connexion with the Chancery Division of the High Court makes it requisite that an appointment should be made. (*c*) When the existing Judge of the High Court of Admiralty shall vacate his office no person is to be appointed to succeed him in that office, but thereupon the High Court of Admiralty shall be united and consolidated with the Supreme Court of Judicature in Ireland. (*d*).

Thus the number of the Judges of the High Court, including the Lord Chancellor, at the passing of the Act was seventeen. This number is to be reduced by one (*i.e.* to sixteen), on occasion of the first vacancy occurring in the office of a Junior Baron of the Exchequer, (*e*) and is subject to be further reduced (*i.e.* to fifteen) on the report of a Royal Commission affecting the office of land judge in the Chancery Division upon the first vacancy. (*f*)

Style and authority of Judges.

(81.) All the Judges of the Supreme Court are to be addressed in the manner which was customary in addressing the Judges of the Superior Courts of

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(*a*) J. A. 1877, s. 6, § 1. (*aa*) *Ib.* § 8. (*b*) S. 6, § 5. (*c*) S. 6, § 6
(*d*) S. 9, § 3. (*e*) S. 6, § 5. (*f*) *Ib.* § 6.

Common Law in Ireland. (*g*) They have in all respects (save as in the Act otherwise expressly provided) equal power, authority, and jurisdiction. (*h*) *High Court of Justice.*

(82.) Every existing judge (that is existing at the time appointed for the commencement of the Act) who has been by the Act made a Judge of the High Court of Justice, or an Ordinary Judge of the Court of Appeal, remains in the same condition as to tenure of office, rank, between himself and the other existing judges, title, patronage, (*i*) and powers of appointment and dismissal, and all other privileges and disqualifications, and also as to salary and pension (save as hereafter mentioned) as if the Act had not passed, and subject to the change effected in his jurisdiction and duties by or in pursuance of the Act, is capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom if the Act had not passed. (*j*) But no judge appointed before the 1st day of January, 1875, except a land judge, (*k*) can be required without his own consent to act under any Commission of Assize, Nisi Prius, Oyer and Terminer or Gaol Delivery, or for the trial of crimes and offences, unless he was so liable by usage or custom at the time of the passing of the Act; (*k*) but every judge appointed after the said date, (*k*) whether of the High Court or Court of Appeal, is capable and bound to act on such a commission if named in it. (*l*) Rights and obligations of existing Judges saved.

(83.) The Lord Chancellor is to be appointed and to hold his office in the same manner as heretofore, *i.e.* by Her Majesty's Letters Patent, (*m*) and with the same rank, salary, and pension attached to the Office of Lord Chancellor.

(*g*) S. 6, § 7. Query has the title "His Honor," usually addressed to the Master of the Rolls, become obsolete?

(*h*) S. 6, § 7. (*i*) *Vide ante* (59), *p.* 74. (*j*) S. 15, §. 1.

(*k*) *Sic* in Act. (*l*) S. 15, § 2. (*m*) S. 6, § 2.

High Court of Justice.

office as heretofore; (*n*) and the officers in the Lunacy Department, and the officers personally attached to or connected with the Lord Chancellor, continue attached to him in the same manner as heretofore. (*o*)

Judicial functions of.

The Lord Chancellor is, when present, President of the High Court of Justice, (*p*) and also of the Court of Appeal, (*q*) as well as President of the Chancery Division. (*r*) But except in matters specially reserved to the Lord Chancellor himself by the Judicature Act, or some other Act, he is not bound or required to exercise any of the functions of a Judge of the High Court or of the Chancery Division of the same, unless he shall by special order, direct that any matter shall be disposed of by himself; but all such matters shall be disposed of by one of the other judges of the Chancery Division, and the Lord Chancellor is in relation to such matters to exercise only the functions of a Judge of the Court of Appeal. (*s*)

This restores the Lord Chancellor to his natural and historic position as head of his own court, from which he was displaced by the first of the General Orders of the Court of Chancery, 1867, in effect reducing him to the position of a judge of first instance, co-ordinate in rank and distribution of business with the other judges of his court.

Lords Commissioners.

When the Great Seal of Ireland is in commission the Lords Commissioners represent the Lord Chancellor for all the purposes of the Judicature Act, save as to the presidency of the Court of Appeal, and the appointment and approval of officers, or the sanction of any order for the removal of officers, or any other act to which the concurrence or presence

(*n*) J. A., 1877, s. 82. (*o*) *Ib.* (*p*) S. 6, § 8. (*q*) S. 10, § 5. (*r*) S. 34, § 1. (*s*) S. 10, § 5.

of the Lord Chancellor is made necessary by the Act, in all which cases the powers given to the Lord Chancellor may be exercised by the senior Lord Commissioner for the time being. (*t*) *High Court of Justice.*

(84.) When any future vacancy occurs in the office of Lord Chief Justice, Master of the Rolls, Lord Chief Justice of the Common Pleas, or Lord Chief Baron, a new judge may be appointed to fill the vacancy in the office by Her Majesty by Letters Patent, and the person so appointed shall have the same precedence, and be appointed by the same title and in the same manner as heretofore. (*u*) Chief Judges.

(85.) Whenever the office of a judge (other than the Lord Chancellor and the Chief Judges mentioned above, (84), or the office of a land judge, or Judge of the Court of Exchequer, mentioned in (80), shall become vacant, a new judge may be appointed thereto by Her Majesty's Letters Patent. (*v*) The judge appointed to fill the vacant place is to be styled in his appointment Judge of Her Majesty's High Court of Justice in Ireland (*w*) generally and not of any particular division, so that the ancient designation of Judges of the Queen's Bench or Common Pleas or of the Barons of the Exchequer will in course of time be disused, as occurred recently in the appointment of Mr. Justice Hawkins, to fill the office vacated by a Baron of the Exchequer in England. Still on such an appointment the new judge becomes *ipso facto* a member of the division to which the judge whose place has become vacant belonged. (*x*) The other Judges.

Any vacancy occurring in the office of Judge of any Court whose jurisdiction is transferred—unless such is under suspension as stated in (80)—may be supplied by the appointment of a new Judge in

(*t*) S. 83. (*u*) S. 6, § 4. (*v*) S. 6, § 3.
(*w*) S. 6, § 4. (*x*) S. 34, § 10.

High Court of Justice.

his place in the same manner as if the vacancy had occurred after the commencement of the Act. (*y*)

Qualification of Judges.

(86.) Any person who has practised for not less than ten years at the bar of Ireland is qualified to be appointed a Judge of the High Court of Justice. (*z*)

Oaths of office.

Every Judge of the High Court of Justice, other than the Lord Chancellor, when he enters on the execution of his office, is required to take in the presence of the Lord Chancellor, the oath of allegiance and judicial oath, as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor are the same as heretofore. (*a*)

Tenure of office.

(87.) Every Judge of the High Court, other than the Lord Chancellor, holds his office for life, subject to the power of removal by Her Majesty on an address presented to Her Majesty by both Houses of Parliament. (*b*)

Incapacities.

(88.) No Judge of the High Court is capable of being elected to or of sitting in the House of Commons, or while he continues such Judge can hereafter, unless otherwise provided by Parliament, be appointed to any place of profit under the Crown except on a transfer to another judicial appointment. (*c*)

Precedence of Judges.

(89.) The Judges of the High Court of Justice, who are not also Judges of the Court of Appeal, have rank next after the ordinary Judges of the Court of Appeal, and amongst themselves (subject to the provision as to existing Judges), (*d*) according to the priority of their respective appointments. (*e*)

Salaries and pensions.

(90.) The salaries payable to the Judges have been, in certain cases, increased, (*f*) and the salaries of future Judges diminished, (*g*) and provision is made for retiring pensions. (*h*)

Vacancy by resignation.

(91.) The office of any Judge of the High Court

(*y*) J. A., 1877, s. 34, § 8. (*z*) S. 12. (*a*) S. 13. (*b*) S. 13. (*c*) *Ib.* (*d*) *Vide ante* (82). (*e*) S. 14. (*f*) S. 17. (*g*) S. 18. (*h*) S. 19.

of Justice or of the Court of Appeal, may be vacated by resignation in writing under his hand, addressed to the Lord Lieutenant, without any deed of surrender, or by a Judge of the High Court being appointed to the office of ordinary Judge of the Court of Appeal. *High Court of Justice.*

The Court is to be deemed duly constituted during and notwithstanding any vacancy in the office of a Judge (*i*)

(92.) In case from the amount of business in the Chancery Division of the High Court of Justice, or in any division of the Court from the absence of a Judge or Judges through illness, it shall be found expedient that some or one of the ordinary Judges of the Court of Appeal, appointed after the passing of the Act, should assist in transacting the business of the division, it will be lawful for them or him so to do, and while so sitting and acting the Judge will have all the power, jurisdiction, and authority of a Judge or Judges of the High Court of Justice. (*j*) Judges of Appeal may act as Judges of the High Court.

CHAPTER III.

Divisions of the High Court of Justice.

93. Five Divisions, p. 87.
94. Vacancies supplied, 89.
95. Transfer of Judges, 89.
96. Judges may sit in any Division, 89.

(93.) For the more convenient despatch of business in the High Court of Justice, it is made to consist of five divisions, (*a*) viz. :— Five Divisions of High Court,

1. The Chancery Division, containing as its judges the Lord Chancellor, who is President; the Master of the Rolls, the Vice-Chancellor, and the Judges of the Landed Estates Court, one of whose Chancery Division.

(*i*) S. 11. (*j*) S. 55. (*a*) S. 34, § 1.

Divisions of High Court.

offices is liable to be suppressed on the first vacancy. (*b*)

Queen's Bench Division.

2. The Queen's Bench Division, having the Lord Chief Justice (of Ireland) as President, and the other Judges of the Court of Queen's Bench not being more than four in all. (*bb*)

Common Pleas Division.

3. The Common Pleas Division, having the Lord Chief Justice of the Court of Common Pleas, and the other Judges of the Common Pleas Division, not being more than three in all; but with the occasional accession of a fourth judge from the Queen's Bench Division for Parliamentary election business, as mentioned below.

3*a*. The Act provides that whenever the Common Pleas Division is engaged in the hearing or despatch of any business relating to a Parliamentary election, within its exclusive cognizance, and there being but three judges attached to the division, the junior puisne judge of the Queen's Bench Division is empowered and bound to attend and take part in the hearing and despatch of the business, and is for the purpose constituted a fourth member of the Common Pleas Division. (*c*)

Exchequer Division.

4. The Exchequer Division, having the Lord Chief Baron as President, and the other Barons of the Exchequer, not being more than three in all—after the next vacancy. (*d*)

Probate and Matrimonial Division.

5. The Probate Division, having the Judge of the Court of Probate, who is also the Judge for matrimonial causes and matters, and whose successor in some future event is to exercise the jurisdiction of the Court of Admiralty. (*e*)

After the Admiralty jurisdiction has become vested in the Judge of the Probate and Matrimonial

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(*b*) S. 6, § 6. (*bb*) S. 36, § 2. (*c*) S. 36, § 3 & 4.
(*d*) S. 36, § 5. (*e*) S. 9, § 3.

Division, the fifth division is to be called the "Probate, Matrimonial, and Admiralty Division." (*f*) *Divisions of High Court.*

(94.) Upon any vacancy happening among the Judges of the High Court of Justice, the judge appointed to fill the vacancy shall (subject to any rules of Court) become a member of the division to which the judge whose place has become vacant belonged. (*g*) Vacancies supplied.

(95.) Any judge of any of the divisions may be transferred by Her Majesty, under Royal Sign Manual, from one to another division, provided that in the case of any judge existing at the commencement of this Act such transfer shall not be made without his own consent. (*h*) Transfer of Judges from one division to another.

(96.) Any Judge of the High Court is competent to sit whenever required in any Divisional Court, or for any judge of a different division from his own; (*i*) and the junior judge of the Queen's Bench Division is required, in certain events, to sit in and form a fourth member of the Common Pleas Division on the hearing of election petition matters. (*j*) Judges may sit in any division.

(*f*) S. 34, § 6. (*g*) S. 34, § 10.
(*h*) S. 34, § 9.
(*i*) S. 34, § 1. (*j*) S. 36, § 4.

CHAPTER IV.

Divisional Courts.

97. For what business, p. 90.
98. How constituted, 91.
99. Attendance of Judges, 91.
100. Arrangement of business, 91.
101. Jurisdiction of, 92.
102. Cases and points reserved, 92.
103. New Trial Motions, 92.

Divisional Courts.

For what business.

(97.) A divisional court is a different thing from a division. (*a*) Divisional courts are to be formed for the purpose of hearing such causes and matters as are not proper to be heard by a single judge, (*b*) and generally all business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions which, according to the practice formerly existing in the Superior Courts of Common Law in Ireland, would have been proper to be transacted and disposed of by the court sitting in Banc, may be disposed of by one of these divisional courts.

Thus cases and points reserved (*c*) are to be argued, and motions for new trials, motions in arrest of judgment or to enter judgment *non obstante*, or to enter a nonsuit, are to be heard before a divisional court, (*d*) and appeals, from orders made by a judge in chambers may be discharged by a divisional court. (*e*) A divisional court formed of judges of any one division, *ex. gr.* the Queen's Bench Division, may hear appeals from a judge at chambers belonging to a different division. (*f*)

In Chancery business.

It does not appear that a divisional court is con-

(*a*) See Fisher *v.* Val de Travers Asphalte Co., 24 W. R. 198.
(*b*) J. A., 1877, s. 46. (*c*) S. 48, § 1. (*d*) S. 51.
(*e*) S. 54, § 1.
(*f*) See Pacey *v.* London Tramways Co., 20 Sol. Jour. 412, where the Queen's Bench Division sustained the Exchequer Division practice, though different from that of the Queen's Bench Division.

templated for the Chancery business, at least in ordinary cases, though it is presumed that it will be competent for the Lord Chancellor or the Master of the Rolls, as heretofore, or, indeed, for any judge of the Chancery division to request the assistance of another Judge of the High Court to assist in deciding on novel or important questions. In one case a Chancery Judge seemed to think a divisional court might advantageously be constituted in the Chancery Division. (*g*) *Divisional Courts.*

(98.) A divisional court is constituted by two or more judges sitting together. Every Judge of the High Court is qualified and empowered to sit in any divisional court, and any number of divisional courts may sit at the same time. The senior judge of those present, according to the order of their precedence, will be president of the court. (*h*) How constituted.

In England a divisional court may be constituted in vacation by two vacation judges sitting together. (*i*)

(99.) Every Judge of the High Court who is not for the time being occupied in the transaction of any business specially assigned to him, or in the business of any other divisional court, is bound to take part, if required, in the sittings of such divisional courts as may from time to time be necessary for the transaction of the business assigned to the Queen's Bench, Common Pleas, and Exchequer Divisions. Attendance of Judges.

Each divisional court should, so far as may be found practicable, include one or more judge or judges attached to the particular division of the court to which the cause or matter out of which the business arises has been assigned. (*j*)

(100.) The necessary and proper arrangements for constituting or holding divisional courts, and for Arrangements as to business.

(*g*) See Amies *v.* Clark, W. N. 1875, 210 V. C. M.
(*h*) S. 45. (*i*) Ord. 55, R. 6. (*j*) S. 46.

Divisional Courts.

the proper transaction of that part of the business of the Queen's Bench, Common Pleas, and Exchequer Divisions, which ought to be transacted by one or more judges not sitting in a divisional court, are to be made from time to time under the direction and superintendence of the Judges of the High Court of Justice, and in case of any difference amongst them, in such manner as the majority of the Judges of the High Court with the concurrence of either the Lord Chancellor or the Lord Chief Justice shall determine. (*k*)

Jurisdiction of.

(101.) A divisional court for the purpose of hearing causes and matters brought before it, has and may exercise all or any part of the jurisdiction of the High Court. (*l*)

Cases and points reserved.

(102.) Any Judge of the 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 of a case to be argued before any such court, and any such court has power to hear and determine the case or point so reserved or directed to be argued. (*m*)

Motions for new trials, &c.

(103.) All motions for new trials of any cause or matter arising in the Queen's Bench, Common Pleas and Exchequer Divisions, on which a verdict has been found by a jury, or by a judge without a jury, and all motions in arrest of judgment, or to enter judgment *non obstante veredicto*, or to enter a verdict for plaintiff or defendant, or to enter a non-suit, or to reduce damages, must be heard before a divisional court, (*n*) otherwise no appeal will lie from the judgment, but when the divisional court does decide on any such motion or proceeding, an appeal lies from its decision to the Court of Appeal. (*o*)

(*k*) J. A., 1877, s. 46. (*l*) S. 45. (*m*) S. 48, § 1. (*n*) S. 51. (*o*) *Ib.*

CHAPTER V.

Commissions of Assize and Nisi Prius.

104. Commissions to try questions of law and fact, p. 93.
105. Circuits and Assizes to continue, 93.
106. Power to re-arrange circuits, 94.
107. Winter Assizes, 94.
108. Judges for ordinary commissions, &c., 95.
109. One Judge for Dublin Commission, 96.
110. Clerks of Assize and Nisi Prius, 96.

Commissions of Assize and Nisi Prius.

Commissions to try questions of law or fact.

(104.) Her Majesty is authorized by commission of assize or by any other commission, either general or special, to assign to any Judge or Judges of the High Court of Justice or other persons usually named in commissions of assize, the duty of trying and determining within any place or district specially fixed for that purpose by the commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the High Court, and any commissioner or commissioners appointed accordingly will, when engaged in the exercise of any jurisdiction assigned to him or them, be deemed to constitute a court of the High Court of Justice. (*a*) This would seem to authorize the hearing of a cause from the Chancery Division, or an issue on a question of law to be had in the country. (*a*)

Circuits and assizes to continue.

(105.) The Act provides that its provisions shall not affect the circuits of the Judges, or the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other commissions for the discharge of civil or criminal business on circuit or otherwise, unless or until other commissions

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(*a*) S. 32, § 1.

Commissions of Assize and Nisi Prius.

are issued in pursuance of the Act, (*b*) or any patronage vested in the Judges going circuit, or the position, salaries, or duties of any officers transferred to the Court of Judicature who were officers of the courts of common law and perform duties in relation to either the civil or criminal business transacted on circuit, (*c*) except as is by the Act expressly directed, (*c*) *ex. gr.* as to registrars and clerks of Assize or Nisi Prius. (*d*)

Power to re-arrange circuits.

(106.) The Lord Lieutenant is authorized from time to time, after the 1st day of January, 1878, by an Order in Council, to re-arrange the several circuits or reduce their number, and direct what counties and towns shall be upon each circuit. (*e*)

All Orders in Council made in pursuance of this provision are to be laid before each House of Parliament within such time and are subject to be annulled in such manner as is provided in the Judicature Act. (*f*)

Winter assizes.

(107.) The provisions of the Winter Assizes Act, 1876, (*g*) except section 5, are extended to Ireland, and its powers vested in the Lord Lieutenant and the Privy Council, by whom provision may be made by an Order in Council for the hearing and despatch at any Winter Assizes, as well of criminal business as also of such civil business as may be by such order prescribed. (*h*) The Winter Assizes Act, 1876, provides (*i*) that where it appears that by reason of the small number of prisoners or otherwise it is usually inexpedient to hold separate Winter Assizes—that is, assizes to be held in the months of November, December, or January, (*j*) a later statute adds the months of September and

(*b*) See *supra* (104.) (*c*) J. A. 1877, s. 81.
(*d*) See *infra* (110.) (*e*) S 62. (*f*) *Ib.*, and see *ante* (32).
(*g*) 39 & 40 Vic., c. 57. (*h*) J. A., 1877, s. 63.
(*i*) 39 & 40 Vic., c. 57. s. 2. (*j*) 39 & 40 Vic. c. 57, s. 6.

October, but this is not extended to Ireland, (*k*)— for any county, by Order in Council from time to time, provision may be made for uniting one county with any neighbouring county or counties, and appointing a place or places at which the Winter Assizes shall be held for the united counties in each or in different years, and for regulating the jurisdiction of the court, the attendance, authority, and duty of sheriffs, gaolers, officers, jurors, and other persons; the use of prisons, the alteration of commissions, writs, precepts, indictments, recognizances, proceedings, and documents, and their transmission; the expenses of prosecutors and witnesses, and of maintaining and removing prisoners. Any such Order in Council purporting to be made in pursuance of the Act is invested with the same force and effect as if it were enacted in the statute, and for all the purposes of the holding of the Winter Assizes, the counties united by the order are to be deemed one county, and the Assizes as if held in and for each of the constituent counties. Those Orders in Council may be revoked or altered by future Orders in Council, and are required to be laid before each House of Parliament in the usual way. (*l*) All other enactments as to alteration of circuits or places for holding Assizes, (*m*) or otherwise relating to Assizes and circuits are made applicable to the winter assizes. (*n*)

Commissions of Assize and Nisi Prius.

(108.) Subject to any arrangements which may be, from time to time, made by mutual agreement between the Judges of the High Court, the sittings for trials by jury in Dublin, and the sittings of Judges of the High Court under Commissions of Assize, Oyer and Terminer and Gaol Delivery, will be held by or before Judges of the Queen's Bench,

Judges for ordinary commissions and sittings at nisi prius.

(*k*) 40 & 41 Vic. c. 46. (*l*) 39 & 40 Vic. c. 57, s. 2.
(*m*) See *ante* (104). (*n*) 39 & 40 Vic. c. 57, s. 4.

Commissions of Assize and Nisi Prius.

Common Pleas, and Exchequer Divisions of the High Court. But Her Majesty may, if she so think fit, include in any such commission any ordinary Judge of the Court of Appeal, or any Judge of the Chancery Division appointed after the 1st day of January, 1875. Also any of her Sergeants-at-Law and counsel learned in the law who, for the purposes of the commission, will have all the power, authority, and jurisdiction of the High Court. (*o*) The Act then makes provision for payment of a commissary not being a Judge of the High Court, and in certain cases for a deduction from the salary of the Judge in whose place the commissary is sent. (*p*)

One Judge for Dublin Commission.

(109.) The Act provides that it shall not be necessary, as heretofore, in any commission for the trial of crimes and offences in the county of the city and county of Dublin, to nominate more than one Judge to preside, nor for more than one Judge to preside under any commission existing at the commencement of the Act. (*q*)

Clerks of assize and nisi prius.

(110.) Clerks of Assize and Nisi Prius on circuit and at Winter Assizes may be appointed and paid in the same manner as heretofore; clerks of Nisi Prius in Dublin are to be appointed by the existing Chief Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions, and shall be paid as heretofore, but this right of appointment will not be continued to their successors, and other provisions are to be made for the discharge of the duties now discharged by such clerks under the provisions of the Judicature Act relating to future officers of the Court. (*r*)

(*o*) J. A., 1877, s. 41. (*p*) *Ib.* (*q*) S. 41. (*r*) S. 77.

CHAPTER VI.

Court Sittings and Vacations.

111. Abolition of Terms, p. 97.
112. When Measures of Time, 97.
113. Courts may sit at any time or place, 98.
114. Court Sittings, 98.
115. Vacations regulated, 98.
116. Vacation Judges, 99.

Abolition of Terms.

(111.) The division of the legal year into Terms is abolished so far as relates to the administration of justice. There will no longer be "terms" applicable to any sitting or business of the High Court of Justice or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under the Act.(*a*)

When measures of time.

(112.) In all other cases than as relates to the administration of justice, in which under the existing law, the "terms" into which the legal year was divided, were used as a measure for determining the time at, or within which any act is required to be done, the same may be continued to be referred to for the same or the like purpose, unless and until provision is otherwise made by some lawful authority.(*b*) Thus the statute 9 & 10 Wm. III. c. 15, s. 2 (Engl.) corresponding to the 10 Wm. III. c. 14 (Irish) required that any application to set aside an award, under its provisions, shall be made before the last day of the next term after the award shall be made and published.(*c*) This limitation of time still existing, as regards the duration of the old term, in certain periods of the year, is calculated to make it difficult, if not impossible, to have such application made in time; thus, where an award was made on the 28th

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(*a*) J. A., 1877, s. 29. (*b*) *Ib.*

(*c*) As to its application hitherto see Corporation of Huddersfield *v.* Jacomb, L. R., 17 Eq. 476, V. C. M.; S. C. on Appeal, L. R., 10 Chan. 92, L. JJ., Com. Law Pro. Act, 1856, s. 12.

Court Sittings and Vacation.

March, 1877, an application to set it aside made on a day after the 8th May following, on which Easter Term used to end, was too late and refused.(*d*)

Courts may sit at any time or place.

(113.) Subject to Rules of Court, the High Court of Justice, the Court of Appeal, and the Judges of same respectively, or any Commissioners to whom any jurisdiction is assigned under the Act, have power to sit at any time, and at any place for the transaction of any part of the business of their Courts, respectively, or of such Judges or Commissioners or for the discharge of any duties which by any Act of Parliament or otherwise, is required to be discharged during or after terms.(*e*) Of course it should not be assumed from this, that any court or judge will sit in private to hear (even by consent of parties) matters which the public interest requires to be investigated in public. The affairs of lunatics and wards of court, and peculiar cases, in which a public trial would defeat the ends of justice, are exceptions to this Rule.(*f*)

Court sittings.

(114.) The Judges, with certain sanctions and consents, are authorized(*g*) to make Rules of Court for regulating the Sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts and of the Judges of the High Court sitting in Chamber.

Vacations regulated by Order in Council.

(115.) The Lord Lieutenant and Privy Council, on the report of the judges or council of judges, (and with the consent of the Lord Chancellor) from time to time may by order regulate the vacations to be observed in the High Court of Justice, the Court of Appeal, and in the offices of the respective courts;

(*d*) Governors of Christ's Hospital, Brecknock, *v.* Martin, 25 W. R. 637; W. N., 1877, 132, A. C.

(*e*) J. A., 1877, s. 29.

(*f*) See Andrew *v.* Raeburn, L. R., 9 Ch., 522. Nagle Gilman *v.* Christopher, W. N., 1876, 280 M. R.

(*g*) *Vide ante*, p. 58.

and the Order in Council, so long as it is in force, shall be of the same effect as if contained in the Act; and Rules of Court may be made for carrying these regulations into effect, as if the Order in Council were part of the Judicature Act. Meanwhile the vacations shall be fixed in the same manner and by the same authority as heretofore. (*h*) *Court Sittings and Vacation.*

(116.) Provision is to be made for the hearing in Dublin during vacation, by Judges of the High Court of Justice and the Judges of the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard. (*i*) Vacation Judges.

CHAPTER VII.

Nisi Prius Sittings, Dublin.

117. Sittings to be continuous, 99.
118. Judges for, 99.

(117.) Sittings for the trial by jury of causes and questions or issues of fact, are to be held in Dublin, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year, by as many judges as the business to be disposed of may render necessary.(*a*) Dublin Nisi Prius sittings to be continuous.

(118.) Subject to any arrangements which may be from time to time made by agreement between the Judges of the High Court, the sittings for trials by jury in Dublin, are to be held before Judges of the three Common Law Divisions of the High Court;(*b*) of course every Judge of the High Court has full power and jurisdiction to sit for trial of issues without reference to the Division from which they come. When so sitting he will be deemed to constitute a Court of the High Court of Justice.(*c*) Judges for Nisi Prius sittings.

(*h*) J. A., 1877, s. 30. (*i*) *Ib.*, s. 31. (*a*) *Ib.*, s. 33.
(*b*) *Ib.*, s. 41. (*c*) *Ib.*, s. 33.

CHAPTER VIII.

Election Judges.

119. Rota of Judges for Election Petitions, 100.

Rota for election petitions.

(119.) The judges to be placed on the rota for the trial of election petitions for Ireland in each year, under the provisions of the "Parliamentary Elections Act, 1868," 31 & 32 Vic., c. 125, are to be selected out of the Judges of the three Common Law Divisions of the High Courts of Justice, in such manner as may be provided by any Rules of Court to be made for that purpose.(*a*) In the meanwhile and subject thereto, the judges are to be selected out of the Common Law Divisions by the judges of the same, as if such divisions had been named instead of the Courts of Queen's Bench, Common Pleas, and Exchequer, respectively, in the Act, and the judges who at the commencement of the Act shall be judges upon the rota for the trial of election petitions during the year 1878 continue upon such rota for the same period, and in the manner as if the Judicature Act had not passed.(*b*)

The exclusive jurisdiction belonging to the former Court of Common Pleas for the general disposal of election matters save and except the trial (*c*) is reserved to the Common Pleas Division. The junior Judge of the Queen's Bench Division is required to sit with and form a fourth member of the Common Pleas Division when engaged in the hearing or despatch of any part of this business so within its exclusive jurisdiction.(*d*)

(*a*) *Semble* under section 25 of the Election Petitions Act, and not under the Judicature Act.

(*b*) J. A., 1877, s. 43.

(*c*) See as to this, Macartney *v.* Corry, Ir. Rep. 7 C. L. 242, Coram Fitzgerald, J., in Chamber.

(*d*) J. A., 1877, s. 36, § 4.

CHAPTER IX.

The Court of Appeal, Constitution of.

120. Constituent members of, p. 101.
121. First ordinary members, 101.
122. Lord Chancellor, President, 102.
123. Authority of Judges, and business arrangements, 102.
124. Vacancies, how filled, 103.
125. Qualifications and disabilities, 103.
126. Precedence of Judges, 103.
127. May act on Commissions of Assize, 103.
128. May sit in Chancery Division, or for other Judge, during illness, 104.
129. No Judge to sit on appeal from his own order, 104.

Constituent members of.

(120.) The second but higher permanent division of the Supreme Court of Judicature consists of "Her Majesty's Court of Appeal in Ireland," and is constituted as follows:—

1st. *Five ex-officio Judges*, namely, the Lord Chancellor, Lord Chief Justice, Master of the Rolls, Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer.

2nd. *Two ordinary Judges*, styled Lords Justices of Appeal.

3rd. *Additional Judges*, consisting of ex-judges who have at one time, held the office of Lord Chancellor or of Chief Justice, Master of the Rolls, Chief Justice of the Common Pleas, or Chief Baron of the Exchequer in Ireland, and shall signify in writing their willingness to serve as such additional judges. They may be appointed such by Her Majesty under Her Royal Sign Manual with the style of Lord Justice of Appeal.(*a*)

First ordinary Judges.

(121.) The first ordinary judges of the court are the existing Lord Justice of Appeal in Chancery, and such other person as Her Majesty may appoint by Letters Patent either before or after the commencement of the Act, upon the terms as to salary and otherwise, and subject to the conditions and in the manner provided by the "Chancery Appeal

(*a*) J. A., 1877, s. 10.

Court of Appeal.

Court (Ireland), Act, 1856," in respect of the office of Lord Justice thereby created.(*b*)

The existing judge in ordinary, viz., the Lord Justice of Appeal in Chancery remains in the same condition as to tenure of office, rank, title, patronage, and powers of appointment or dismissal, and all other privileges, &c., and as to salary and pension, and obligations, as heretofore. He is not bound, without his own consent, to act in any commission of assize.(*c*)

Lord Chancellor President.

(122.) The Lord Chancellor is the President of the Court of Appeal, (*d*) and the Judicature Act provides that he shall not be bound or required to exercise any of the functions of a judge of the High Court of Justice, or of the Chancery Division of same, unless he shall by special order direct that any shall be disposed of by himself. But all matters of first instance shall be disposed of by one of the other Judges of the Chancery Division, so that the Lord Chancellor shall in relation to such matters exercise only the functions of a Judge of the Court of Appeal.(*e*) The result of the Lord Chancellor discharging business of a first instance nature, is that an appeal from his order will be impracticable, or he must retire from the Court of Appeal and cease to act as President of it, inasmuch as no judge can sit on the hearing of an appeal from any order made in a cause or matter heard by himself.(*f*)

Authority of Judges.

(123.) All the Judges of the Court of Appeal have in all respects, save where otherwise expressly provided by the Act, equal power, authority, and jurisdiction.(*g*)

Arrangement of business.

All such arrangements as may be necessary or proper for the transaction of the business from time to time pending before the Court of Appeal are to

(*b*) J. A., 1877, S. 10, § 5.
(*c*) S. 15.
(*d*) S. 10, § 6.
(*e*) *Ib.*
(*f*) See s. 57, *infra* (129).
(*g*) S. 10, § 3.

be made by and under the direction of the President and the other Judges of the court.(*h*) *Court of Appeal.*

(124.) When the office of Judge of the Court of Appeal becomes vacated (as it may be by simple resignation in writing under his hand addressed to the Lord Lieutenant),(*i*) a new judge may be appointed by Letters Patent as provided by the Chancery Appeal Court (Ireland) Act, 1856.(*j*) But the court is to be deemed duly constituted notwithstanding any vacancy in the office of any judge.(*k*) Vacancies.

(125.) The qualification required for the office of ordinary judge of the Court of Appeal is "a fit person who shall have exercised the office of Lord High Chancellor of Ireland, or who shall have practised at the bar for not less than fifteen years,"(*l*) or has been a Judge of the High Court of Justice of not less than one year's standing.(*m*) The tenure and oaths of office and disabilities attached to the office are the same as those of a Judge of the High Court.(*n*) Qualification and disabilities.

(126.) The *ex-officio* Judges of the Court of Appeal take rank in the Supreme Court of Judicature in the order of their respective official precedence. The ordinary judges of the court take rank as provided by the Chancery and Common Law Officers (Ireland) Act, 1867, *i.e.* "next after the Lord Chief Baron of the Court of Exchequer in Ireland."(*o*) The ordinary judges if not entitled to precedence as Peers or Privy Councillors, take precedence as between themselves, according to the priority of their respective appointments.(*p*) Precedence of Judges.

(127.) Any Judge of the Court of Appeal appointed after the 1st day of January, 1875, is capable May act under Commission of Assize.

(*h*) J. A., 1877, s. 58. In the J. A., 1873, s. 55, it is "The President and the other *ex-officio and ordinary* judges."

(*i*) J. A., 1877, s. 11.

(*j*) *Ib.*, s. 10; and see 19 & 20 Vic., c. 92, s. 3.

(*k*) J. A., 1877, s. 11. (*l*) 19 & 20 Vict., c. 92, s. 3.

(*m*) J. A., 1877, s. 12. (*n*) *Ib.*, s. 13, and *vide ante* (86).

(*o*) 30 & 31 Vic., c. 129, s. 34. (*p*) *Ib.*, s. 14.

Court of Appeal.

and bound to act under any Commission of Assize, Nisi Prius, Oyer and Terminer or Gaol Delivery, or for the trial of crimes and offences.(*q*)

Any Judge of the Court of Appeal appointed before the day above mentioned cannot be so required to act without his own consent.(*q*)

It would seem that any Common Law Judge accepting the office of Lord Justice of Appeal in ordinary would, according to the language of the Act, be bound to act in such a commission if named.

Judge may sit in Chancery Division, or for other Judge during illness.

(128.) In case, in the Chancery Division of the High Court of Justice, from the amount of business, or in any Division of the Court, from the absence of a judge or judges through illness, it is found expedient that some or one of the ordinary Judges of the Court of Appeal, appointed after the passing of the Judicature Act (*r*) should assist in transacting the business of the Division, he may do so, and while so sitting and acting the judge will have all the power, jurisdiction, and authority of a Judge or Judges of the High Court of Justice.(*s*)

No Judge to sit on appeal from his own order.

(129.) No Judge of the Court of Appeal can sit as a judge on the hearing of an appeal from any judgment or order made in a cause or matter heard by himself either sitting alone or with other judges.(*t*)

The Lord Chancellor being the permanent President of the Court of Appeal, if he were to act as a judge of first instance, some embarrassment would be created if an appeal were taken to his own order. A judge of a divisional court cannot sit on appeal from a decision in which he has taken a part, yet any other judge of the same division may sit on the appeal.(*u*)

(*q*) J. A., 1877, s. 15, § 2, but see as to date 1st January, 1875, *infra* (128).

(*r*) This is not in harmony as to date with s. 15, *vide ante* (127).

(*s*) S. 55. (*t*) S. 57.

(*u*) Fisher *v.* Val de Travers Asphalte Co., 24 W. R. 198.

PART II.

JURISDICTION.

Chapter X.—Transferred to High Court.

„ XI.—Not transferred.

„ XII.—Lunacy Jurisdiction.

„ XIII.—Common Law Jurisdiction of Lord Chancellor.

„ XIV.—Landed Estates Court Jurisdiction.

„ XV.—Probate and Admiralty Jurisdiction.

„ XVI.—Criminal Jurisdiction.

„ XVII.—Of Single Judge at Chambers or Nisi Prius.

„ XVIII.—Of Court of Appeal.

CHAPTER X.

General Jurisdiction of High Court.

130. Jurisdiction in General, p. 106.
131. Acts of Parliament applied, 107.
132. The Court, 108.
133. Powers of a Single Judge, 108.
134. Statutory Powers of Masters in Chancery, 108.
135. Chancery Powers, 111.
136. Receiver-Masters, 111.
137. Public Accounts Audit, 112.
138. Authorities not incident to Administration of Justice, 112.

Jurisdiction of the High Court generally.

(130.) The High Court of Justice is constituted a "Superior Court of Record," and there is transferred to and vested in it the jurisdiction which, at the commencement of the Act, was vested in or capable of being exercised by all or any of the Courts following, that is to say:—

1. The High Court of Chancery as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him or the Lord Chancellor in relation to the Court of Chancery as a Common Law Court, and including any jurisdiction of the Masters in Chancery.

2. The Court of Queen's Bench.

3. The Court of Common Pleas.

4. The Court of Exchequer as a Court of Revenue as well as a Common Law Court.

5. The Court of Probate.

6. The Court for Matrimonial Causes and Matters.

7. The Landed Estates Court, including the control and direction of the Record of Title Office of the said Court, and all powers and authorities exercised by the Judges of that Court or any of them, under the Record of Title Act, 1865.

8. The Court created by Commissions of Assize, of Oyer and Terminer and of Gaol Delivery, or any of such Commissions.(*a*) *Jurisdiction of High Court.*

The jurisdiction transferred to the High Court of Justice includes all the jurisdiction which was vested in or capable of being exercised by all or any one or more of the judges of the courts transferred respectively, sitting in court or chambers or elsewhere, or by any Master of the Court of Chancery, when acting as judges or a judge in pursuance of any statute, law, or custom, and all powers given to any such court, or to any such judges or judge, masters or master by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdiction so transferred.(*b*)

(131.) All Acts of Parliament relating to the several courts and judges whose jurisdiction is transferred to the High Court of Justice (and to the Court of Appeal), or wherein any of such courts or judges are mentioned or referred to, are to be construed and take effect, so far as relates to anything done or to be done after the commencement of the Judicature Act, as if the High Court of Justice (or the Court of Appeal) and the judges thereof respectively, as the case may be, had been named therein instead of such courts or judges whose jurisdiction is so transferred respectively; and in all cases not expressly provided for, in which, under any such Act, the concurrence or the advice or consent of the judge, or any judges, or of any number of the judges of any one or more of the courts, whose jurisdiction is so transferred to the High Court of Justice, is made necessary to the exercise of any power or authority capable of being exercised after the commencement of the Act, such power or authority may *Acts construed as applying to.*

(*a*) J. A., 1877, s. 21. (*b*) *Ib.*

Jurisdiction of High Court.

be exercised by and with the concurrence, advice, or consent of the same or a like number of judges of the High Court of Justice. But any provisions of such Acts inconsistent with the provisions of the Judicature Act are repealed.(*c*)

The Court.

(132.) The jurisdiction so transferred to the High Court of Justice is to be exercised by its divisions or by divisional courts, or by courts consisting of a single judge. The High Court of Justice itself does not sit as a court in civil matters, and the word "Court" throughout the Judicature Act seems to mean either a divisional court or a single judge.(*d*)

Powers of a single Judge.

(133.) Any Judge of the High Court of Justice may (subject to any Rules of Court) exercise in court or in chambers all or any part of the jurisdiction vested in the High Court, in all such causes and matters, and in all such proceedings in any causes and matters as before the passing of the 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, or as may be directed or authorized to be so heard by any Rules of Court to be made.

In all such cases, any judge sitting in *Court* is to be deemed to constitute a court.(*e*)

So any Judge of the High Court, sitting for trial of causes and issues in Dublin, is to be deemed a Court of the High Court of Justice.(*f*)

Jurisdiction of Masters in Chancery.

(134.) All jurisdiction possessed by any Master of the Court of Chancery, and all powers given to any Master or Masters by any statute have been transferred to the High Court of Justice.(*g*)

The Clerks or Masters in Chancery (of whom

(*c*) J. A., 1877, s. 71.

(*d*) Kingchurch *v.* People's Garden Co., L. R., 1 C. P. D., 45, 24 W. R., 41, *vide ante* (17).

(*e*) S. 44. (*f*) S. 33. (*g*) S. 21.

the Master of the Rolls was the chief) originally assisted the Lord Chancellor in framing and issuing writs, and latterly in working out the details of his decretal orders. *Jurisdiction of High Court.*

The statute 28 Geo. III., c. 35, enacted that where the Court of Chancery has decreed a sale of lands to a purchaser, and difficulty arises as to the execution of any deed of conveyance by any proper or necessary party to the deed, who is bound by the decree, and ought to execute it, but obstinately refuses or declines to execute the same, or cannot be found, or by being out of the jurisdiction cannot be compelled to obey the decree or order, the Court may order one of the Masters of the Court to execute any such deed by signing, sealing, and delivering the same in the name of the party so bound and ordered to execute it, and such execution by the Master is declared to be a valid and effectual execution in law of the deed by the person who ought to have executed it.

The statute 4 & 5 Wm. IV., c. 78, sec. 8, enacted that when any person who has been directed by any decree or order of the Court of Chancery to execute any deed or other instrument, or make a surrender or transfer, or to levy a fine or suffer a recovery, if it shall appear upon affidavit to the satisfaction of the Court that such person refuses, declines, or neglects to execute same, the Court may, after the expiration of ten days from the service of the decree or order personally, and tender of such deed for execution, make an order upon motion in *open Court* that one of the Masters in ordinary of the Court shall execute such deed or other instrument, or make such surrender or transfer, or levy such fine, or suffer such recovery, in the name of such person, and do all acts necessary to give validity and operation to such fine or

Jurisdiction of High Court.

recovery, and to lead the uses thereof, and the execution of the deed, &c., by the Master shall in all respects have the same force and validity as if the same had been made and executed, levied, or suffered by the party himself.

These statutes as to execution of deeds by a Master, did not apply to the case of an infant, he not being *sui juris*,(*h*) nor to that of a married woman.(*i*) But it was held that an infant might be ordered to execute a deed *proprio manu* as an adult,(*j*) though he could not write, and an order for an attachment has been made for his refusal, he being of fifteen years of age,(*k*) and where the infant had refused, an order that the Master do execute has been made.(*l*)

The Renewable Leasehold Conversion Act (12 & 13 Vict., chap. 103, sec. 27), contained a similar provision, where the owner of the reversion refuses to execute the fee-farm grant, and enabled a Master of the Court of Chancery to execute on his behalf under the order of the Court.(*m*)

The Chancery (Ireland) Act, 1867, enacted that all or any of the powers, authorities, and jurisdiction given to the Masters in ordinary of the Court by any Act or Acts then in force may be exercised by the Master of the Rolls and Vice-Chancellor respectively.(*n*)

The same Act (*o*) conferred on the Master of the

(*h*) M'Cartney *v.* Simonton, 5 Ir. Eq. Rep. 594, Ex. Flood *v.* Sutton. Flan. and Kel. 179. Goddard *v.* Macauley, 6 Ir. Eq. Rep. 221, M.R.

(*i*) Nugent *v.* Piers, 12 Ir. Eq. Rep., 198, M.R.

(*j*) Jones *v.* Ham., 3 Ir. Eq. Rep., 68, Ex. Archbold *v.* Rice, 5 Ir. Eq. Rep., 33, Ex. Henry *v.* Rankin, 4 Ir. Eq. Rep. 681, Ex.

(*k*) M'Cartney *v.* Simonton, *ubi supra.*

(*l*) Goddard *v.* Macauley, 6 Ir. Eq. Rep., 223.

(*m*) See *Ex parte* Guerin, Ir. Rep., 4 Eq., 467, M.R.

(*n*) 30 & 31 Vic., c. 44, s. 143.

(*o*) *Ib.*, s. 144.

Rolls and Vice-Chancellor respectively all the special powers for winding up causes and matters depending before them respectively in chambers, which the Masters in Chancery acquired under sections 31 to 38 of the Chancery Act. *Jurisdiction of High Court.*

The powers of executing deeds on behalf of owners who refuse to obey the order of the Court, have fallen into partial disuse by reason of the Trustee Acts, 1850 and 1852. Section 29 of the Trustee Act, 1850, enabled the Court of Chancery to declare parties seized of lands ordered to be sold, to be deemed trustees of same, and by its mere order to vest the lands in the purchaser. Section 30 contains a similar provision where the Court decrees specific performance of a contract for sale of lands, or a partition or exchange. The Trustee Act, 1852, sec. 1, enacts that generally in all cases where a decree or order is made directing a sale of lands for any purpose, all persons seized of the lands, and bound by the decree shall be deemed trustees of it, and the Court is enabled to make vesting orders in favour of the purchaser.

(135.) Upon the death, resignation, or release of the existing Receiver-Master,(*p*) all matters other than his duties as a Master in Lunacy,(*q*) and in reference to the management of estates and supervision of Receivers,(*r*) and the audit of public accounts,(*s*) which shall be then pending in the office of the Receiver-Master shall, subject to rules of Court and to the power of transfer, be distributed among the Judges of the Chancery Division of the High Court as the Lord Chancellor, with the concurrence of any two of the judges of that division shall direct.(*t*) Chancery matters in Receiver-Master's office.

(136.) Upon the death, resignation, or release of Receiver business.

(*p*) As to which see *ante* (76). (*q*) See Chapter xii.
(*r*) See Chapter xiv. (*s*) See *infra* 137. (*t*) J. A., 1877, s 75, § 3.

Jurisdiction of High Court.

the existing Receiver-Master(*u*) the powers and duties vested in and performed by him in reference to the management of landed estates and the supervision and control of receivers over the same, are to be exercised by the Land Judges, or the junior of them, so long as there are two,(*v*) and all matters and business which shall be then pending in the office of such Receiver-Master, in reference to receivers appointed over any estates, by or in pursuance of any order of the Court of Chancery, or of the Lord Chancellor acting in Lunacy, and the accounting of such receivers, and the letting and management of the estates over which any such receivers shall have been appointed, shall be thereupon transferred to the Land Judges, and shall thenceforth, subject to any rules of Court to be made by the Lord Chancellor, with the concurrence of the Land Judges or either of them, be prosecuted and conducted before such judges or one of them, in the same manner as the same would have been prosecuted or conducted before the Receiver-Master heretofore.(*w*)

Audit of public accounts.

(137.) The jurisdiction of the Receiver-Master to audit certain public accounts (including the accounts of the Commissioners of Charitable Donations and Bequests in Ireland), and every other jurisdiction not in reference to causes or matters, or proceedings in Chancery vested in him shall (unless the Lord Lieutenant in Council shall otherwise direct), after the death, resignation or release of the existing Receiver-Master vest in and be exercised by the Local Government Board of Ireland, subject to such rules and regulations as the Lord Lieutenant in Council may see fit to provide.(*x*)

Authority not incident to administration of justice.

(138.) Generally, until not otherwise specially provided, where a liability to any duty, or any

(*u*) *Vide ante* (135).
(*v*) J. A., 1877, s. 75, § 13.
(*w*) *Ib.*, s. 75, § 2.
(*x*) *Ib.*, s. 75, §. 8.

power or authority *not* incident to the administration of justice has been imposed or conferred by any statute, law, or custom upon the judges or any judge of a court whose jurisdiction is now transferred to the High Court, every judge of the latter court is, unless otherwise expressed by the Act, capable of performing and exercising and is liable to perform and empowered to exercise every such duty, authority, and power in the same manner as if the Act had not passed, and as if such judge had been appointed the successor of the judge liable to such duty or possessing such authority or power before the passing of the Act. But where the duty, authority, or power happens to be imposed or conferred on the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, it will still continue to be performed and exercised by them respectively, and by their respective successors, in the same manner as if the Act had not passed.(*y*) *Jurisdiction of High Court.*

CHAPTER XI.

JURISDICTION NOT TRANSFERRED TO HIGH COURT OF JUSTICE.

139. Appellate Jurisdiction, p. 113.
140. Prerogative Jurisdiction, 114.
141. Visitorial Jurisdiction, 114.
142. Record Jurisdiction of the Master of the Rolls, 114.

(139.) The appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal from the Court of Probate, the Court for Matrimonial Causes and Matters, the Landed Estates Court, the Court of Bankruptcy, or *Jurisdiction of Chancery Appeal Court.*

(*y*) J. A., 1877, s. 16.

Jurisdiction not transferred.

the High Court of Admiralty, is not transferred to the High Court of Justice.(*a*)

Prerogative writs: Letters Patent. Commissions.

(140.) The jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent or the issue of Commissions or other writings under the Great Seal of Ireland, is not transferred to the High Court.(*b*)

This reservation would seem to include Commissions *de lunatico inquirendo,* Commissions of the Peace and Supersedeas, for Assizes and General Gaol Delivery, for swearing in high functionaries, such as Judges and Lieutenants of counties.

Writs *De coronatore, eligendo, et exonerando.*

Writs De coronatore eligendo are issued under the Great Seal on certificate to the Lord Chancellor of a vacancy from the Foreman of the Grand Jury or two Justices of the county, or on memorial from the Grand Jury on loss of qualification;(*c*) and writs *De coronatore exonerando* are also issued to remove a coroner for misconduct or non-residence in his county. The latter writ is usually accompanied by the writ *De coro. eligendo.*(*d*)

Lord Chancellor's visitorial jurisdiction.

(141.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty, as visitor of any college or of any charitable or other foundation, is not transferred to the High Court of Justice.(*e*)

Master of Rolls' Record jurisdiction.

(142.) Any jurisdiction of the Master of the Rolls in relation to records in Dublin or elsewhere in Ireland is not transferred.(*f*) It would seem that the jurisdiction conferred on the Master of the Rolls by

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(*a*) J. A., 1877, s. 22, § (1). (*b*) s. 22, § (3). (*c*) 9 & 10 Vic., c. 36.

(*d*) *Ex parte* Coroner West Riding of Cork, 1 L. R. O.S., 373; Attorney-General *v.* Pasley, 3 Dr. & War. 34; *Ex parte* Parnell, 1 Jac. & W. 451.

(*e*) S. 22, § (4).

(*f*) *Ib.* § (5); see Johnson's Patent, L.R., 5 Ch. D., 503, M. R.; and *in re* Morgan's Patent, 24, W.R., 24, W.N., 1876, 27, M. R.

certain Acts, *e.g.*, Improvement of Land Act, 1864, under which the petition should be addressed and presented to him personally,(*g*) is transferred to the Supreme Court of Judicature. *Jurisdiction not Transferred.*

CHAPTER XII.

The Lunacy Jurisdiction.

143. Special Jurisdiction under Queen's Letter, p. 115.
144. At Common Law, 117.
145. Authority Ministerial, 117.
146. Appeal from, 117.
147. Officers in Lunacy, 117.
148. Receiver-Master's Duties, 118.
149. Analogous Jurisdiction in other Divisions, 118.
150. Statutory Jurisdiction and Trustee Acts, 120.
151. Chancery Appointment of new Trustee in lieu of a Lunatic Trustee, 120.
152. Divesting Order of Estate of a Lunatic in Chancery, 124.
153. Appointment of Trustees in Lunacy, 126.
154. Divesting Estate of Lunatic in Lunacy, 127.
155. Appointing Person to convey, 127.
156. Divesting Stock and Choses in Action in Lunacy, 127.
157. When both Objects can be attained in Lunacy, 128.
158. Territorial Limits of the Jurisdiction, 131.
159. Exercise of powers of Appointment of Trustees vested in Lunatic donee, 132.

(143.) The jurisdiction usually vested in the Lord Chancellor, in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind, is not transferred to the High Court of Justice, (*a*) and will still be exercised usually by the Lord Chancellor in the lunacy department. *Special jurisdiction in lunacy.*

The jurisdiction in lunacy is so far intermixed and impinges on the Chancery jurisdiction in certain matters, that it may be useful to define and distinguish them in so far as they approach each other.

The Lord Chancellor has usually, but not necessarily, vested in him by special letters, under the

(*g*) *Ex parte* Dillon, Ir. Rep., 7 Eq., 443, M. R.
(*a*) J. A., 1877, s. 22, subs. (2).

Lunacy Jurisdiction.

Royal Sign Manual, countersigned by two or more Lords of the Treasury, the care and commitment of the persons and estates of idiots, lunatics, and persons of unsound mind.

Before the Lunacy Regulation (Ireland) Act, 1871, the authority of the Lord Chancellor in lunacy, except as to issue of the commission, commenced with the finding of a jury on inquisition, without which he had no power to take on himself the care of the person or property of an individual on the ground of his being of unsound mind,(*b*) and the jurisdiction ceased with the life of the lunatic, except so far as to making the committee of the estate account.(*c*)

In some few cases of special emergency, orders had been made to protect the property or person of lunatics and persons of unsound mind pending a commission which was awarded, *ex. gr.*, to prevent the lunatic being taken out of the jurisdiction,(*d*) or his property being made away with ;(*e*) but such orders were provisional and *ad interim*, and to prevent the jurisdiction being fraudulently defeated. In one case the commission thus awarded had been suspended as to its execution for a considerable time on the ground of the great age and infirmity of the party whose health might be affected by its execution,(*f*) but the prolonged continuance of this state of things was deemed of doubtful legality, and the Lunacy Regulation Act has enabled the Lord Chancellor to act before a commission is issued or executed.

(*b*) See now 34 Vic., c. 22.

(*c*) *In re* Barry, 1 Mol. 414; see *in re* Fitzgerald, 2 Sch. and Sef. 441; but see now Lunacy Regulation (Ireland) Act, 1871, ss. 52, 54, 55.

(*d*) *In re* Costelloe, L. C. O'Hagan, 19 December, 1870.

(*e*) *In re* Heli, 3 Atk. 635.

(*f*) *In re* Lawler, L. C. Blackburne, 27 April, 1867.

Lunacy Jurisdiction.

Common law jurisdiction.

(144.) The Lord Chancellor's action in matters of lunacy is not exclusively under the powers conferred by the Queen's Letters. As Keeper of the Great Seal he issues the commission which is in the nature of a writ *de lunatico inquirendo*, and as incident to his office he has power to control the execution of the commission, and make orders relating to the superintendence and conduct of the committee, and the management both of the person and property of the lunatic, and these orders being founded on his Common Law Jurisdiction were perhaps subject to review in the House of Lords by Writ of Error.(*g*)

Authority ministerial.

(145.) The authority conferred by the letters in lunacy is chiefly ministerial and administrative. So far so that the Lord Chancellor may act *ex mero motu*, or on any private information that may reach him.(*h*)

Appeal from.

(146.) The appeal from his acts in this behalf is to the Queen in her Privy Council in England, and not to the House of Lords, *ex. gr.*, from an order appointing a committee or directing payments to be made in the management of the estate.(*i*)

The English Judicature Act gives an appeal now from the order of the Lord Chancellor or Lords Justices intrusted in lunacy, to the new Court of Appeal, but the Irish Judicature Act has not done so.

Officers in lunacy.

(147.) The Judicature Act (*j*) enacts that the officers in the Lunacy Department shall continue attached to the Lord Chancellor as before, and confers power on the Lord Chancellor with the con-

(*g*) Corporation of Burford *v.* Lenthall, 2 Atk. 553, per Lord Hardwicke. *In re* Fitzgerald, 2 Sch. and Lef. 438, per Lord Redesdale; and see Lord Campbell's Lives of the Chancellors, vol. 1, p. 13, Edition of 1857, 3 Blacks. Com. 427.

(*h*) *In re* Persse, 1 Mol. 219; see Anon. 4 L. R. O. S. 127, per Lord Plunket.

(*i*) Rochfort *v.* Ely, 1 Brown P. C. 450. See *In re* Lord Lanesborough, Beatty, 638, where orders of Privy Council reversing Lord Chancellor are mentioned.

(*j*) J. A., 1877, s. 82.

Lunacy Jurisdiction.

currence of the Treasury to abolish or alter the duties and designation of any of the officers in the Lunacy Department, and to fix the salaries of such as may be retained, saving the rights of existing officers.

Duties of Receiver-Master.

(148.) The powers and duties in lunacy matters vested in and performed by the Receiver-Master, other than those connected with land, after a vacancy in the office of Receiver-Master, are thenceforth to be exercised and performed by the Lord Chancellor and the officers attached to him according to the course of procedure in his court and offices.(*k*) The duties and business as to Receivers appointed in lunacy will be transferred to the junior of the Land Judges.(*l*)

Jurisdiction analogous to that in lunacy.

(149.) The Court of Chancery, and the Courts of Common Law at times, exercised a power to make orders respecting the application of moneys belonging to persons of unsound mind, and who happened to be parties in suits or matters pending before them, not very unlike the peculiar jurisdiction of the Lord Chancellor in Lunacy, (*m*) and where the amount of property was small, to avoid the expense of a Commission in Lunacy, the court has directed an inquiry into the state of mind and body of the party affected, by whom he had been taken care of, what would be a proper amount to be expended on his future maintenance, and to whom it should be paid.(*n*)

In other cases where an inquiry was deemed to be unnecessary, dividends have been paid to the next friend or nearest relation of an idiot on his undertaking to apply them properly.(*o*) Surplus in-

(*k*) J. A., 1877, s. 75, § 1. (*l*) *Ib.*, § 13.

(*m*) See Light *v.* Light, 25 Beav., 248.

(*n*) Knox *v.* Watters, 10 Ir. Eq. Rep. 358, L. C.

(*o*) Carr *v.* Boyce, 13 Ir. Eq. Rep., 102, L. C. Volans *v.* Carr, 2 De Gex and Sma. 242. See *In re* Burke, 2 De Gex F. and Jo., 124. *In re* Berry 13 Beav. 455. Conduit *v.* Soane, 5 Myl. and Cr. 11.

Lunacy Jurisdiction.

come has been applied towards payment of debts incurred for past maintenance of a lunatic defendant,(*p*) but it was considered questionable, whether any judge but the Lord Chancellor, intrusted by the Queen's letters in lunacy, could dispose of surplus property for the benefit of relations of the party as the Lord Chancellor might do in lunacy, although something like this was done on more than one occasion.(*q*) Where the capital of the fund was very small it has been handed over altogether to be applied for the benefit of the lunatic.(*r*) This jurisdiction has been exercised in regard to persons incapable of managing their own affairs, from infirmity of age,(*s*) or from being deaf and dumb.(*t*)

This jurisdiction, however, was exercised only in respect of property actually in Court and under the administration of the Court in some cause or matter;(*u*) it might be a trustee relief matter,(*v*) or an action at common law.(*w*)

The Chancery Division of the High Court of Justice can, in like manner, make orders relating to the past and future maintenance and support of persons of unsound mind not so found by inquisition, where the property is small and under the control of the Court, and there is no likelihood of a Commission in Lunacy.(*x*)

(*p*) Wilkinson *v.* Letch, 2 Coop. temp. Cottenham, 195. Machin *v.* Salkeld, *ib.* 148. See Edwards *v.* Abrey, 2 Ph. 37.

(*q*) Graves *v.* Chamney, L. C. O'Hagan, 20 Nov., 1869. See also Hewson *v.* Guinness, 5 March, 1870.

(*r*) *Ex parte* White, Ir. Rep., 6 Eq. 82; a case under the Lunacy Regulation Act, 1871.

(*s*) Eldridge *v.* Croucher, 2 Coop. Cottenh., 196.

(*t*) *In re* Biddulph, 5 De Gex and Sm. 469.

(*u*) See *in re* Tayler per L. J. Turner, 2 De Gex, Fish. and Jo., at p. 127.

(*v*) *In re* Macfarlane, 2 J. and H. 473. *In re* Burke, 2 De Gex, F. and Jo. 124. Whitby's Trusts, W. N., 1877, 208, V.C.M.

(*w*) Little *v.* Stewart, Ir. Rep. 1 C. L. Ex. 566.

(*x*) See Vane *v.* Vane, L. R. 2 Ch. D 124; 24 W. R. 602, M. R.

Lunacy Jurisdiction.

But, on the other hand, mere lunacy or unsoundness of mind does not as infancy does, *per se* afford jurisdiction to the Chancery Division, and it cannot undertake the management of the estate of a living person.(*y*)

Statutory jurisdiction.

(150.) The Lord Chancellor, in his character as delegate, intrusted with the care and custody of lunatics, has conferred on him by statute law, certain special powers, especially by the Trustee Act, 1850, sections 3, 4, 5, 10, 20, 32, 33 and 34, and the Trustee Act, 1852, sections 9, 10, chiefly for the purpose of vesting estates of trustees who have become lunatic (including persons of unsound mind though not found to be lunatic or incapable of managing their own affairs.) These functions are peculiar to the Lord Chancellor, and could not be exercised by any other Chancery Judge,(*z*) and the language of the J. A., 1877, sec. 22, subs. (2) would seem to reserve them still to the Lord Chancellor.

By the not over-precise language of the Trustee Acts, the lunacy and chancery jurisdictions are somewhat intermixed, if not confused, and this has occasioned a considerable number of decisions by no means easy to understand or to reconcile with one another.

Chancery appointment of new trustee in lieu of a lunatic.

(151.) The Court of Chancery (as distinguished from the Lord Chancellor intrusted in Lunacy), had under the T. A., 1850, in analogy to its ancient jurisdiction, exclusive powers to appoint new trustees in all cases, including the case of incapacity by the unsoundness of mind of an existing trustee. Under the 32nd section of the T. A., 1850, in all cases of difficulty, including cases in which there was no power to appoint new trustees contained in the instrument creating the trust, or where the donee

(*y*) Beall *v.* Smith, L. R., 9 Ch. 95.

(*z*) See Smith's Trusts, Ir. Rep. 4 Eq. 180, M. R.; Moorhead *v.* Moorhead, Ir. Rep. 2 Eq. 492.

Lunacy Jurisdiction

of the power was dead,(*b*) or was resident abroad or disclaimed,(*c*) or was incapable of exercising *ex. gr.* by being a lunatic. In all these cases, a difficulty arose within the terms of s. 32, enabling the Court of Chancery to appoint the trustee.(*d*) But not so where there was a donee of a power living and able and willing to exercise it.(*e*) Where the power to appoint was exercisable by the surviving trustees, and one of them was incapable of exercising it, by reason of lunacy, a jurisdiction arose in the Court of Chancery to appoint new trustees not by exercising the power conferred on the lunatic by the deed, but by an independent statutory power under section 32.(*f*) Where, however, a power was conferred on the trustees for the time being, to appoint in lieu of a trustee dead or incapable of acting, the capable trustee was authorized to execute the power,(*g*) and the Court of Chancery would in such a case decline to interfere.(*g*)

Where the order to appoint a new trustee is founded upon the fact of an existing trustee being a lunatic, and the fact is disputed or uncertain, a difficulty would seem to arise as regards the safety of an order made by the Court of Chancery to appoint under such circumstances, as it will be observed that the language of T. A., 1850, sec. 44, which makes certain allegations, *e.g.* the personal incapacity of the trustee, on the faith of which the order is made, conclusive evidence of the matter so alleged, seems to point to a vesting order rather than an

(*b*) *In re* Boyce, 4 De Gex, Jo. & Smith, 207; 10 Jur. N. S., 138; 12 W. R., 359.

(*c*) *In re* Humphrey's Estate, 1 Jur. N. S. 921, V. C. W.

(*d*) *In re* Sparrow, L. R. 5 Ch. 662, followed in Morgan's Trusts, L. C. O'Hagan, 10 May, 1873.

(*e*) *In re* Hodson, 9 Hare, 118.

(*f*) *In re* Vickers, L. R. 3 Ch. D. 112.

(*g*) See *in re* East, L. R. 8 Ch. 735.

Lunacy Jurisdiction.

order to appoint new trustees,(*h*) and the power to direct a commission *de lunatico* is, under sec. 52, confined to the Lord Chancellor, intrusted a power which it would be very undesirable to exercise for such a purpose, involving the family of the lunatic trustee in a controversy in which they had no sort of interest.(*i*)

But apart from this, when the object is merely to fill up the place of a lunatic trustee or mortgagee, and no vesting order is sought for or necessary, and no appointment under a power is attainable, the order should be had by petition to the Chancery Division alone and not to the Lord Chancellor intrusted in lunacy.(*j*) Probably there are not many cases of this nature, as a vesting order is generally required, but where, for example, the legal estate in the trust fund is outstanding in a third person, and may be obtained by direct conveyance without a vesting order, the application should be to Chancery.(*k*)

In the case of *In re* Burton(*l*) and in some other cases(*l*) it is stated in the report, that a petition to appoint a new trustee in the place of one who has become lunatic or imbecile, and not been so found by inquisition, can only be disposed of by the Lord Chancellor in Lunacy, but the proposition seems to be put too broadly, although probably on the facts of each of the cases (the trustee in *In re* Burton refusing to sign checks, &c.), a vesting order was also required, and for this purpose the lunacy jurisdiction would certainly be required in order to make a complete or useful order.

In one of the earliest cases, "Ormerod's Will"(*m*)

(*h*) And see *in re* Shorrock's Trusts, 1 Myl. & Cr. 31. See *in re* Walker, Cr. & Ph. 147.

(*i*) See *in re* Walker, *ubi supra.*

(*j*) *In re* Vickers, L. R. 3 Ch. D. 112. (*k*) *Ib.*

(*l*) *In re* Burton, Ir. Rep. 6 Eq. 270, V. C., following the case of *in re* Good Intent Society, 2 W. R. 671.

(*m*) Ormerod's Will, 3 De Gex and Jo. 249.

Lunacy Jurisdiction.

the Lords Justices Turner and Knight Bruce, are reported to say that it was settled by the decided cases that the power to appoint new trustees in the place of persons of unsound mind, not so found by inquisition, is by the Trustee Acts given, not to the Court of Chancery, but to the Lord Chancellor intrusted in Lunacy. In that case, the trust estate was vested in the lunatic and two other trustees. It was therefore necessary to have resort to the Lunacy jurisdiction to divest whatever estate was in the lunatic, and it does not appear from the report, whether the order afterwards was made in Lunacy alone, or in Chancery and Lunacy; nor did the difficulty suggested in Pearson's case,(*n*) by Lord Justice James, viz.: that if the order was made in Lunacy alone it could not affect the estate of the two continuing trustees, and would sever the joint tenancy, appear to be present to the mind of the court. At all events the broad proposition laid down in the case(*o*) is entirely inconsistent with the current of later cases and with the precise terms of the Trustee Acts. Where a trustee is already appointed under a power, it does not seem clear whether the Court of Chancery will go through the fictitious process of re-appointing him for the purpose of making a vesting order under the T. A., 1850, s. 34, or will *bonâ fide* appoint one or more new trustees.(*p*) In the latest case of a petition to vest leaseholds under s. 34 in trustees appointed under a power, the last surviving trustee being dead and having no representative, the Court of Appeal refused to comply

(*n*) *In re* Pearson, a lunatic, L. R. 5 Ch. D. 982, 25 W. R., 853, L.JJ.

(*o*) See *in re* Vicars, L. R. 3 Ch. D 112.

(*p*) *In re* Drivers' settlement, L. R., 19 Eq., 352. *In re* Butterworths' trusts, 9 Ir. Law Times, 65, *contra*. *In re* Mundel's trusts, 8 W. R. 683. *In re* Morris' settlement, 4 N. R. 480; and see the case of *in re* Jones, L. R., 2 Ch. 71, L.JJ., *infra*, p. 127.

Lunacy Jurisdiction.

with the prayer, and ordered the petition to be amended for a re-appointment of the new trustees on a proper affidavit of their fitness. (*q*)

Divesting estate of lunatic trustee in Chancery.

(152.) But where the principal object is, as it usually is, to divest an estate vested in a lunatic trustee or mortgagee, resort must be had to the jurisdiction of the Lord Chancellor intrusted in Lunacy (*r*) with one or two exceptions to be mentioned presently.

The first exception is where a trustee or mortgagee is a person of unsound mind but not found a lunatic and happens also to be an infant; in that case, the jurisdiction both to appoint the new trustee and to transfer the estate vested in the former belongs to the Chancery Division. This is from the terms of the definition of "a person of unsound mind," which excludes the case of an infant, whilst the power to divest the estate of an infant trustee in land is given to the Court of Chancery by T. A., 1850, s. 7, and in personalty by T. A., 1852, s. 3; (*s*) but there is no similar exception in respect of an infant trustee found by inquisition to be a lunatic, nor in respect of a lunatic trustee being resident out of the jurisdiction. (*t*)

Another apparent exception to the exclusive jurisdiction of the Lord Chancellor intrusted in Lunacy to divest the estate of a lunatic or person of unsound mind, being a trustee, is created by the T. A., 1852, s. 1, under which, when the Chancery Division by decree or order directs the sale of lands for any purpose (the T. A., 1850, s. 29, was confined to sales for payment of debts) "every person being a party and bound, is to be *deemed a trustee* seized or pos-

(*q*) *In re* Dalgleish, I. R. 4 Ch. D., 143; 25 W. R. 122, A. C.

(*r*) *In re* Vickers, *ubi supra*. Jeffryes *v.* Drysdale, 9 W. R. 428.

(*s*) See *in re* Arrowsmith, 4 Jur. N. S. 1123; 6 W. R. 642

(*t*) Smith's trusts, Ir. Rep. 4 Eq. 80, M. R.

Lunacy Jurisdiction.

sessed or entitled in a trust, and the Court of Chancery may (if it be expedient for the purpose of carrying out the sale by order) vest such land for such estate as it thinks proper, either in a purchaser or some other person."

Thus, where after a decree for a dissolution of partnership, part of the property being leasehold, was vested in the plaintiff and defendant, and the latter being a person of unsound mind and unable to concur in the assignment of the legal estate (to a purchaser under a sale directed by the Court),(*u*) the Court, (consisting of Lord Cairns, L.C., and Wood and Selwyn, L.JJ.), directed the order to be made in Chancery without resort to the Lunacy Jurisdiction. (*v*)

But where the decree is for a partition without sale, or for exchange of lands, and a co-owner is a person of unsound mind, and under T. A., 1850, s. 30, declared a trustee of the share vested in him, the divesting order must be made by the Lord Chancellor intrusted. (*y*)

So where the heir of a deceased vendor of real estate became lunatic the lunacy jurisdiction became necessary to appoint a person to convey the lands to the purchaser. (*z*) Where in a partition suit a co-owner was a lunatic tenant-in-tail, an order was made in lunacy appointing the committee of her estate to execute the necessary disentailing deed; (*a*) but this was under the Lunacy Regulation Act (*b*).

(*u*) This, though not stated, is manifestly so, as the order was made under T. A., 1852, s. 1.

(*v*) Herring *v.* Clarke, L. R. 4 Ch. 167.

(*y*) *In re* Molyneux, 4 De Gex, F. & Jo., 361. *In re* Bloomer, 2 De Gex & Jo., 88. *In re* Moorehead *v.* Moorehead, Ir. Rep., 2 Eq., 492.

(*z*) *In re* Cuming, L.R. 5 Ch., 72. See Collingwood's Trusts, 6 W.R., 536.

(*a*) *In re* Sherrard Lowther *v.* Cuffe. 1 De Gex, Jo. & Sm., 431.

(*b*) 16 & 17 Vic., c. 70, ss. 124, 136, 137.

Lunacy Jurisdiction.

Trustees appointed in lunacy.

(153.) As we have seen, under the T. A., 1850, the Lord Chancellor intrusted in lunacy had no power to appoint new trustees even in lieu of a lunatic trustee, and to do so, the chancery jurisdiction had to be resorted to; and on the other hand the chancery jurisdiction did not enable that Court to make an order divesting the estate of a lunatic trustee (except in the special cases mentioned in (152). So that when an appointment and a vesting were required, both jurisdictions were required to act.

This involved duplicate orders, or the incongruity of one compound order made by two wholly different jurisdictions, entered separately in the books of chancery and lunacy, a process which might prove embarrassing in the possible event of an appeal to two different tribunals from one and the same order.

This led to the enactment in the T. A., 1852, s. 10. viz.:—"That where the Lord Chancellor intrusted, &c., has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing new trustees in like manner as the Court of Chancery may, without its being necessary that the order should be made in chancery as well as in lunacy, or be passed or entered by the registrar of the Court of Chancery."

Thus the Lord Chancellor intrusted, &c., is enabled to perform the double operation of divesting the estate of a lunatic trustee or mortgagee, and appointing a new trustee in his stead, in all cases in which he has jurisdiction to vest or transfer the land or stock. This, of course, throws us back on the inquiry—in what cases the Lord Chancellor has the primary jurisdiction of divesting the estate of the lunatic?

Lunacy Jurisdiction.

Divesting land of lunatic trustee by Lord Chancellor.

(154.) As to vesting orders the Lord Chancellor intrusted in lunacy is enabled by T. A., 1850, s. 3, to make a vesting order of lands vested in a lunatic or person of unsound mind by way of trust or mortgage, and the order has the same effect as if the trustee or mortgagee, being sane, had duly executed a conveyance of the land. Under s. 4 he may release or dispose of a contingent right in lands vested in a trustee or mortgagee who is lunatic or of unsound mind.

Appointing person to convey.

(155.) Under T. A., 1850, s. 20, the Lord Chancellor intrusted, &c., instead of an order divesting lands out of a lunatic trustee or mortgagee, or releasing a contingent right in lands under s. 4, may, if he should deem it more convenient to do so, make an order appointing a person to convey or assign the lands or to release or dispose of the contingent right.

Where two new trustees had been appointed under a power in place of a lunatic trustee, the same persons were appointed by an order in lunacy to assign the legal estate in the mortgaged property to a mortgagor.(*c*)

The provisions of the T. A., 1850, ss. 3 and 4, enabling the Lord Chancellor intrusted, &c., to divest or release the estate or contingent right or interest of a lunatic trustee or mortgagee in land (when contrasted with the language of the sections 5 and 6, which follow, as to stock or choses in action), would seem to be substantially if not entirely confined to cases in which the lunatic was solely seized of the land or interest, or of some share of it, whether by original right or by survivorship.

Divesting stock or choses in action.

(156.) Under T. A., 1850, s. 5, the Lord Chancellor intrusted, &c., may vest the right to transfer stock or

(*c*) *In re* Jones, L.R., 2 Ch., 71, L.JJ.

Lunacy Jurisdiction.

choses in action to which a trustee or mortgagee, being lunatic or of unsound mind is solely entitled in any person appointed by the Lord Chancellor, or where the lunatic trustee or mortgagee is entitled jointly with another person or persons not of unsound mind, the order may vest the right of transfer or suit in the other trustee or trustees so jointly entitled, or in them with any other person or persons the Lord Chancellor may appoint. So under T.A., 1850, s. 6, where the personal representative of any deceased person in whose name any stock or chose in action may stand or be vested, happens to be a lunatic, the Lord Chancellor intrusted may vest the right to transfer the stock or receive the dividends, or to sue for the chose in action, in any person or persons the Lord Chancellor may choose to appoint.

Under T. A., 1850, s. 20, the Lord Chancellor instead of making an order under s. 5, vesting the right to transfer stock in some particular person, may direct some officer of the bank to make or join in making the transfer to some person or persons named in the order.

The order may go to transfer stock into Court.(*d*)

When both objects can be attained in lunacy.

(157.) As the Lord Chancellor's jurisdiction in lunacy to appoint new trustees is expressly limited to cases in which he has jurisdiction in lunacy to order a conveyance or transfer of land or stock, or to make a vesting order (see T. A., 1852, s. 10), it would seem that as regards land if the lunatic trustee or mortgagee is not solely seized of the land, the Lord Chancellor has no jurisdiction either to make a complete divesting order or consequently an order to appoint new trustees in the place of a lunatic or person of unsound mind.

If the lunatic trustee is solely seized of land the

(*d*) See *in re* Dawson Barber *v.* Dawson, 6 N.R., 346, L. JJ.

Lunacy Jurisdiction.

Lord Chancellor may both divest the estate, and appoint one new trustee or several, completing the full number of the trustees, although some of the vacancies have been occasioned by other events than lunacy.(*e*)

The doubts expressed by Lord Westbury in a case like this—*In re Boyce*(*f*)—where he required the order to be made both in chancery and in lunacy will be found when examined to arise from the circumstance, that it was not altogether certain whether the lunatic trustee was seized of any estate at all, which could be divested, or was merely invested with a naked power to sell. Lord Westbury inclined to the opinion that the trustee had by implication an estate in the land, and if he had been solely seized he had jurisdiction to divest the estate, and appoint new trustees, but for security's sake he directed that the order should be made in both jurisdictions, to appoint new trustees in place of the original trustee under T. A., 1850, s. 32, and to vest such estate (if any) as was vested in the original trustee.

In the case of *in re* Mason,(*g*) the trust estate consisted of realty and personalty, and was vested in three persons as devisees of a deceased trustee, and one of them was a lunatic, the other two declining to act. As the Lord Chancellor's order in lunacy could not divest the estate in the realty out of the latter, it became necessary to resort to the Chancery jurisdiction in respect of them, appointing two new trustees and a person to convey the estate vested in the three devisees of the surviving trustee, together with a vesting order as to the per-

(*e*) *In re* Owen, L.R., 4 Ch., 782, L. J. Giffard.

(*f*) *In re* Boyce, 4 De Gex, Jo. & Smith, 205, and see *in re* Porter's Will, 3 W.R., 583.

(*g*) *In re* Mason, L. R., 10 Ch. 273.

Lunacy Jurisdiction.

sonalty. If the two devisees who were of sound mind had elected to act, it is doubtful whether the Lord Chancellor's order in lunacy could have transferred the estate of the lunatic to the acting trustees, and if it could, it would occasion a severance of the estate in joint tenancy which would be inconvenient in a case of this nature.

In re Pearson, a lunatic, (*h*) the trust estate consisted of realty and personalty, and was vested in three trustees, one of whom became a lunatic, and a new trustee had been duly appointed in his stead under a power in the settlement; a vesting order was sought in Lunacy of the real estate and for the right to call for a transfer of the personal estate in the two continuing trustees and the new trustee, but L. J. James required the petition to be first amended by entitling it in the Chancery Division as well as in Lunacy, for if the order was made in Lunacy only, it could not affect the two continuing trustees, and would sever the joint tenancy. (*i*)

In re White (*j*) the trust estate consisted of canal shares, probably personalty, and became vested in three executors, one of whom became of unsound mind, and the other two refused to act or make a transfer. A petition was presented, entitled both in Chancery, and in Lunacy, by the *cestui que* trusts for a transfer of the canal shares under T. A., 1850, ss. 5 and 24. The L. J. James, thought the case was perhaps not within the strict letter of the Act, but that as an order might be made vesting the share of the lunatic executor in the other two executors of sound mind who declined to act, and on their

(*h*) *In re* Pearson, a lunatic, L. R. 5 Ch. D. 982, L.J.J., 25 W. R. 853.

(*i*) See, however, statute 22 & 23 Vic., c. 35. s. 21, as regards leasehold, whether the order might vest chattels real in the new and in continuing trustee jointly.

(*j*) *In re* White, L. R., 5 Ch. 698.

Lunacy Jurisdiction.

refusal to transfer, a second order might vest the right in the petitioners he considered that, to avoid circuity, one order might be made to accomplish the desired result.

If the trust fund were altogether pure personalty, stock, or choses in action, and one trustee became lunatic, the Lord Chancellor by an order in Lunacy might vest the right of transfer and suit, in the other trustees or in them jointly with other persons named: T. A., 1850, s. 4. But if the latter refuse to act, or are resident out of the jurisdiction, a difficulty occurs again, and the Chancery jurisdiction must be resorted to, as was done in the case of *in re* Stewart. (*k*)

Territorial limits of the powers of Chancery and Lunacy.

(158.) The powers conferred by the T. A., 1850, on the Court of Chancery and on the Lord Chancellor in England intrusted in lunacy, are more extensive than those given to the corresponding authorities in Ireland.

The order of the Court of Chancery in England may affect lands and personal estate situated anywhere within the Queen's dominions and colonies, except Scotland only, thus reaching lands and personalty in Ireland (T. A., 1850, s, 54). (*l*)

The order of the Lord Chancellor of England intrusted in lunacy, may affect lands and personal estate situated anywhere within the Queen's dominions and colonies except Ireland and Scotland (T. A., 1850, s. 56). Thus the Court of Chancery in England has a more extensive range of jurisdiction than the Lord Chancellor of England intrusted in lunacy, as the Court of Chancery can and the Lord Chancellor cannot affect property in Ireland.

(*k*) *In re* Stewart, 8 W. R. 297.

(*l*) See *in re* Tait's Trusts, W.N., 1870, 257; M. R. made such an order "after some hesitation."

Lunacy Jurisdiction.

The powers of the English Court of Chancery are so far concurrent with those of the Irish Court of Chancery as both can affect property in Ireland, but not so as regards the jurisdiction of the Lord Chancellor in lunacy.(*m*)

In a recent case "*In re* Lamotte "(*n*) it was considered that although the English lunacy jurisdiction could not reach lands in Ireland, yet by an order made in both chancery and lunacy in England, the estate of a sole surviving trustee of lands in Ireland, he being a lunatic, might be divested. This seems strange, for as the powers of the Court of Chancery in England do not reach the estates of lunatics in England, it is hard to see how they can be made to reach lands in Ireland similarly circumstanced.

The powers given to the Court of Chancery in Ireland, and to the Lord Chancellor of Ireland intrusted, &c., are strictly confined to lands and personalty in Ireland, and do not reach property of any kind in England, Scotland, or the Colonies.(*o*)

Power vested in lunatic may be exercised by committee.

(159.) Under the Lunacy Regulation Acts, England, 1853, and Ireland, 1871,(*p*) where a power is vested in a lunatic in the character of trustee or guardian, &c., and it appears to the Lord Chancellor intrusted as aforesaid to be fit and expedient that the power should be exercised, &c., &c., the Committee of the estate, in the name and on behalf of the lunatic, under an order of the Lord Chancellor intrusted as aforesaid, made upon the application of any person interested in the exercise of the power, may exercise the power, &c., in such manner as the order shall

(*m*) See *in re* Davies, 3 Mac. & G., 278. *In re* Hewitt's Estate, 6 W. R., 537, V. C. K.

(*n*) *In re* Lamotte, L. R., 4 Ch. D., 325; 25 W.R., 149.

(*o*) T. A., 1850, ss 55 and 57.

(*p*) 16 & 17 Vic., c. 70, s. 137; 34 Vic., c. 22, s. 87 (Ireland.)

Lunacy Jurisdiction.

direct; and by another section of the same statute (*q*)—"Where under this Act the committee of the estate under order of the Lord Chancellor intrusted as aforesaid, exercises in the name and on behalf of the lunatic a power appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the powers, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the Court of Chancery under the T. A., 1850, or any Act amending the same, or if he or they had been appointed by a decree of that Court in a suit duly constituted, and the Lord Chancellor intrusted as aforesaid may, in any such case, where it seems to him to be for the lunatic's (*r*) benefit, and also expedient, make any and every order respecting the land or stock or choses in action, subject to the trust, as might have been made in the same case, under the provisions of the T. A., 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees."

(*q*) 16 & 17 Vic., c. 70, s. 138; 34 Vic., c. 22, s. 87 (Ireland.)
(*r*) *Sic.*

CHAPTER XIII.

Common Law Jurisdiction of the Court of Chancery.

159. What it consists of, 134.
160. Writ of Error, 134.
161. Writ of *Certiorari*, 135.
162. Writ of *Habeas Corpus*, 136.
163. Writ of Prohibition, 138.
164. Writ of *Scire facias*, 141.
165. Writ to Judge to sign Bill of Exception, 141.
166. Writ of *Ne Exeat*, 142.
167. Common Law Jurisdiction of Master of the Rolls, 142.

Common law jurisdiction of Court of Chancery.

(159.) The jurisdiction of the Court of Chancery as a court of common law, including the jurisdiction of the Master of the Rolls as the Judge or Master of the Court of Chancery as a common law court is transferred to the High Court of Justice.(*a*)

For all practical purposes this Common Law Jurisdiction of the Court of Chancery may be considered under the following heads, as it regards:—1. Writs of Error; 2. Writs of *Certiorari;* 3. Writs of *Habeas Corpus;* 4. Writs of Prohibition; 5. Writs of *Scire facias;* 6. Writs to Judges to sign Bills of Exception; 7. Writs *Ne Exeat Regno.*

We shall afterwards consider the Common Law Jurisdiction of the Master of the Rolls.

Writs of Error.

(160.) The issue of writs of error to reverse judgments of the courts of common law which belonged to Chancery, was abolished as regards civil actions by the Common Law Procedure Act (Ireland), 1853, and all that remains of this jurisdiction pertains to Writs of Error in criminal cases. Writs of Error to the House of Lords in cases on the Crown side of the Queen's Bench Division, may issue in like manner and subject to the like conditions and permission, and in respect of the like proceedings as such writ

(*a*) J. A., 1877, s. 21.

would have been issued from the Court of Queen's Bench if the Judicature Act had not been passed. (*b*) It was assumed at one time, that a Writ of Error was of right in criminal cases, except in cases of felony or treason,(*c*) but even in cases of misdemeanour the Writ of Error in practice only issued on the warrant of the Lord Lieutenant which was grounded on the certificate of the Attorney-General ;(*d*) but it is now settled that in no case should it issue, without the fiat of the Attorney-General, whether in cases of misdemeanour or of felony.(*e*)

Common Law Jurisdiction of Chancellor.

Writs of Error have been issued from Chancery returnable into the Queen's Bench to reverse the judgments of inferior Courts of Record.(*f*)

(161.) Writs of *Certiorari* issued from and were returnable into Chancery, in analogy to the Writ of *Certiorari* of the courts of common law to reverse proceedings of inferior courts where the right sued for was equitable.(*g*) A plaintiff could have this writ only upon filing a bill.(*h*) The common law Writ of *Certiorari* in civil cases was regulated by general orders.(*i*) It was used sometimes to bring up a record, *e.g.*, decree of an Assistant Barrister's Court for inspection on a plea of judgment recovered.(*j*)

Certiorari.

In ordinary cases when used for the purpose of removing proceedings, it was confined to such as were according to the course of the common law and

(*b*) J. A., 1877, s. 65, § 2.

(*c*) *Ex parte* Rowe, 2 Mol. 27, per L. Manners, L.C.

(*d*) *Ib.* see Mr. Sauren at p. 28.

(*e*) Castro *v.* Murray, L. K., 10 Exch. 213.

(*f*) See Toole *v.* Duffey, 2 Dr. & War. 380. See Harkin *v.* Montgomery, 3 Ir. L. R. 471.

(*g*) See Davies *v.* MacHenry, L. R., 3 Ch. 200. Tracy *v.* Open Stock Exchange, L. R., 11 Eq. 556.

(*h*) Mitford on Pleading, 50. (*i*) See 149, 152, G. O., 1854.

(*j*) See Fitzsimon *v.* Lyons, 4 Ir. L. R. 222, C. P. Comerford *v.* Watson, 5 Ir. Jur. 37.

Common Law Jurisdiction of Chancellor.

not founded on statute merely. (*k*) In criminal cases the Court of Queen's Bench issued another kind of *certiorari*; *ex.* where a summary conviction was in excess of the jurisdiction, (*l*) or to quash a presentment. (*m*)

In many cases the removal of proceedings, civil or criminal, by *certiorari* is forbidden by statute. (*n*)

Habeas Corpus.

(162.) Several kinds of writs of *Habeas Corpus* issued from Chancery.

Ad testificandum.

a. Habeas Corpus ad testificandum where a witness was in prison under some common law process. (*o*) The Statute 44 Geo. III., c. 102, enabled any Judge or Baron of the Common Law Courts or Justice of Oyer and Terminer or Gaol Delivery to award a writ of *Habeas Corpus* to bring up a prisoner detained in any gaol or prison before any such Court, or at any sitting of Nisi Prius, or before any other Court of Record in Ireland to be examined as a witness, or to testify before any grand, petit, or other jury in any cause or matter, civil or criminal, depending or to be inquired into or determined in any of the said Courts.

b. Habeas Corpus ad faciendum issued in order to execute an attachment against a person already in custody under civil process of some other Court; (*p*) or to bring up a person in arrest under an attachment to attend a taxation of costs. (*q*)

(*k*) See Knott *v.* Fitzgibbon, 4 Ir. Jur. 28 Q. B. See 3 & 4 Vic., c. 108, s. 175, Sullivan *v.* Burke, 10 Ir. L. R., 204.

(*l*) Queen *v.* Justices of Kilkenny, Ir. Rep., 5 C. L., 394.

(*m*) *In re* Ardfert Presentment, Ir. Rep. 3 C. L. 16.

(*n*) As to the effect of this see Queen *v.* Chantrell, L. R., 10 Q. B., 587, and Colonial Bank of Australasia *v.* Willan, L. R., 5 Pr. C. 417.

(*o*) Daniels Ch. Br. p. 842.

(*p*) See Oldfield *v.* Cobbett, 2 Ph. 289.

(*q*) See Walsh *v.* Wilson, 2 Chan. Rep. 79; Dennison *v.* Keatinge, 3 L. R. N. S. 191 Q. B.; but see Major *v.* Barton, 1 Ir. Jur., N. S. 468. See the Queen *v.* Hussey, 11 Ir. C. L. Rep. xx. to bring up a prisoner in order that bail might be sworn in his presence.

Common Law Jurisdiction of Chancellor.

c. Habeas Corpus ad subjiciendum to bring up the body of a person restrained of his liberty in a common gaol, or by a private person, by the common law, issued from Chancery as well as from the Queen's Bench or Common Pleas.

The Lord Chancellor is also one of the Judges mentioned by name in the first Habeas Corpus Act (Ireland), (*r*) and was bound equally with the Judges of the Queen's Bench and Common Pleas (Barons of the Exchequer were not included), to issue the writ to bring up the body of a person in the custody of a sheriff, gaoler, or other person under colour of legal process for any criminal or supposed criminal matter (unless for treason or felony plainly and specially expressed in the warrant of commitment), under a penalty of £500 for delay of issuing the writ. (*s*)

The second Habeas Corpus Act (*t*) included the Barons of the Exchequer as well as the Judges of the Queen's Bench and Common Pleas, but omitted the Lord Chancellor. It applies where any person is confined or restrained of liberty unjustly, *ex. gr.*, persons confined on an allegation of lunacy (*u*) (but not for some criminal or supposed criminal matters, a class of cases provided for by the first Act), excepting persons imprisoned for debt or by process in any civil suit (*v*) which included an attachment for contempt from the Court of Chancery. (*w*)

(*r*) 21 & 22 Geo. III., c. 11, A.D., 1781, corresponding to 31 Car. II., c. 2, English.

(*s*) *Ib.* s. 9.

(*t*) See *ex parte* Carpenter, Smith, and Batty, 81; Queen *v.* Riall, 11 Ir. C. L. R., 279, K. B. *In re* Cody, 5 Ir. Jur., N. S. 175.

(*u*) 56 Geo. III., c. 100, A.D., 1816, E. and J.

(*v*) See Page *v.* Williams, 1 Ir. C. L. R. 527, and see an arrest after an escape, *in re* Everard *ex parte*, Fitzgerald, *J.*, 7 Ir. Jur. N. S. 346.

(*w*) *Ex parte* Higgins, 9 Ir. L. R., 414, C. P. *In re* Madden. Ir. Rep. 5 C. L. 396. *In re* Aylward, 12 Ir. C. L. R. 448, C. P.

Common Law Jurisdiction of Chancellor.

It gave power to the Court to examine into the truth of the return in a summary way, if it were disputed, whereas at the common law and under the first Act, if the truth of the return was challenged the Judge could only direct an action to be brought for a false return.

Lord Redesdale is reported (most probably erroneously)(*x*) to have refused to issue a writ of *Habeas Corpus* while the Common Law Judges were sitting. Lord Eldon treated the writ as of common right, whether under the common law or under the first statute, and used not to refuse it, but recommended the parties to apply to the law courts, because they had power (which he had not), under the second Act to inquire summarily into the truth of the return.

This difficulty no longer has weight, but the Lord Chancellor from the inevitable pre-occupation of his time in administrative and political, as well as judicial affairs, is probably the least convenient tribunal to resort to for a summary remedy.

As one superior Court would not allow a *Habeas Corpus* to bring up a person in custody under committal of another superior Court, it seems *a fortiori* that one Division of the High Court will not do so in regard to another division. Every branch of the High Court, however, is competent to consider the use made of the powers of the High Court.

Writ of Prohibition.

(163.) *Prohibition* to restrain proceedings in an Inferior Court was a Prerogative writ issued from the Hanaper Office in Chancery in Ireland; and in respect of it the Lord Chancellor exercised a jurisdiction similar to that of the Superior Courts of Common Law, with this advantage—that it could be exercised in vacation as well as in term time. (*y*) It was ex-

(*x*) *In re* Roe, 1 Mol. 280.

(*y*) See *in re* Bateman, L.R., 9 Eq. 66, V. C. James.

Common Law Jurisdiction of Chancellor.

tended to criminal matters as well as civil, (*a*) and after judgment or conviction and award of execution as well as before, but not after execution fully executed. (*b*)

It is inapplicable generally where an appeal is provided by statute, (*c*) or where a statute has taken away a plea to the jurisdiction of the Court; (*d*) one Superior Court could not prohibit another, (*e*) and, of course, one division of the High Court cannot prohibit the proceedings in another division, (*f*) nor is it likely that after a prohibition has been refused in one division, it will be granted in another division; indeed it would seem, the order of refusal would estop any further application, but the applicant can take the case to the Court of Appeal. (*g*)

Applications to the Lord Chancellor (or to Chancery Judges in England who were competent to entertain them), were not frequent, and were inconvenient, (*h*) inasmuch as if the writ was granted, it was, of necessity, returnable into the Court of Queen's Bench or Common Pleas, where a jury might be had to try issues in fact; and where the Common Law Courts were open, the Court of Chancery sometimes refused to entertain such applications, even if the proceeding originated in vacation, (*i*) unless the application had been made and refused at

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(*a*) *Exp.* Duke of Devonshire, Ir. Rep., 3 Eq. 412, L. C.

(*b*) Rich *v.* Anderson, 3 Ir. Chan. Rep. 463, L. C.

(*c*) Hawes *v.* Paveley, L.R. 1 C.P.D. 418, 24 W.R. 895, A.C., overruling Worthington *v.* Jeffries, I. R. 10 C.P., 379; and see Oram *v.* Breary, I. R. 2 Ex. D. 346; Jacobs *v.* Brett, L.R., 20 Eq. 1, M.R.

(*d*) *Exp.* Williams, 34 Beav., 370.

(*e*) See *Exp.* Cowan, 3 B. and A. 123.

(*f*) J. A., 1877, s. 27, subs. (5.)

(*g*) See Hawes *v.* Paveley, I. R., C. P. D. 418, 24 W. R. 895; 20 Sol. J, 640, A. C.

(*h*) See Jacobs *v.* Brett, L. R. 20, Eq. 1, M. R.

(*i*) *In re* Foster, 24 Beav., 428. Montgomery *v.* Blair, 2 Sch. and Lef. 136.

Common Law Jurisdiction of Chancellor.

Common Law, (*k*) or that it was very desirable to have a matter decided by a particular Court, *ex. gr.*, the Court of Queen's Bench, and which could not be reviewed by another Court, put in train for reconsideration in the Court of Exchequer Chamber. (*l*)

In Chancery, it was usual to grant only a conditional order that a writ do issue, which operated as an interim stay on the proceedings. (*m*) Either party then might apply on affidavit to discharge or make absolute the conditional order. In cases of difficulty, the Court, instead of making the conditional order absolute, would direct the complainant to declare in prohibition, and proceed to an issue of law or fact, and all proceedings on the conditional order were suspended meanwhile; (*n*) but the plaintiff in the Court below had no absolute right to put the applicant to declare in prohibition. (*o*)

If a demurrer were taken to the declaration it was heard by the Lord Chancellor, (*p*) and from his judgment, an appeal, by way of a writ of error, lay to the Court of Exchequer Chamber by the statute 40 Geo. III., c. 39, s. 2. (*q*) When an issue in fact resulted the cause was remitted to the Court of Queen's Bench, as the Lord Chancellor had not power to summon a jury, the verdict was returned into Chancery and judgment entered there at the Petty Bag side, either for the plaintiff, *quod stet prohibitio*, (*r*) or for the defendant, that the writ of prohibition do not issue.

(*k*) See *Exp.* Lynch, 1 Mad. Rep. 15; 24, Walke *v.* Fauderbeide, 1 Dick, 336.

(*l*) See *in re* Duke of Devonshire, Ir. Rep. 3 Eq. 412, L. C.

(*m*) Rich *v.* Anderson, 3 Ir. Chan. Rep. 463; *Exp.* Duke of Devonshire, L. C. Brewster, 4 July, 1868.

(*n*) *Exp.* Duke of Devonshire, L. C. O'Hagan, 19 April, 1869.

(*o*) Worthington *v.* Jeffries, L. R., 10 C. P. 379.

(*p*) Foot *v.* Duke of Devonshire, Petty Bag, Ir. Rep. 5 Eq. 310.

(*q*) See Rex *v.* Dolphin, 2 Mol. 26, Duke of Devonshire *v.* Foot, Ir. Rep. 7 Eq. 365, *Ex* ch.

(*r*) *Exp.* Duke of Devonshire *v.* Foot, Ir. Rep. 5 Eq. 314, L. C.

Common Law Jurisdiction of Chancellor.

The statute 1 Wm. IV. c. 21, A.D. 1831, has improved the proceedings in prohibition and prescribes the form of procedure, whether on affidavits or on regular pleading. It enacts, sec. 1, "That the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs." (*s*) Under the Judicature Act an appeal lies from the decision of the High Court of Justice to the Court of Appeal, in prohibition.(*t*)

Scire facias.

(164.) Pleas by way of *Scire facias* were held by the Common Law, at the Petty Bag side of the Court of Chancery, to enforce execution on recognizances and statutes staple taken in the Court of Chancery, and this jurisdiction was exercised according to the course of the Common Law. The orders were made up on petition in the office of the Clerk of the Hanaper,(*u*) but issues in fact were sent for trial to the Court of Queen's Bench.

Writ to Judge to sign Bill of exceptions.

(165.) The mandatory writ, directed to a Judge under the statute of Westminster, commanding him to seal a Bill of exceptions, also issued from Chancery. How far this writ has become obsolete in civil actions may become a question for consideration having regard to the provision in the Judicature Act,(*v*) that the right to have issues for

(*s*) As to costs where no pleading has taken place and order made absolute. Wallace *v.* Allen, L. R. 10 C. P. 607.

(*t*) See Hawes v. Paveley, L. R., 1 C. P. D. 418; 24 W. R. 895, A.C.

(*u*) See Regina *v.* Eastern Archipelago Company, 4 De Gex, M. & G. 199.

(*v*) J. A., 1877, s. 48, § 2.

Common Law Jurisdiction of Chancellor.

trial submitted to a jury with a proper and complete direction upon the law, and the evidence applicable to such issues may be enforced by motion in the High Court of Justice, and by motion in the Court of Appeal founded upon an exception entered upon or annexed to the Record, remains to be decided. The writ would seem to have its use still.(*w*)

Ne Exeat Regno.

(166.) The writ of *Ne Exeat Regno*, originally applicable only to state purposes, was another of the High Prerogative writs formerly issued from the Hanaper Office, but latterly from the Record and Writ Office. It required a person about to leave the kingdom to evade payment of an equitable claim, *ex. gr.*, an executor making away with assets, to give sufficient bail or security in a fixed sum, not to go into parts beyond the sea without the leave of the Court. It was not issued except in a plenary suit, and was refused on an administration summons.(*w*)

This writ was in Ireland issued by all the Chancery Judges, and of course can be had on the order of any Judge of the High Court under like circumstances, but in Common Law cases a writ of an analogous character has been introduced under the provisions of Debtors Act.(*w*)

Master of Rolls' common law jurisdiction.

(167.) The Judicature Act(*x*) professes to transfer to the High Court of Justice "any jurisdiction exercised by the Master of the Rolls in relation to the Court of Chancery as a Common Law Court." The Master of the Rolls in England is by virtue of his office "Clerk of the Petty Bag," and was described as assistant to the Chancellor in matters

(*w*) See Hayes *v.* Price, 3 Jo. & Lat., 568, not in criminal cases, and see North *v.* Crofton, Wallis's Rept. by Lyne, 41.

(*x*) J. A., 1877, s. 21.

of Common Law,(*y*) and he accordingly used to entertain applications for writs of prohibition.(*z*) But in Ireland the Master of the Rolls has declined to make orders at the Petty Bag side of the Court.(*a*)

Common Law Jurisdiction of Chancellor.

Whether this was a just view of his powers seems now to be matter of less importance, as of course, all the Common Law jurisdiction of the Lord Chancellor is communicated to the Master of the Rolls and the Vice-Chancellor in common with the other Judges of the High Court of Justice.

CHAPTER XIV.

Landed Estates Jurisdiction.

169. Land Judges, p. 143.
170. Jurisdiction of Chancery matters, 144.
171. Rules and Orders of Landed Estates Court, 144.
172. Separate seal, 144.
173. Original powers of Court, 145.
174. Auxiliary to other Courts, 145.
175. Bound to determine incidental Controversies, 146.
176. Procedure in, 147.
177. Binding parties to accounts, 147.
178. Administration of appeals, 147.
179. Receiver matters, 148.
180. Appointment of Receiver, 148.
181. References to, 148.
182. Attending Receiver, 148.
183. Appeals from, 149.

(169.) The existing Judges of the Landed Estates Court, and their successors, are constituted judges of the Chancery division, and are to be distinguished as the Land Judges of that division. (*a*)

Land Judges.

Every proceeding within the exclusive jurisdiction of the Landed Estates Court is to be commenced in

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(*y*) See Lord Campbell's Lives of the Chancellors, vol. ii., p. 342.

(*z*) See Saunderson *v.* Claggett, 1 P. Wm., 663. Wright *v.* Cattell, 13 Beav. 81.

(*a*) See Herricks Minors, 3 Ir. Chan. Rep., p. 81, per M. R. (Smith).

(*a*) J. A., 1877, s. 7.

Landed Estates Jurisdiction.

the Chancery division and addressed to the Land Judges of that division. (*b*) This is repeated in another clause qualified by the words subject to any rules of Court and to the power of transfer. (*c*)

Land Judges to assist Chancery business.

On the other hand if the state of business in connexion with the peculiar jurisdiction of the Land Judges of the Chancery division shall permit, they are bound, in addition to their ordinary business, from time to time to assist in the general business of the Chancery division. (*d*)

Jurisdiction of Land Judges.

(170.) The peculiar jurisdiction formerly exercised by the Judges of the Landed Estates Court is still to be exercised by them and by the judges who may from time to time be appointed to succeed them, and in the case of the illness, absence, or other inability of them or either of them to discharge their duties, or of a vacancy in the office of the judges, then by any other judge of the Chancery division of the High Court. (*e*)

Chancery Judges.

Rules and orders of Landed Estates Court.

(171.) The rules and orders and practice of the Landed Estates Court are to be used in proceedings before the Land Judges for the sale or partition of estates, declaration or record of titles, and all other proceedings which would have been within the exclusive cognizance of the Landed Estates Court if the Act had not passed, unless and until altered by the Lord Chancellor and the Land Judges. The Lord Chancellor and the Land Judges, or either of them may alter the rules, orders, and practice, but all such new rules must be laid before each House of Parliament in the usual way. (*f*)

Separate seal.

(172.) There is to be still a separate seal for the Land Judges, and conveyances executed with that seal have the same force as those executed with the seal of the Landed Estates Court. (*g*)

(*b*) J. A., 1877, s. 37, § 4. (*c*) S. 47. (*d*) S. 7, § 2.
(*e*) S. 7, § 1. (*f*) S. 7, § 3. (*g*) S. 7, § 4.

Landed Estates Jurisdiction.

Original powers of the Court.

(173.) The great powers of the Landed Estates Court, of sale and conveyance of estates, incumbered and unincumbered, giving declarations of an indefeasible title, were of course to be exercised subject to a sound and wise discretion. (*h*) Where the person claiming to be owner was not in possession, or where the title to the estate was in dispute, it was the duty of the court to decline to act until the right was established. (*i*) Where the title was a legal title, and clear as such, but affected by alleged equities which might possibly avoid it, the court would sometimes give opportunity to establish the avoidance by a suit in Chancery or an issue. (*j*) Now it may be the duty of the court to take upon itself to determine all such questions. (*k*)

The powers of the court as regards the land, ceased with the conveyance of it to a purchaser; it could not afterwards declare him to be a trustee for another on the ground of fraud or mistake. (*l*)

Ancillary to its primary jurisdiction, the Landed Estates Court had power to convert a perpetual leasehold into a fee-farm, (*m*) to appoint or change and remove trustees; to make vesting orders under the Trustee Act, 1850, (*n*) to redeem charges, (*o*) to apportion rents, (*p*) to partition property, (*q*) to sanction exchanges, (*r*) and to divide intermixed lands. (*s*)

Auxiliary to other Courts.

(174.) The Landed Estates Court had been constituted the functionary to carry into effect sales

(*h*) 21 & 22 Vic., c. 72, s. 53.

(*i*) See Acheson's estate, Ir. Rep. 3 Eq. 105, A. C. Batty's estate, Ir. Rep. 6 Eq. 469.

(*j*) See Coffee's estate, Ir. Rep. 4 Eq. 47, L. E. C.

(*k*) *Vide infra* (175).

(*l*) Tottenham's estate, Ir. Rep. 3 Eq. 528, A. C. Walsh's estate, Ir. Rep. 1 Eq. 399, A. C.

(*m*) 21 & 22 Vic., c. 72, s. 60. (*n*) *Ib.* ss. 66, 67. (*o*) *Ib.* 68.
(*p*) *Ib.* s. 72. (*q*) *Ib.* s. 79. (*r*) *Ib.* s. 80. (*s*) *Ib.* s. 83.

Landed Estates Jurisdiction.

ordered or decreed by the Court of Chancery or by the Court of Bankruptcy, unless on the representation of the parties, or on consideration of the small value of the property, the Court of Chancery or the Court of Bankruptcy thought proper to retain the sale to itself.(*u*) It also distributed the purchase-money of sales from Chancery unless the Court of Chancery directed or the Landed Estates Court thought it right to have the money lodged to the credit of the Court of Chancery ;(*v*) but when the sale was made under the order of the Court of Bankruptcy, the purchase-money was to abide the orders of the Court of Bankruptcy as if the sale had been made directly under that Court (*v*).

When it sold the land it conferred an indefeasible title on the purchaser ; if it considered the title insufficient or such as should not be sold by it, in its ordinary course it refused to sell, and reported the refusal and reason to the Court of Chancery.(*w*)

Bound to determine incidental controversies.

(175.) In any proceeding before a Land Judge, under the original jurisdiction of the Landed Estates Court, the Judge is bound to decide all controversies and questions as to the validity or effect of any deed, instrument, or contract affecting the land, or any charge or incumbrance thereon, and as to the construction or effect of any devise or bequest of any estate or interest in, or of any charge or incumbrance upon the land which it may be necessary to decide for the purpose of such proceeding, including the validity or effect of any lease or instrument of tenancy affecting land, and requisite to be ascertained for the due settlement of a rental.(*x*)

The Landed Estates Court had already power to

(*u*) 21 & 22 Vic , c. 72, s. 49 ; and see, as to Church Commissioners Act, 1869, 32 & 33 Vic., c. 42, s. 54.

(*v*) 21 & 22 Vic., c. 72, s. 50. (*w*) *Ib.* (*x*) J. A., 1877, s. 39.

Landed Estates Jurisdiction.

have any matter of fact arising in the exercise of its ordinary jurisdiction tried by a special or common jury before the Court itself,(*y*) and it had the same jurisdiction as the Court of Chancery for sale of settled estates under the Act 19 & 20 Vic., c. 120.(*z*) It had the powers of the Court of Chancery to enforce specific performance of contracts of sale of land in certain cases.(*a*)

Procedure in.

(176.) The procedure in such cases, *i.e.*, of trying a question or controversy, is to be settled by Rules of Court, to be made by the Lord Chancellor and the Land Judges or one of them.(*b*)

Binding parties to.

(177.) Any person, whether already a party to the proceeding in any cause or matter before the Land Judges or not, who shall have been duly served with notice in writing pursuant to the Rules of the Court, will thenceforth be deemed a party to the cause or matter, with the same rights in respect of his claim or defence as if he had duly sued or been sued in a suit instituted for the purpose of deciding the question or controversy.(*c*)

To take accounts and administer assets.

(178.) The Land Judge is also bound to take accounts, and administer the assets of any deceased person whenever it may be necessary for a distribution of the purchase-money of land sold before him (provided there be not then depending before any of the Judges of the High Court, a suit for the administration of such assets), and it will not be necessary to institute any other cause or matter for any such purpose.(*d*)

Formerly the Landed Estates Court did not possess jurisdiction for the general administration of an estate under the trusts of a will, after

(*y*) 21 & 22 Vic., c. 72, s. 38.
(*a*) *Ib.* s. 48.
(*c*) *Ib.* s. 39.
(*z*) *Ib.* s. 46.
(*b*) J. A., 1877, s. 39.
(*d*) *Ib.* s. 39.

Landed Estates Jurisdiction.

payment of specific charges, but used to direct the surplus to remain in Court to give opportunity for the parties interested to institute proceedings in Chancery,(*e*) and accordingly it would not make an order for sale of land on foot of a general charge of debts created by will,(*f*) nor for payment of a legacy not specifically charged on the land.(*g*).

Receiver matters.

(179.) On a vacancy in the office of Receiver-Master, the powers and duties vested in and performed by the Receiver-Master in reference to the management of landed estates and the supervision and control of Receivers over same, are to be exercised by the junior of the Land Judges, and all matters and business pending in the office of the Receiver-Master in reference to Receivers in Chancery or Lunacy, and the accounting of Receivers, and the letting and management of estates are to be transferred to the Land Judges, or one of them, in the same manner as they would have been prosecuted and conducted before the Receiver-Master.(*h*)

May appoint Receiver.

(180.) Applications to appoint a Receiver over land, where the land is the subject of a proceeding before the Land Judges, are to be made to the Land Judge to whom the proceeding is attached.(*i*)

References to appoint Receiver.

(181.) All future references to appoint Receivers over lands made by any Judge of the High Court or in Lunacy (where the Receiver is not appointed by the Judge himself) shall be made to the junior of the Land Judges.(*j*)

Extending Receiver.

(182.) When once a Receiver is appointed over land, either by a Land Judge or by any other Judge of the High Court having power to appoint one, it

(*e*) *In re* Bateman, 6 Ir. Jur. N.S., 162.

(*f*) *In re* Warnock's Estate, Ir. Rep., 8 Eq., 239, L. E. C.

(*g*) *In re* Carson's Estate, Ir. Rep., 4 Eq., 555. *In re* Cuthbert's Estate, Ir. Rep., 4 Eq., 573.

(*h*) J. A., 1877, s. 75, § 2 & § 13. (*i*) *Ib.* s. 39.

(*j*) *Ib.* s. 75, § 4 & § 13.

will not be necessary for any party claiming to be entitled to or interested in the rents of the lands over which the Receiver has been appointed to file any bill,(*k*) or institute any other cause or proceedings to have the Receiver extended to his claim, but he may apply by summary motion to a Land Judge to have the Receiver extended to his claim. On hearing such an application, the Judge may either grant the application or order a bill to be filed, or other proceeding to be instituted for the purpose of ascertaining the rights of the party applying; and the costs of a suit, cause, or other proceeding, the object of which shall be the taking an account on foot of any mortgage or other security affecting land, and the extension of a Receiver already appointed to the matter of said suit, cause, or other proceeding, shall not be allowed unless it shall have been commenced by direction of one of the Land Judges.(*l*)

Landed Estates Jurisdiction.

(183.) All appeals from orders of the Land Judges as to receiver matters are to be brought to the Court of Appeal and not to the particular Judge who made the reference.(*m*) In other matters than receiver matters the appeal is also to the Court of Appeal.

Appeals from.

CHAPTER XV.

Probate and Admiralty Jurisdiction.

184. Testamentary and Matrimonial Matters, p. 149.
185. Establishment of Wills as to Realty, 150.
186. Rules and Orders of Court, 152.
187. Admiralty annexed to Probate, 153.

(184.) One clause of the Judicature Act provides that every testamentary or matrimonial proceeding

Testamentary and matrimonial matters.

(*k*) *Sic* in J. A., 1877, s. 40. (*l*) *Ib.* s. 40. (*m*) *Ib.* s. 75, § 6.

Probate and Admiralty Jurisdiction.

must be commenced in the Probate and Matrimonial Division, and addressed to the Judge of that Division for the time being.(*a*) Another clause declares that, subject to any rules of Court and the power of transfer, all causes and matters which would have been within the *exclusive* cognizance of the Court of Probate or the Court for Matrimonial Causes and Matters shall be assigned to the Judge of the Court of Probate and Matrimonial Division.(*b*)

Whether these two provisions are to be referred to the same class of causes and matters testamentary, it is not very clear.

Perhaps the expression "testamentary proceedings" is to be understood as referring to "matters and causes testamentary," defined in the Probate Act as comprehending "all matters and causes relating to the grant and revocation of probate of wills or of administration.(*c*)

The latter clause will probably include cases by way of appeal from Chairmen at Quarter Sessions, under the 20 & 21 Vic., c. 79, s. 62,(*d*) and cases under the Legitimacy Declaration Act, 1868.(*e*)

Establishment of wills.

(185.) The establishment of wills, both as to real and personal property, would seem to be peculiarly appropriate for assignation to the Probate Division, but it was not within the exclusive jurisdiction of the Court of Probate in our former judicature, as the question of fact might be tried in an action of ejectment, in any of the Common Law Courts, and the Court of Chancery might entertain a suit to establish a will where necessary for the administration or marshalling of assets, or where the

(*a*) J. A., 1877, s. 37, § 3. (*b*) *Ib.* s. 47.
(*c*) 20 & 21 Vic., c. 79, s. 2.
(*d*) See as to form of Kevil *v.* Lynch, Ir. Rep., 9 Eq., 249, Pro.
(*e*) See A. B. *v.* Attorney-General, Ir. Rep., 4 Eq., 56 Pro.

devisee of the legal estate, who was in possession, claimed to obtain a perpetual injunction against a person who claimed to be heir-at-law, but who had brought no action of ejectment as yet, to prevent him afterwards attempting to impeach the will.(*f*) *Probate and Admiralty Jurisdiction.*

Wills affecting real estate as well as personal might be proved in the Probate Court in solemn form, or in a contentious suit, provided the heir or devisee was cited,(*g*) and, if proved, the decree of the Court was binding on all persons interested in the real estate so far as the validity and contents of the will,(*h*) and probate copies of all wills made after 1st January, 1858, were made conclusive evidence of the will in questions of real estate as well as of personal,(*i*) and as regards other wills, a probate and office copy may be made evidence of the will, in lieu of producing the original, in questions of real property, on giving notice of the intention to use it, unless a counter-notice is given by a party that he disputes the validity of the will.(*j*)

Where the will related to realty and personalty, although the heir-at-law was not cited, yet if he had notice or knowledge of the testamentary suit he was held bound by the decree, so far as the personalty, and he might dispute it as to the realty.(*k*)

But where the will was exclusively conversant with real property, the Court of Probate had no jurisdiction as regards the heir-at-law to grant probate, although the testator charged his debts and legacies to be paid out of it ;(*l*) but if the heir con-

(*f*) See Boyse *v.* Rossborough, Kay 71, Story, § 1445–7.

(*g*) Probate Act, 20 & 21 Vic., c. 79, s. 65 ; see s. 41.

(*h*) *Ib.* s. 66. (*i*) *Ib.* s. 66. (*j*) *Ib.* s. 68.

(*k*) Moran *v.* Moran, Ir. Rep., 8 Eq., 303 ; see O'Kelly *v.* Browne, Ir. Rep., 9 Eq., 353, Prob.

(*l*) Bootle *in re* L. R., 3 Prob. & Div. 177.

Probate and Admiralty Jurisdiction.

sented or had notice he might be bound by probate as regards the personalty.(*m*)

The heir-at-law is entitled to a trial by jury,(*n*) which may be directed to the assizes, but is generally had in Dublin.(*o*)

The Court of Probate was prohibited from entertaining suits for legacies or for the distribution of residue, its old jurisdiction in that respect having been abolished.(*p*)

Rules and orders of Probate, &c.

(186.) The rules and orders of the Court of Probate and the Court for Matrimonial Causes and matters, in force on the 1st day of January, 1877, are, except so far as they shall be by rules of Court expressly varied, to remain in force in the High Court of Justice and in the Court of Appeal in all respects as if they had been rules of Court under the Judicature Act.(*q*)

The Court of Probate in aid of proceedings in the Court of Chancery used sometimes relax its rules as to requiring from an administrator justifying security on granting administration, and it provided for the safety of the assets by impounding the grant and allowing it to be used as circumstances might require.(*r*)

Where a decree for administration in favour of the administratrix had been made, but not passed until the production of the letters, the Judge directed the officer of the Probate Court to attend the Registrar of the Court of Chancery, with the letters of administration, at any proper time that might be named, and when the decree had been

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(*m*) Lawless *v.* Lawless, Ir. Rep., 3 Eq. 87.

(*n*) 20 & 21 Vic., c. 79, s. 41. See Isaac *v.* Grant, Ir. Rep., 8 Eq., 253, Prob., as to form of issues. (*o*) See Fleming *v.* Fleming, Ir. Rep., 7 Eq., 409, Prob.

(*p*) See 20 & 21 Vic., c. 79, s. 28. (*q*) J. A., 1877, s. 64.

(*r*) See *in re* Goods of Vaughan, Ir. Rep., 10 Eq., 1 Prob.

passed the party might apply to the Court of Probate for delivery out of the letters to the administratrix.(*s*)

Probate and Admiralty Jurisdiction.

Admiralty to be annexed to Probate.

(187.) When the existing Judge of the High Court of Admiralty shall die or resign, no person shall be appointed to succeed him in his office, and all the jurisdiction vested in him will be transferred to the High Court of Justice to be exercised by some Judge of the High Court of Justice appointed to be a Judge since the 1st day of January, 1874, or such Judge appointed before that date, who shall consent thereto, to be nominated by the Lord Lieutenant.(*t*) This arrangement is provisional, and until the vacancy next ensuing after the passing of the Act, in the office of Judge of the Probate and Matrimonial Division, shall have been filled up, after which all the jurisdiction in Admiralty matters then vested in the Judge appointed by the Lord Lieutenant will be transferred to and vested in the new Judge of the Probate Division, and all causes and proceedings in Admiralty are to be heard before him.(*u*)

The Court of Admiralty has jurisdiction to award damages, under Lord Campbell's Act, for loss of life occasioned by improper navigation of ships.(*v*)

(*s*) See *in re* Goods of John O'Brien, Ir. Rep., 9 Eq., 214, Prob.; and see *in re* Goods of Richardson, 35 *Law Times*, 767, where it is stated the Judge acted on the certificate of the Judge of the Chancery Division that it was expedient to issue the grant.

(*t*) J. A., 1877, s. 9. (*u*) *Ib.*

(*v*) See the *Franconia*, L. R. 2, Prob. D. 163.

CHAPTER XVI.

Criminal Jurisdiction and Courts of Assize.

188. Jurisdiction of Courts of Assize and Gaol Delivery, p. 154.
189. Criminal procedure, 154.
190. Writ of error in criminal matters, 154.
191. No appeal except for error apparent, 155.
192. Crown cases reserved, 155.
193. Decisions final, 155.

Jurisdiction of commissions of assize and gaol delivery.

(188.) The Act expressly includes within the courts whose jurisdiction is transferred to the High Court of Justice, the courts created by commissions of assize, of Oyer and Terminer, and of Gaol Delivery, or any of such commissions, and declares that nothing contained in the Act shall abridge or alter the jurisdiction conferred by any statute upon any judge or judges, Commissioner or Commissioners of Assize.(*a*)

Courts of Oyer and Terminer and Gaol Delivery, and of Assize and Nisi Prius, were Superior Courts, and could as such commit for contempt upon a general warrant not stating the nature of the contempt or the facts showing there was a contempt, as Inferior Courts were bound to do.(*b*)

Criminal procedure.

(189.) Until rules of court are made pursuant to the Act, the practice and procedure in all criminal causes and matters in the High Court of Justice (including the practice and procedure with respect to Crown cases reserved) will be the same as the practice and procedure in similar causes and matters were before the Act.(*c*)

Writ of error in criminal matters.

(190.) A writ of error to the House of Lords may issue in cases on the Crown side of the Queen's Bench Division in like manner and subject to like

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(*a*) J. A., 1877, s. 21.

(*b*) *Ex parte* Jose Luis Fernandez, 10 C. B. N. S. 3. *In re* Daniel M'Aleece, Ir. Rep. 7 C. L. 146, Q. B.

(*c*) J. A., 1877, s. 65.

conditions and permission (*d*) and in respect of like proceedings as such writ would have issued from the Court of Queen's Bench if the Act had not passed.(*e*) *Criminal Jurisdiction.*

(191.) No appeal will lie from any judgment of the High Court of Justice in any criminal cause or matter, save for error apparent on the record and as to which no question has been reserved for the consideration of the judges by the Act 11 & 12 Vic., c. 78.(*f*) No appeal except for error apparent.

(192.) The jurisdiction and authorities in relation to questions of law arising in criminal trials formerly vested in the twelve Common Law Judges by Act 11 & 12 Vict., c. 78, is now vested in the Judges of the High Court of Justice, or any five of them, of whom one at least of the three Chief Judges shall be part.(*g*) Crown cases reserved.

(193.) The determination by the Judges of the High Court of any question of law reserved is final and without appeal.(*h*) Decision final.

CHAPTER XVII.

Jurisdiction of Single Judge.

194. Jurisdiction in Court or at Chambers, p. 155.
195. Judge at Nisi Prius, 156.
196. Commissioner to try causes, &c., 156.
198. Discharging orders made at Chambers, 157.

(194.) Any single Judge of the High Court of Justice, may exercise in Court or in Chambers, all or any part of the jurisdiction vested in the High Court, in all such causes and matters, and in all such proceedings in any causes or matters, as before the passing of the Act might have been heard in Court Jurisdiction of a single judge in court and chambers.

(*d*) *Vide ante* (160), p. 135.
(*e*) J. A., 1877, s. 65, and *vide infra*, s.(202).
(*f*) *Ib.* s. 50. (*g*) *Ib.* s. 50. (*h*) *Ib.* s. 50.

Single Judge, Jurisdiction of.

or in chambers respectively by a single Judge of any of the Courts, whose jurisdiction has been transferred to the High Court, or as may be directed or authorized to be so heard by rules of Court. In all such cases any Judge *sitting in Court* constitutes a Court.(*a*) In matters pertaining to the Chancery division, a single Judge will be competent as heretofore to hear and determine causes in Court, whereas in causes belonging to the Common Law divisions—those formerly disposed of in Banco—a single Judge will probably not be competent to act alone unless by consent of parties, or unless rules of Court make provision in that behalf.

The Judge at Nisi Prius constitutes a Court.

(195.) Any Judge of the High Court of Justice sitting for the trial of causes and issues in Dublin,(*b*) at any place heretofore accustomed, or to be hereafter determined by rules of Court, is to be deemed a Court of the High Court of Justice.(*b*) This appears to confer on the Judge every jurisdiction which the High Court possesses. Formerly Courts of Nisi Prius and of Assizes on Circuit were mere Courts of trial, and had no power to give judgment, except in rare statutory cases.

Commissioner to try causes.

(196.) Any Judge or other person appointed under a commission to try and determine causes or matters, or questions or issues of law or of fact, or partly of fact and partly of law, in any cause or matter depending in the High Court, when engaged in the exercise of the jurisdiction assigned to him under the 32nd section of the Judicature Act, constitutes a Court of the High Court of Justice.(*c*)

Right of suitor to resort to.

(197.) Subject to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may with the leave of the Judge or division

(*a*) J. A., 1877, s. 44. (*b*) *Ib.* s. 33. (*c*) *Ib.* s. 32.

to which the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner, or at sittings in Dublin, and the question or issue shall be tried and determined accordingly. (*d*) By consent of all the parties to the cause, any cause or matter, though not involving any question or issue of fact, may be tried and determined at a commission or sittings.(*e*)

Single Judge, Jurisdiction of.

(198.) Every order made by a Judge of the High Court in chambers, except orders made in the exercise of his discretion as to costs in cases where, under the Act, a right of appeal is not expressly given, may be set aside or discharged upon notice, by any divisional Court, or by the Judge sitting in Court, according to the course and practice of the division of the High Court to which the particular cause or matter in which the order is made, may be assigned. No appeal lies from any such order, unless such a motion to set it aside or discharge it has been made, or unless the Judge making the order, or the Court of Appeal specially gives leave to appeal.(*f*) If the appeal should come, as it may, before a divisional Court, different from that to which the cause is attached, the Court will decide the case according to the practice of the latter division, though different from that of the division to which the Judges happen to belong.(*g*)

Discharging orders at chambers.

Appeals from.

(*d*) J. A., 1877, s. 32. (*e*) *Ib.* (*f*) *Ib.* s. 54.
(*g*) See Pacey *v.* London Tramways Co., 20 Sol. Jour. 412.

CHAPTER XVIII.

JURISDICTION OF COURT OF APPEAL.

198. Jurisdiction transferred to, p. 158.
199. Appeals from Orders of High Court, 158.
200. Where no Appeal lies, 159.
201. Land Cases Reserved, 159.
202. Criminal Cases, 159.
203. Primary Jurisdiction, 160.
204. Number of Judges to constitute Court, 161.
205. Incidental Directions by Single Judge, 161.
206. Authority over Officers, 161.

A Court of Record.

(198.) The Court of Appeal is constituted a Superior Court of Record, and there is transferred to and vested in it all the jurisdictions and powers following:—

Jurisdiction transferred.

1st. 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 of Appeal sitting on appeals from the Court of Probate, the Court for Matrimonial Causes and Matters, the Landed Estates Court, the High Court of Admiralty, or the Court of Bankruptcy.

Exchequer Chamber.

2nd. All jurisdiction and powers of the Court of Exchequer Chamber, including its appellate jurisdiction in appeals under the Registration of Voters Acts.

Registration of voters.

Land cases reserved.

3rd. All jurisdiction and powers of the Court for Land Cases Reserved at Dublin under the provisions of the Landlord and Tenant Act, 1870.(*a*)

4th. The jurisdiction on writs of error in criminal cases on appeal from the Queen's Bench Division of the High Court of Justice.(*b*)

Appeals from orders of High Court.

(199.) The Court of Appeal has jurisdiction and power to hear and determine appeals from any judgment or order (with some exceptions)(*c*) of the

(*a*) 33 & 34 Vic., c. 46. (*b*) J. A., 1877, s. 23, subs. (4)
(*c*) See *infra*, s. (200).

High Court of Justice or of any Judges or Judge thereof, subject to such rules and orders of Court for regulating the terms and conditions on which the appeal shall be allowed as may be made pursuant to the Judicature Act.(*d*) *Court of Appeal Jurisdiction.*

Appeals from the Court of Bankruptcy are noticed in s. 8, and from the High Court of Admiralty in s. 9.

(200.) No appeal can be taken to any order made by the High Court of Justice, or any Judge of it, by consent of parties, or as to costs only, being costs which by law are left to the discretion of the Court, unless by leave of the Court or Judge making such order.(*e*) *Where no appeal lies.*

Nor can an appeal be taken from any judgment founded upon and applying any verdict, unless a motion has been made to a Divisional Court to set aside or reverse the verdict or the judgment, if any, founded upon it, but if this be done an appeal lies to the Court of Appeal from the decision of the Divisional Court.(*f*)

(201.) Any person aggrieved by any decision or order upon any question of law made by any Judge or Judges of Assize under the Landlord and Tenant (Ireland) Act, 1870, or in the case of the county or the county of the city of Dublin made by the Judges mentioned in that Act, in that behalf, may require the Judge or Judges making such decision or order to reserve such question of law by way of case stated for the consideration of the Court of Appeal, and the same thereupon will be reserved in the form and manner prescribed by rules made in pursuance of section 31(*g*) of that Act.(*h*) *Land cases reserved to Appeal Court.*

(202.) In criminal cases no appeal lies from any *Criminal cases.*

(*d*) J. A., 1877, s. 24. (*e*) *Ib.* s. 52 (*f*) *Ib.* s. 51.
(*g*) 33 & 34 Vic., c. 46, s. 31. (*h*) J. A., 1877, s. 49.

Court of Appeal Jurisdiction.

judgment of the High Court, except for error apparent on the record, nor from any case reserved for the consideration of the Judges.(*i*)

When error appears on the face of the judgment or order in a criminal matter, an appeal will lie to the Court of Appeal.

A writ of error also may issue to the House of Lords in like manner, and subject to like conditions and permission, and in respect of like proceedings, as such writ would have issued from the Court of Queen's Bench before the Judicature Act.(*j*)

It does not appear whether the resort to a writ of error is to be an alternative to the right to appeal, or whether after an appeal in a case on the Crown side of the Queen's Bench Division, a writ of error may issue to the House of Lords.

Primary jurisdiction.

(203.) For all the purposes of and incidental to the hearing and determination of an appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on the appeal, and for the purpose of every other authority expressly given to the Court of Appeal by the Act, it possesses all the power, authority, and jurisdiction vested in the High Court of Justice.(*k*)

The jurisdiction of the Court of Appeal is therefore simply appellate, and it has no original or first instance jurisdiction, save so far as it may be incident to the determination of a case brought before it by way of appeal. (*l*)

It cannot entertain a motion fit for the Chancery Division although the Master of the Rolls be sitting in the Court,(*m*) nor can it entertain an application to rehear or set aside a decree made on fraudulent

(*i*) J. A., 1877, s. 50.
(*j*) *Ib.* s. 65.
(*k*) *Ib.* s. 24.
(*l*) *Ib.* s. 5.
(*m*) Glover *v.* Greenbank Alkali Co., W. N. 1876, 157, A. C.; and see *In re* Oxenden, 21 Sol. Jour., 707, L.JJ.

Court of Appeal Jurisdiction.

evidence, it being the subject of an action to set aside the judgment on the ground of fraud.(*n*)

Number of Judges to constitute a Court.

(204.) Where the subject-matter of appeal is a final order, decree, or judgment, the appeal must be heard before not less than three judges of the court sitting together. Where the appeal is from an interlocutory order, decree, or judgment, it must be heard before not less than two judges sitting together.

Any doubt, whether a decree, order, or judgment, is final or interlocutory is to be determined by the Court of Appeal itself.(*o*) It is not said that the presence of the Lord Chancellor, as the President of the Court, is essential to the legal constitution of the Court.

Incidental directions by single Judge.

(205.) Any direction incidental to a proceeding in appeal not involving the hearing of the decree, judgment, or order, whether final or interlocutory, may be given by a single judge of the court.(*p*)

Interim orders in vacation.

A single judge may at any time in vacation make any interim order to prevent prejudice to the claim of any parties pending an appeal which he may think fit, but any such order may be discharged or varied by the Court of Appeal.(*q*)

Authority over officers.

(206.) The authority of the Court of Appeal over the officers attached to the Court with respect to any duties to be discharged by them may be exercised by the Lord Chancellor.(*r*)

(*n*) See Flower *v.* Lloyd, 25 W. R. 793, A. C.
(*o*) J. A., 1877, s. 56, § 2. (*p*) *Ib.* § 3. (*q*) *Ib.*
(*r*) *Ib.* s. 73, § 15.

PART III.

DISTRIBUTION OF BUSINESS.

CHAPTER XIX.—DISTRIBUTION OF BUSINESS.

„ XX.—OPTION OF DIVISION AND TRANSFERS.

CHAPTER XIX.

Distribution of Business.

207. Transfer of pending causes to Supreme Court, p. 164.
208. Distribution by General Orders, 165.
209. Partial distribution by Statute, 165.
210. Appropriation of pending business, 165.
211. Future business, appropriation of, 165.
212. Chancery Division—
(*a*) Administration suits, 166.
(*b*) Partnership dissolutions, and accounts of, 167.
(*c*) Action of Account, 168.
(*d*) Bill in Equity for an Account, 168.
(*e*) Redemption and Foreclosure of Mortgages, 169.
(*f*) Raising portions, 169.
(*g*) Sale for lien, 170.
(*h*) Execution of trusts, 170.
(*i*) Rectification and cancellation of deeds, 170.
(*j*) Specific performance, 171.
(*k*) Partition and sale of estates, 171.
(*l*) Wardship of infants, 172.
213. Audit of Public Accounts, 173.
214. Chancery matters not assigned, 173.
215. Queen's Bench Division, 173.
216. Common Pleas Division, 174.
217. Exchequer Division, 174.
218. Common Law Actions not assigned, 174.
219. Assignment to a single Judge, 175.

Transfer of pending causes to Supreme Court of Judicature.

(207.) The Judicature Act(*a*) directs that all causes, matters, and proceedings whatsoever, whether civil or criminal, which shall be pending in any of the courts whose jurisdiction is transferred to the Supreme Court of Judicature, shall be continued according to its nature and character, viz.:—1st. Proceedings in error and on appeal, and proceedings before the Court of Appeal in Chancery, or in the Court for Land Cases Reserved at Dublin, in and before the Court of Appeal. 2nd. As to all other proceedings in and before the High Court of Justice.

The Court of Appeal and the High Court of Justice respectively have conferred upon them the same jurisdiction in relation to the causes and matters and proceedings thus transferred to them as if they had been commenced in the High Court of

(*a*) J. A., 1877, s. 25.

Justice or the Court of Appeal, as the case may be, down to the point at which the transfer took place. (*b*)

Distribution of Business.

(208.) The causes and matters so transferred to the High Court of Justice, as well as those to be hereafter commenced in the High Court itself, are to be distributed amongst its several divisions and judges in such manner as may from time to time be determined by general orders, or orders of transfer made under the authority of the Act. (*c*)

Distribution by General Orders.

(209.) Until rules of Court for the purpose are made and subject thereto, the statute itself makes a partial distribution of business,(*d*) leaving the matter otherwise in the option of the plaintiff (subject to orders of transfer) to select the division to which he will assign any cause, action, or matter to be hereafter initiated. (*e*)

Partial Distribution by Statute.

(210.) Thus the statute assigns to the Chancery Division all causes and matters pending in the Court of Chancery at the commencement of the Act.

Appropriation of pending business.

1st. And also all matters pending in the Landed Estates Court, to be attached to the Land Judges of the Chancery Division.

2nd. To the Queen's Bench Division, all causes and matters, civil and criminal, pending in the Court of Queen's Bench.

3rd. To the Common Pleas Division the business pending in the Court of Common Pleas.

4th. To the Exchequer Division, all the business pending in the Court of Exchequer.

5th. To the Probate and Matrimonial Division, all the business pending in the Court of Probate or Court for Matrimonial Causes. (*f*)

(211.) As to future business, the statute further assigns to each Division all causes and matters

Assignment of peculiar business exclusively attached to former Courts.

(*b*) J. A., 1877, s. 25. (*c*) *Ib.* s. 35. (*d*) *Ib.* (*e*) *Ib.* s. 37. (*f*) *Ib.* s. 37, subs. (3).

Distribution of Business.

which belonged to the exclusive jurisdiction of the former Court, which was corresponding to the new division, *ex. gr.*:

1st. To the Chancery Division, all causes and matters under any Act of Parliament by which exclusive jurisdiction was given to the Court of Chancery or its Judges, or to the Landed Estates Court or its Judges. But every proceeding in any other matter within the exclusive jurisdiction of the Landed Estates Court, before or under the provisions of the Judicature Act, though commenced in the Chancery Division, is to be addressed to the Land Judges of that Division. (*g*)

2nd. To the Queen's Bench Division, all causes and matters, civil or criminal, which would have been within the exclusive jurisdiction of the Court of Queen's Bench, in the exercise of its original jurisdiction.

3rd. To the Common Pleas Division, all causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas.

4th. To the Exchequer Division, all causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court.

5th. To the Probate and Matrimonial Division, all causes and matters within the exclusive cognizance of the Court of Probate, or Court for Matrimonial Causes and matters. (*h*)

Chancery division, special assignment.

(212.) The J. A.(*i*) specially assigns to the Chancery Division ten heads of the former special jurisdiction of the Court of Chancery, viz., all causes and matters for any of the following purposes:—

Administration suits.

(*a.*) Administration suits, and matters for the administration of the estates of deceased persons.

(*g*) J. A., 1877, s. 37, § 4. (*h*) S. 36, § 6.
(*i*) J. A., 1877, s. 36, § 1.

Distribution of Business.

(*b.*) The dissolution of partnerships, or the taking of partnership or other accounts.

Dissolution of partnership.

An account was almost invariably consequent on a dissolution, and where a dissolution was not sought an account of the partnership affairs would not be directed unless under circumstances which would entitle the plaintiff to a dissolution if he had prayed for it ;(*j*) indeed an action for an account by one partner against another necessarily involved a dissolution ;(*k*) so a receiver or manager of partnership property was not appointed except with a view to dissolution.(*l*)

The form of indorsement of claim in partnership given in the schedule of forms(*m*) indicates that the action is not only to have the accounts taken of the partnership dealings but to have the affairs of the partnership wound up.

As formerly an action at law might be brought by one partner against another, in respect of any particular isolated adventure for a share of an ascertained balance after a partnership had closed, so now where a division of profits, *ex. gr.*, on a simple publishing account, is sought as between two persons not involving complicated accounts, the action is not necessarily to be brought in the Chancery Division.(*n*)

As other accounts besides partnership accounts seem to be assigned to the Chancery Division, it may be well to notice briefly the former practice and jurisdiction of Courts of Law and Equity in matters of account.

(*j*) See Loscombe *v.* Rupell, 4 Sim. 10.

(*k*) In the Roman law it operated as such. Dig. Lib. 17, title 2, lex. 65.

(*l*) Hall *v.* Hall, 3. Mac. & Gor. 79; Baxter *v.* West, 28 L. J. Ch., 169.

(*m*) See Appendix of Forms, Part ii., s. 1, No. 3.

(*n*) See Warne *v.* Bell, W. N., 1875, 259.

Distribution of Business.

Action of account at law.

(*c.*) At law an action of account might be brought —1st. Against a bailiff or receiver appointed by the plaintiff or a guardian appointed by law; 2nd. By one merchant against another, regarded in the light of his receiver; 3rd. By one joint tenant against another who received more than his share of the rents, under the statute 6 Anne, c. 10, s. 23.(*o*)

Relief in equity.

(*d.*) In a Court of Equity a bill for an account lay in the following cases:—

1st. Between a principal and his agent or steward, because of the confidence placed by the former in the latter, and that the particulars of their transactions were almost exclusively in his knowledge.(*p*) In the converse case, *i.e.*, between agent and principal, there was ordinarily no such element of trust or special knowledge to entitle the agent to an account from his principal.(*q*)

2nd. Between *cestui que* trust and his trustee. The remedy was not open as between debtor and creditor simply, nor as between a customer and his banker unless the transactions were long and complicated.(*r*)

3rd. Where mutual receipts and disbursements have been made by two parties each for the other.(*s*)

4th. Where special complication of accounts exist, such that they could not be taken by a jury,(*t*) but mere multiplicity of items did not warrant a resort to a Court of Equity, although a Judge at Nisi Prius might urge the parties to refer the

(*o*) Kearney *v.* Kearney, 13 Ir. Com. Law Rep. 314, Q. B.; Purcell *v.* Harding, 15 W. R. 128, Q. B., Ireland.

(*p*) See Dinwiddie *v.* Bailey, 6 Ves. 141.

(*q*) Padurek *v.* Stanley, 9 Hare, 627.

(*r*) Foley *v.* Hill, 2 H. L. C., 28; see Pott *v.* Clegg, 16 M. & W. 321; see as between an architect and his employer, Kimberley *v.* Dick, L. R. 13 Eq. 1.

(*s*) Phillips *v.* Phillips, 9 Hare, 471, V. C. Turner.

(*t*) O'Connor *v.* Spaight, 1 Sch. & Lef. 305.

matter to arbitration,(*u*) and still more so now where the Common Law Judges have the power, on the application of either party, and it appearing that the matter in dispute consists wholly or in part of matters of account which cannot conveniently be tried in the ordinary way, either to decide such matter in a summary way or to order the matter to be referred to an arbitrator to be appointed by the parties, or to the Master of the Court, or in country causes to the Assistant Barrister of any county or riding on such terms as to costs and otherwise as the Court or Judge shall think reasonable."(*v*) *Distribution of Business.*

5th. Account in equity was given as incidental to other heads of relief, such as administration of assets, foreclosure and redemption of mortgages, dissolution of partnership, and in respect of equitable claims generally; and this would seem to be the scope of the clause assigning "other accounts" to the Chancery Division, but it does not seem to contemplate that every case growing out of privity of contract, which may happen to involve an account simple and ordinary in its character, should be attached to the Chancery Division.(*w*) "Other accounts."

(*e.*) The redemption or foreclosure of mortgages. A form of indorsement of claim by mortgagee for an account and foreclosure of sale is given in the Form No. 4, and by mortgagor for an account and redemption, No. 5 of Appendix A, part 2, sect. 1. Redemption and foreclosure of mortgages.

(*f.*) The raising of portions or other charges on land. A form of indorsement of claim to raise a portion by younger children provided by settlement will be seen in Form No. 6 of same appendix. Raising portions.

(*u*) South-Eastern Ry. Co. *v.* Martin, 2 Ph. 758; see T. Phillips *v.* Phillips, 9 Hare, at p. 474, V. C. Turner; but where the rights of third parties are intermixed, see Taff Vale Ry. Co. *v.* Nixon, 1 H. L. C. 111.

(*v*) See C. L. Pro. Act, 1856, s. 6. Ferg. 2nd Edn. 303.

(*w*) See Warne *v.* Bell, W. N. 1875, 259.

Distribution of Business.

(*g.*) The sale and distribution of the proceeds of property, subject to any lien or charge.

Sale for lien.

For the purpose of this subsection it will be well to observe the distinction between a lien and a debt.(*x*)

Execution of trusts.

(*h.*) The execution of trusts whether charitable or private.

This does not seem to include actions simply for a declaration of trust, and not its execution.(*y*)

Rectification and cancellation of deeds, &c.

(*i.*) The rectification or setting aside and cancellation of deeds or other written instruments.

In order to the rectification of a written instrument on the ground of mistake, the mistake must be common to all parties, and in such a state of things relief may be had in respect even of a marriage settlement.(*z*) But where the mistake is one-sided the instrument cannot be reformed (*a*) though it may be rescinded, provided the Court can remit the parties to their original position. If, however, the mistake is one-sided, and this *restitutio in integrum* cannot be accomplished (as in the case of a marriage contract), equity will not interfere; whereas, if the mistake were mutual, it might do so, and the mistake being unilateral even a Court of law would consider it a defence to an action on an instrument although forming part of a completed contract of marriage.(*b*) But although rectification for mistake on one side could not in any case be forced on a defendant in equity, the Court might offer him the

(*x*) See British Mutual Investment Company *v.* Smart, L. R., 10 Ch., 567. Morris *v.* Livie, 1 You. & C., Ch. 380, MacNamara *v.* Church, 1 Law Rec. N. S., 1 L. C.

(*y*) See Anon., W. N., 1876, Denman, J.

(*z*) Hamil *v.* White, 3 Jo. & Lat., 695. King *v.* King-Harman, Ir. Rep., 7 Eq., 446, V. C.

(*a*) Mortimer *v.* Shortall, 2 Dr. & War., 363, see Fowler *v.* Fowler, 4 De Gex & Jo., 273.

(*b*) See Hogan *v.* Healy, Ir. Rep., 11 C. L., 119, Exch. Ch.

alternative of having the contract rescinded, or of taking it in the form the plaintiff intended it to be, and of course restoring the defendant to his original position.(*c*) Concealment of a material fact affecting the subject-matter of the contract known to one party, and kept back from the other, was a ground for cancellation of the instrument, *e.g.*, a lease, and not for reforming it.(*d*)

Distribution of Business.

(*j.*) The specific performance of contracts between vendors and purchasers of land, including contracts for leases.

Specific performance.

And also the specific performance of any other contracts in respect of which a Court of Equity decrees performance.

The corresponding section of the J. A. 1873,(*e*) omits the latter clause, and is apparently confined to cases between vendor and purchaser of real estates, including therein contracts for leases, and leaving out contracts of sale, whether of leaseholds or other personalty.

(*k.*) The partition or sale of real estates (including chattels real). The J. A., 1873, s. 34, omits the inclusion of chattels real, the partition of and sale of which were always enforced on the same principles as of real estates.

Partition and sale of estates.

The Partition Act, 1868, 31 & 32 Vic. c. 40, has made a considerable change in the jurisdiction of the Court by enabling it in certain cases to direct a sale instead of a partition of the common property under s. 4. A plaintiff having the interest in a moiety of leasehold property, may have a sale, notwithstanding the opposition or disability of the owner of the other moiety, unless the objecting

(*c*) See *per* Lord Romilly, Harris *v.* Pepperell, L. R., 5 Eq., at p. 5.

(*d*) See Mostyn *v.* the West Mostyn Coal Company, 24 W. R., 401, C.P.D.

(*e*) J. A., 1873, s. 34.

Distribution of Business.

party will purchase under section 5, or the Court sees good reason why a sale should not be made.(*f*) It is not good cause that the income will be materially diminished by the sale of a leasehold.(*g*)

Wardship of infants.

(*l.*) The wardship of infants and care of infants' estates.

The protective jurisdiction of the Court of Chancery in the wardship of infants was of a judicial character, and as such, pertained to all the Judges of the Court, and was subject to appeal to the House of Lords.

Whether or not the jurisdiction was independent of the possession of property, the Court, as a general rule, declined to exercise it where there was no property to be administered.(*h*) To meet this difficulty, by way of a legal fiction, in some cases, even small sums, such as £20, have been vested in trustees for the benefit of the infant.(*i*)

The jurisdiction was attached by the mere institution of a suit or petition preferred in relation to the person or estate of an infant, whether as plaintiff or as defendant, he becoming *ipso facto* a ward of Court,(*j*) even before the petition has been fiated,(*k*) and an order made under the Trustee Relief Act in respect of money belonging to a minor directing payment of maintenance to his testamentary guardian would have this effect,(*l*)

(*f*) Pemberton *v.* Barnes, L. R., 6 Ch. 685, L. C.

(*g*) See Rowe *v.* Gray, 1 Ch. D. 263, V. C.

(*h*) Wellesley *v.* Duke of Beaufort, 2 Russ. 21.

(*i*) Andrews *v.* Salt, L. R., 8 Ch. 627. *In re* O'Malleys Mi., 8 Ir. Chan. Rep. 291.

(*j*) *In re* Graham, L. R. 10 Eq. 530; Richards *v.* Truell, 6 L. R. N. S. 383, M. R.

(*k*) *In re* Baldwin, 3 L. R. N. S. 48.

(*l*) *In re* Hodges' Settlement, 3 K. & J. 213; see also *in re* Graham, L. R., 10 Eq., 530.

and an order for the appointment of a guardian in a suit for an account of the property of the infant. (*m*) *Distribution of Business.*

Semble now will the acquisition of property by the judgment of the Common Law Division of the High Court constitute an infant plaintiff a ward of Court.

(213.) Many subjects of ordinary Chancery jurisdiction have been left unappropriated. Some of these had been already, in some measure, brought within the jurisdiction of the Common Law Courts, such as Injunction, Interpleader, Discovery. Others seem now for the first time, made matter of co-ordinate authority in the Common Law Divisions, and subject to the election of the suitor. Among these may be mentioned, actions to perpetuate testimony,(*n*) and in the nature of bills of peace,(*o*) *Quia timet*,(*p*) for Declaration of rights,(*q*) for review and reversal of judgments and decrees of the High Court, obtained by fraud or surprise.(*r*) Chancery matters not assigned.

So an action to declare a charge on the separate estate of a married woman, *ex. gr.*, in respect of a guarantee given by her.(*s*)

(214.) The Queen's Bench Division has specially assigned to it besides its old original criminal juris- Queen's Bench Division.

(*m*) Stuart *v.* Marquis of Bute, 9 H. L. C. 457.

(*n*) *In re* Tayleur L. R. 6 Ch. 416. Earl Spencer *v.* Peek, L. R. 3 Eq. 415. See Ellice *v.* Roupell, 32 Beav. 299; and as to mode of taking the evidence, see Cook *v.* Hall, 9 Hare, App. xx., and our Chancery Act, 1867, s. 98, contra; and when it can be used, see Hill *v.* Hibbet, L. R. 7 Eq. 421.

(*o*) See Storey, 853; Foxwell *v.* Webster, 4 De Gex, Jo. & Sm. 77; Sheffield Waterworks *v.* Yeomans, L. R., 2 Ch. 8. Allan *v.* Donnelly, 5 Ir. Chan. Rep. 229. Ashworth *v.* Browne, 10 Ir. Chan. Rep. 421, M.R. Warwick *v.* Queen's College, L. R. 10 Eq. 105, 6 Ch. 716. Commissioners of Sewers *v.* Glasse, L. R. 7 Ch. 464.

(*p*) See Pattison *v.* Gilford, L. R. 18 Eq. 259. Woolridge *v.* Norris, L. R. 6 Eq. 410.

(*q*) See Cox *v.* Barker, W. N. 1876, 210, V. C. B.

(*r*) See Flower *v.* Lloyd, 25 W. R., 793, A. C.

(*s*) See Morrell *v.* Cowan, 25 W. R. 808, Ch. D.

Distribution of Business.

diction, and superintendence over the inferior Courts of criminal jurisdiction, and as regards civil causes and matters, such only as would have been within the exclusive cognizance of the Court of Queen's Bench, in the exercise of its original jurisdiction. This latter limitation, if taken literally, would appear to confine it to actions of trespass *vi et armis*.

Common Pleas Division.

(215.) To the Common Pleas Division, the assignment is of causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas. This would seem, if taken literally, to be limited, as regards actions, to real actions now abolished. It preserves to the Court the former jurisdiction of the Common Pleas, under several statutes, such as the Parliamentary Elections Act, 1868, 31 and 32 Vic., c. 125, which commits to the Court itself(*u*) the general control of the matter, though it be specially attached for trial to a particular Judge on the rota.(*v*) Special cases under section 11 may be referred to it.(*w*)

Also certain jurisdiction under the Local Government Act, 34 & 35 Vic., c. 109.

Exchequer Division.

(216.) The assignment to the Exchequer Division as regards civil actions, seems to be confined to certain actions against debtors to the Crown, or actions specially limited to the Court of Exchequer by statute where a public body, *ex. gr.*, the Board of Works, could be sued only by leave of the Court of Exchequer.(*x*) Probably such leave should still be sought from the Exchequer Division. All causes and matters within the exclusive cognizance of the

Probate Division.

(*u*) See as to attendance of junior Judge of the Queen's Bench Division on that occasion, s. 36.

(*v*) See Macartney *v.* Corry, Ir. Rep. 7 C. L. 242.

(*w*) See Athlone Election Petition, Ir. Rep. 8 C. L. 240.

(*x*) See Caldwell *v.* Board of Works, 1 Ir. Jur., N. S. 106, Ex.

Court of Probate or the Court for Matrimonial Causes, are assigned to the Judge of the Probate and Matrimonial Division, and all matters within the exclusive jurisdiction of the Landed Estates Court are assigned to the Land Judges.(*y*) *Distribution of Business.*

(217.) Thus the Judicature Act assigns to the Queen's Bench, Common Pleas, Exchequer, and Probate Divisions all the jurisdiction over which the correlative courts of former times respectively had exclusive jurisdiction, and to the Land Judges of the Chancery Division the peculiar jurisdiction of the Landed Estates Courts. It then specially assigns to the Chancery Division a selection out of the matters over which the Court of Chancery had exclusive jurisdiction, leaving a portion of the jurisdiction previously peculiar to Courts of Equity and all matters in which there had been concurrent jurisdiction at law and in equity, unenumerated, and in respect of these a plaintiff is as it seems empowered to select his own division. Common Law Divisions.

Common Law actions, so far as they were not within the exclusive cognizance of the Courts of Queen's Bench and Common Pleas and Exchequer are unassigned.(*z*)

(218.) All business of a character which heretofore was accustomed to be disposed of by a Judge only, as in the Court of Chancery, and the Probate and Matrimonial Courts, and in the Landed Estates Court, will still be transacted and disposed of in the first instance by a single judge, and is assigned to the same judge, to whose court it was attached. Assignment to a single Judge.

(*y*) J. A. 1877, s. 47. (*z*) *Vide ante* (18), p. 40.

CHAPTER XX.

Option of Division and Transfers.

219. Option as to Division, how far, p. 176.
220. Marking name of Division, 176.
221. Assignment to wrong Division, 176.
222. Power of transfer and retainer, 177.
223. Grounds of transfer generally, 177.
224. To Chancery Division, 177.
225. To Common Law Division, 180.
226. To Probate Division, 181.
227. Pendency of a suit relating to same subject, 181.
228. The order of transfer, 182.

Option as to choice of division.

(219.) Subject to the provisions made for the assignment of certain business to particular divisions, mentioned in the previous Chapter XIX, and to the power of transfer from one division to another, by order of court, it is optional with a suitor commencing any cause or matter to assign it to such one of the divisions of the High Court of Justice as he may think fit; but after the first assignment all interlocutory and other steps and proceedings in the cause or matter must be taken in the division to which the cause or matter is for the time being attached.(*a*)

Marking with name of division.

(220.) Every person commencing a suit or matter in the High Court of Justice must assign it to some particular division of the High Court by marking the document by which the proceeding is commenced with the name of the division and giving notice of it to the proper officer of the court.(*b*)

Cause assigned to wrong division.

(221.) If the cause or matter is assigned to a wrong division of the Court, *i.e.* to one which, according to the provisions of the Act or the rules, it ought not to be assigned, the Court, or any Judge of the division to which it is so assigned, upon being informed thereof, may, on a summary application at any stage of the

(*a*) J. A. 1877, s. 37, subs. (1). (*b*) *Ib.*, s. 37.

Option of Division and Transfers.

cause or matter, direct it to be transferred to the proper division to which it ought to have been assigned, or he may, if he thinks it expedient so to do, retain it in the division in which it has been commenced; and all steps and proceedings taken and orders made in the cause or matter before such transfer will be valid and effectual to all intents and purposes as if taken and made in the proper division.(*c*)

Power to transfer or retain.

(222.) Any cause or matter may, at any time or at any stage of it, and either with or without application from any of the parties thereto, by an order in that behalf, be transferred from one division or Judge of the High Court of Justice to another division or judge, or by a like order may be retained in the division in which it has been commenced, although it be not the proper division to which it ought in the first instance to have been assigned.(*d*)

Ground generally.

(223.) The mere consent of the parties has been deemed not a sufficient ground for transfer of a cause from one division to another, and from a Common Law, to the Chancery Division.(*e*) But the order may be had on showing any sufficient grounds of convenience or expediency.

Ground for transfer to Chancery Division.

(224.) Certain actions, though originally proper for a Common Law Division, may in progress develop grounds for transfer to the Chancery Division, as for example, where the writ was issued in the Exchequer Division to recover possession of lands, and the defence was by way of counter-claim for specific performance of an agreement for a lease, and there was no other question to be tried but that of the existence of the agreement for which the defendant had made out a *prima facie* case, such that the Court of Chancery would have granted an injunction to

(*c*) J. A., 1877, s. 38. (*d*) *Ib.*

(*e*) Anon. W. N. 1876, 55, Archibald, J.

Option of Division and Transfers.

restrain the action, it was transferred to the Chancery Division, in which the question could be more conveniently disposed of.(*f*) So where the action was to charge the separate estate of a married woman, it was transferred from the Queen's Bench to the Chancery Division, reserving the costs in the Q. B. D. to be disposed of there.(*g*) So where the real dispute though arising in a common law action for goods sold, resolves itself into a question involving not merely equitable principles which the Common Law Judges are fully competent to apply, but matters which can hardly be dealt with satisfactorily in Courts of Law, as demanding something of equitable administration, requiring the official machinery of the Chancery Division in taking of complicated accounts, the specific performance of contracts and inquiries into title, or the setting aside of written instruments on grounds of equitable fraud, it will probably be found more convenient to transfer the action to the Chancery Division, at least until the official staff of the Common Law Divisions shall have been assimilated.(*h*) Thus, where to an action on a deed the sole question left for decision being whether the deed should be set aside on the ground of undue influence, the action was transferred to the Chancery Division.(*i*) In another action, of ejectment, the defence being a counter-claim for specific performance of an agreement for a lease, and that being the real question to be tried, the action was transferred.(*j*) And where an action was brought in the Exchequer Division by a purchaser to recover back

(*f*) Hillman *v.* Mayhew, L. R. 1 Ex. D. 132, 24 W. R. 435.

(*g*) Anon. W. R. 1876, 22, 20, Sol. J. 242, Lindley, J.

(*h*) See Padwick *v.* Scott, W. N. 1876, 74, 20 Sol. J. 299, 320, Archibald, J.

(*i*) *Ib.*

(*j*) Hillman *v.* Mayhew, L. R. 1 Exch. D. 132, W. N. 1876, 98, 24 W. R. 435.

his deposit on the ground of delay, in completing the purchase, and the vendor filed a counter-claim for specific performance of the same contract, the Court (sustained by the Appeal Court) thinking it raised a *bonâ fide* dispute as to title, and that if the vendor was right, the Chancery Division alone, by its more perfect machinery, could give the proper remedy, ordered the action to be transferred to that division.(*k*) But where the equitable impeachment raised by the counter-claim was admitted by being demurred to by the plaintiff, and on the demurrer the Court was clearly of opinion that it sufficiently established the defendant's right on the facts stated and admitted, to have the deed set aside or reformed, the Common Law Division proceeded on the assumption that the deed was actually reformed, and thought it unnecessary to transfer the action to the Chancery Division.(*l*) Where the relief prayed for falls short of the precise subject reserved for the Chancery Division, a transfer has been refused, as an action to recover in the alternative, payments of an annuity in arrear, or a gross sum in lieu of it, or the investment of the latter sum in the name of trustees for the benefit of the plaintiff and her children, seeking the creation of a trust and not the execution of a trust.(*m*)

Where the action was for an occupation rent, brought in the Queen's Bench Division by a vendor against his purchaser, it was contended the claim should be made in the Chancery Division, but the Court did not yield to the contention.(*n*)

An action on a bill of exchange may, under certain

(*k*) Holloway *v.* York, 25 W. R. 403, 21 Sol. Jour. 360, A. C.

(*l*) Mostyn *v.* East Mostyn Coal and Iron Company, L. R. 1 C. P. D. 145, 24 W. R. 401.

(*m*) Anon. 20 Sol. Jour. 342, Denman, J.

(*n*) *Vide* Metropolitan Railway Company *v.* Defries, L. R. 2 Q. B. D. 378 A. C.

Option of Division and Transfers.

circumstances, be properly brought in the Chancery Division, for example, where the plaintiff seeks a declaration that the defendants were partners in a certain firm, and liable for its debts, and for all bills drawn by or in the name of the firm and praying the usual accounts.(*o*)

From Chancery to Common Law Division.

(225.) Where in a Chancery action for specific performance of an agreement entered into by an agent, the principal question raised was the authority of the agent, and the plaintiff might probably have a right to select his mode of trial by jury, and to have his claim for damages brought before it, yet it was so peculiarly within the jurisdiction of the Chancery Courts, that the judge declined to transfer it to a Common Law Division, stating that the claim for damages could be as well tried in Chancery as before a jury.(*p*)

Where the claim is of a nature common to both Chancery and Common Law, for example, to make a defendant answerable for untrue representations made to the plaintiff, the Chancery Division will probably consider that the right of choice given to the plaintiff ought not to be interfered with, though the relief sought is by way of damages.(*q*)

Where a suit had been instituted in the Court of Chancery to restrain an action at law, and an injunction was granted to the hearing, and after the passing of the Judicature Act, it being then unlawful to continue or perpetuate the injunction, the Chancery Division transferred the suit to the Common Law Division in which the action was pending.(*r*)

(*o*) See Pooley *v.* Driver, L. R. 5 Ch. D. 458, M. R.

(*p*) Pilley *v.* Baylis, L. R. 5 Ch. D. 241 V. C. M.

(*q*) See Cannot *v.* Morgan, L. R. 1 Ch. D. 1, 24 W. R. 91, where this view was taken.

(*r*) Edwards *v.* Noble, W. N. 1876, 81, 24 W. R. 390, V. C. B.

Option of Division and Transfers.

(226.) An action being brought for a purpose ancillary to a suit pending in another division, which that division may itself as properly entertain, the second action will probably be transferred, *ex. gr.*, an action for a receiver or administrator, or for an injunction against an administrator meddling with property pending, a suit for probate has been transferred to the Probate Division.(*s*)

To Probate Division.

Admiralty Division.

On similar grounds in England, in actions for damages occasioned by collision between two vessels, where one is at anchor, and the right turns simply on a question of negligence, the Court has refused to transfer the action from a Common Law Division to the Admiralty Division, although probably if it had involved a question of seamanship, especially on the high seas, it would have done so.(*t*)

Suit pending relating to same subject.

(227.) If there be a suit already pending in another division relating to the same subject-matter, and the parties are in privity with each other, this may form a ground for a transfer of the action, *ex. gr.*, an action for possession of land brought by a mortgagee in a Common Law Division, has been transferred to the Chancery Division, in which another action was pending, by the mortgagor for redemption of the same land.(*u*)

An action brought in the Exchequer Division for breach of an agreement, and for fraudulent misrepresentation in connexion with it, was transferred to the Chancery Division, in which an action for specific performance of the same agreement was pending, although some of the matters might be more fitting for a jury.(*v*)

(*s*) Barr *v.* Barr, 20 Sol. J. 272, Prob.

(*t*) See General Steam Navigation Company *v.* London and Edinburgh Shipping Company, W. N., 1876, 56, 20 Sol. J., 282, Archibald, J.

(*u*) Young *v.* King, 20 Sol. J., 218, Lindley, J.

(*v*) Holmes *v.* Harvey, 25 W. R., 60; W. N., 1876, 276, 21 Sol. Jour., 68.

Option of Division and Transfers.

However the pendency of another suit in a different division commenced by the defendant against a third person, although growing out of the same transaction, might not be considered a sufficient reason for transferring the plaintiff's action, as where the plaintiff, an auctioneer, sued a vendor for money paid to him, who again had instituted a suit against the purchaser for specific performance of the contract of sale in the Chancery Division, the auctioneer's claim not being mixed up with the question of title involved in the equity suit a transfer was refused.(*w*)

An action being brought in one division, apparently in violation of the order of another division, is a ground for transfer to the latter.(*x*)

The order of transfer.

(228.) The order for transfer may be made by any Judge of the High Court sitting at Chambers, and must not necessarily be made by a Judge of the division in which the action is attached.(*y*)

By the rules no transfer can be made from or to any division without the consent of the President of the division.(*z*)

Such an order has been made *ex parte*, leaving it to the other parties to have it discharged if desired.(*a*)

The transfer of an action for trial in another division was not considered equivalent to a transfer of the cause absolutely so as to warrant an application for a new trial being made in the latter division.(*b*)

(*w*) Anon., W. N., 1876, 55.

(*x*) Johnson *v.* Moffat, W. N., 1876, 21; 20 Sol. J., 240, Lindley, J.

(*y*) Hillman *v.* Mayhew, *ubi supra.*

(*z*) Ord. 51, English. See *infra* Part VI. for Irish.

(*a*) Field *v.* Field, W. N., 1877, 98 V. C. M.

(*b*) Anon., 20 Sol. J., 292.

PART IV.

CONCURRENT ADMINISTRATION OF LAW AND EQUITY.

(*Section* 27.)

Chapter XXI.—Equitable Claims and Replications, Subs. (1).

„ XXII.—Equitable Defences to Equitable Claims, Subs. (2).

„ XXIII.—Cross-Claims against Plaintiff, Subs. (3).

„ XXIV.—Cross-Claims against Co-defendant or third person, Subs. (3).

„ XXV.—Notice to bind third persons, Subs. (3).

„ XXVI.—Incidental Equities recognised, Subs. (4).

„ XXVII.—Equitable Defence in lieu of Injunction, Subs. (5).

„ XXVIII.—Stay of Proceedings, Subs. (5).

„ XXIX.—Legal Rights recognised, Subs. (6).

„ XXX.—Plenary Relief, Subs. (7).

CHAPTER XXI.

Equitable Claims and Replications.

Section 27, *Subsection* (1).

229. Concurrent Administration, what it means, p. 184.
230. Equitable Claims enforced, 184.
231. Equitable Replications, 186.

Concurrent Administration of Law and Equity.

(229.) The Judicature Act (*a*) enacts that in every civil cause or matter, commenced in the High Court of Justice, Law and Equity shall be administered both in the High Court of Justice and in the Court of Appeal, respectively, according to certain rules set out in seven subsections of section 27. These rules are manifestly not applicable to all actions and matters, as the marginal note, "Law and Equity to be concurrently administered," would seem to indicate, but are confined to those cases in which the combined or conflicting action of law and equity can be brought to bear on the same subject-matter.(*b*)

Equitable claims enforced. Subs. (1).

(230.) The first rule forming subsection (1), of section 27, is as follows:—"In any cause or matter commenced in the High Court of Justice, if any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief, upon any equitable ground, against any deed, instrument, or contract, or against any right, title, or claim whatsoever, asserted by any defendant or respondent in the cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said courts (*i.e.* the High Court of Justice and the Court of Appeal) respectively, and every judge thereof shall give to such plaintiff or petitioner, such and the same relief as ought to have been given by the Court of Chancery, in a suit or proceeding for the same or the like

(*a*) J. A., 1877, s. 27; J. A., 1873, s. 24. (*b*) See *ante* (15), p. 33.

purpose, properly instituted before the passing of this (Judicature) Act."(*c*) The exact scope intended by this provision is not very clear. It seems unnecessary, as regards the several classes of action specially assigned to the Chancery Division, and although every other division of the High Court is competent to entertain, and give relief in respect of, any claim which a plaintiff or petitioner may think proper to make, as being entitled to any equitable estate or right, or to be relieved upon some equitable ground, against any deed, or contract, or right, or title, which may be asserted by the person whom he brings into court as a defendant, it can hardly have been intended to propound, neither more nor less, that "the plaintiff may assert an equitable claim in any court," or "that the plaintiff may obtain an equitable remedy in any court,"(*d*) mere truisms in form of expression and theory, inasmuch as every division of the High Court, is a Court of Equity, but fallacies in practical reality, as any plaintiff would find to his cost, who sought by an original claim, in a Common Law Division, or in the Probate Division, to be relieved against a deed on the ground of fraud. The plaintiff may obtain, in the High Court of Justice, every form and kind of equitable relief which he might have had in a Court of Equity, in a suit properly instituted, but it would seem not to follow from this, that he can have the like relief in any or every division of the High Court, unless in a proceeding properly instituted, according to the Statutory and Curial Rules regulating its procedure, and in this sense and with this limitation, it seems little more than an emphatic repetition of so much of section 21 as enacts that the High Court of Justice

Concurrent Administration of Law and Equity.

(*c*) J. A., 1877, s. 27, subs. 1; J. A., 1873, s. 24.

(*d*) See Wilson's Judicature Acts, p. 58, where the corresponding provision in England is so expounded.

Concurrent Administration of Law and Equity.

shall have vested in it all the jurisdiction which was vested in or capable of being exercised by the High Court of Chancery, as a Court of Equity.

Equitable Replications.

(231.) It may also be intended to convey, that a plaintiff or petitioner shall have the full benefit, by way of equitable replication, of any relief against a deed or title asserted by a defendant *in his defence.*

Under the C. L. Pro. Act (Ireland), 1856, sec. 87, a plaintiff could (but only by the permission of the Court or a Judge) reply in answer to the pleading of the opposite party, facts which avoided the pleading on equitable grounds. The same relief may now, it would seem, be had under the terms of this subsection (1). Thus, if a defendant relies on a deed of release, the plaintiff may, by replication, insist that he, the plaintiff, was induced to execute the deed by the fraudulent representation of the defendant, (*e*) or if the defendant relies on an equitable defence, the plaintiff may show, by his replication, that he has an earlier and a better equity,(*f*) or that he was a purchaser for value, without notice of the defendant's title.(*g*) But a plaintiff cannot, in his replication, shift his claim from a legal ground to an equitable one, as for example, where by his action he claimed a personal debt, founded on a guarantee given by a married woman, to which she pleaded her coverture, the plaintiff was not allowed to shift his ground in his replication, and insist upon relief upon equitable grounds, and to attach the debt on her separate estate; but in a case of this nature the writ would probably be amended in the indorsement of claim.(*h*)

(*e*) Hirschfeld *v.* London and Brighton Railway Company, L. R., 2 Q. B. D. 1.

(*f*) See Sloper *v.* Cottrell, 6 El. & Bl., 497.

(*g*) See Ferguson's Com. Law Pro. Acts, 2nd Edition, p. 381.

(*h*) Anon. 20 Sol. J., 242, Lindley J.

CHAPTER XXII.

Equitable Defences to Equitable Claims.

Section 27, *Subsection* (2).

232. Equitable Defences to Equitable Claims, p. 187.
233. Limited to Equitable Claims, 187.
234. Cross-Claim dispensed with, 189.

Equitable Defences to Equitable Claims.

Subs. (2).

(232.) Section 27, subsection (2) enacts as follows:—

"If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground, against any deed, instrument or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in the cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts, respectively (*i.e.*, the High Court and Court of Appeal) and every Judge thereof, shall give to every equitable estate, right, or ground of relief, so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given, if the same or the like matters had been relied on by way of defence in *any suit or proceeding instituted in that Court* for the same or the like purpose before the passing of this (Judicature) Act."(*a*)

Limited to equitable claims.

(233.) The object of the provision in this subsection (2) would seem, from its concluding words, to be confined to declaring the mode in which the High Court is to exercise its jurisdiction as to defences to equitable claims asserted by any plaintiff,

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(*a*) J. A., 1877, s. 27, subs. (2); J. A., 1873, s. 24.

Equitable Defences to Equitable Claim.

and that the defendant is to be allowed the same benefit as he might have had in the Court of Chancery if the same claim had been made in any suit or proceeding instituted in the Court of Chancery." Equitable defences to legal claims would seem to come more properly within the provisions of subsection (5).

In a recent case, (*b*) an action being brought by owners of a ship for negligence in performing a contract of towage, alleging that the defendant's servant and agent, the master of the tug-vessel, had refused to obey the orders of the pilot, and otherwise neglected to exercise due and proper care in managing the tug, whereby the plaintiffs' vessel incurred damage, a defence was sustained on demurrer, not denying that defendants' agents and servants had not used due diligence, but claiming the benefit of the provision of the Merchant Shipping Act, 1862, s. 54, to limit the amount of the defendant's liability to £8 per ton on the tonnage of the vessel, a relief which, before the Judicature Act, might be enforced in equity by injunction.(*c*) It was assumed that this class of defence was opened by subsection (2) of the J. A., 1873, sec. 24 ; and that the proper, and, in fact, only possible way of claiming such a defence, was to plead it in the statement of defence; but, semble, does not this defence more properly belong to subsection (5) *infra*, as an equitable defence to a legal claim ?

Cross-claims dispensed with.

(234.) This subsection (2), as interpreted by Vice-Chancellor Bacon, would seem to dispense with the necessity of an independent counter-claim in the nature of a cross-bill.

(*b*) Wahlberg *v.* Young, 24 W. R., 847, C. P. D., per Coleridge, L. C. J. at pp. 847-8.

(*c*) See London and South-western Railway Company *v.* James, L. R. 8 Ch. 241, A. C.

Equitable Defences to Equitable Claims.

Thus in a suit (*d*) by a mortgagee in possession seeking to foreclose the mortgage, and praying for an account of what was due on foot of the mortgage deeds, but insisting on certain stipulations in the mortgage deed in favour of the mortgagee, purporting to entitle him to charge commission and discount, and for costs and charges as a solicitor, and binding the defendant (the mortgagor) to certain settled accounts. The defendant, by his answer, alleged that the accounts were signed without examination, and under pressure, and contained errors—a defence which, probably, under the former system, should have been made by cross-bill (*e*) and which it was insisted should still be raised by cross-bill, or counter-claim; yet, the Vice-Chancellor (Bacon) said: "Nothing can be more comprehensive, universal, and plain than the Act, section 24, (*f*) subs. (2), and so long as such a defence is raised upon the record, it was the duty of the Court to deal with it, just as much as if a cross-bill had been filed, and the defendants were entitled to have the accounts opened without filing a counter-claim."

(*d*) Eyre *v.* Hughes, L. R. 2 Ch. D. 148; 24 W. R., 597; W. N., 1876, 80, V. C. B.

(*e*) See Richards *v.* Bayly, 1 Jo. & Lat. 120; Keyland *v.* Corporation of Belfast, 2 Ir. Jur. N. S. 180, M. R.; *sed contra*, S. C *per* L. C. p. 189; M'Namara *v.* Arthur, 2 Ball & B. 349.

(*f*) Corresponding to our Section 27.

CHAPTER XXIII.

Cross Relief by way of Set-off and Counter-claim.

Section 27, *Subsection* (3).

235. Relief by Set-off and Counter-claim, p. 190.
236. Set-off by Common Law and Statute, 190.
237. Set-off in Equity, 191.
238. Debts in same right, 191.
239. Set-off in Bankruptcy, 192.
240. Under the Judicature Act, 192.
241. One trial and judgment, 195.
242. Examples of Cross-Claims, 195.
243. Must not be incongruous, 196.
244. How far confined to same transaction, 198.

Relief by Set-off and Counter-claim

(235.) Subsection (3) enables a defendant to assert by way of counter-claim against the plaintiff, any claim, legal or equitable, which he might have raised by a cross-suit or independent action, either at law or in equity. It enacts as follows:—

Subsection (3)—"The said Courts (*i.e.*, High Court and Court of Appeal) respectively, and every judge thereof, shall also have power to grant to any defendant, in respect of any equitable estate or right or other matter of equity; and also in respect of any legal estate, right or title, claimed or asserted by him, all such relief against any plaintiff, or petitioner, as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any judge thereof, might have granted, in any suit instituted for that purpose, by the same defendant against the same plaintiff or petitioner, &c., &c."(*a*)

The rest of the subsection(*b*) relates to claims against third persons(*b*)

Set-off by the common law and statute.

(236) The principle of set-off by way of allowance of credits against debits in a connected account,

(*a*) J. A., 1873, s. 24; J. A., 1877, s. 27, subs. 3, part of.

(*b*) See *infra*, chapter xxiv.

and arising in the same transaction was admitted at Common Law as well as in Equity. *Set-off and Counter-claim.*

The statutes of set-off (consolidated by the Common Law Procedure Act, 1853(*c*) made mutual debts of a liquidated nature, and arising in the same right, and whether in the same or in different transactions capable of being relied on by way of set-off, provided the defendant's claim was of equal or greater amount than that of the plaintiff.(*d*)

(237.) The mere existence of cross demands which, had they been both legal demands, might have been the subject of set-off at law, was not sufficient to entitle either party to come into equity and ask for its interposition by way of set-off; but the jurisdiction of Equity must have been first attached on some other ground independently of the question of set-off.(*e*) Thus the assignee of a legal chose in action could not, by coming into a Court of Equity, get the benefit of a set-off which was not available to him at law.(*f*) Set-off in equity.

(238) Debts due in different rights could not be set-off either at common law or under the statutes. Debts in same right.

Equity, following the analogy of the Roman Law, likewise did not permit demands existing in different rights to be set-off one against the other, except under special circumstances, from which an agreement express or implied could be raised between the parties, making it inequitable for the plaintiff to enforce his demand without giving credit for the other.(*g*)

Thus it was refused in Equity where the plain-

(*c*) 16 & 17 Vic., c. 113, s. 40.

(*d*) See Ferg, C. L. Pro. Acts, 2 Edn. p. 61.

(*e*) Clarke *v.* Cost, 2 Cr. & Ph. 154; Rawson *v.* Samuel, Cr. & Ph. 178.

(*f*) Middleton *v.* Pollock, L. R., 20 Eq. at p. 36, *per* M. R.

(*g*) Rawson *v.* Samuel, *ubi supra*, *per* Lord Cottenham, see Freeman *v.* Lomax, 9 Hare, *per* V. C. Turner at p. 114; Middleton *v.* Pollock, L. R., 20 Eq. 29 M. R.

Set-off and Counter-claim.

tiff's claim was in *autre droit*, as executor, and the set-off sought was in respect of a private debt due from the executor to the defendant, the allowance of which might alter the amount or distribution of the assets of the deceased party; but in the converse case where the plaintiff sued for his share of the residue of his father's estate in the hands of the defendant, as administrator, the defendant was allowed to set off a personal debt due from the plaintiff in his own right, because this could occasion no disturbance in the administration of the assets.(*h*)

In Bankruptcy.

(239). The Bankruptcy Act in England(*i*) gave a more extensive right of set-off, extending it to "mutual debts or other mutual dealings."(*j*) The Bankruptcy Act, Ireland, 1867,(*k*) extended the right of set-off to "mutual credits or mutual debts."

Under the Judicature Act and Rules.

(240.) Number 22 of the Statutory Rules appended to this Act by way of Schedule, interprets the scope and meaning of this part of the subsection (3.) It provides that, "A defendant in an action, may set off or set up, by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claims in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claims. But the Court or Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of

(*h*) Taylor *v.* Taylor, L. R. 20 Eq. 155 M. R.

(*i*) S. 39.

(*j*) See *Ex parte* Price L. R. 10 Ch. 648, L.JJ., as to what are mutual dealings.

(*k*) S. 251.

in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."(*j*)

Set-off and counter-claim.

The Judicature Act has thus conferred on a defendant, in the way of set-off or counterclaim, advantages vastly transcending anything which he possessed before, either at law or in equity, or even in bankruptcy; it enables him to have the benefit of set-off for amounts either greater or less than the plaintiff demands, and for unliquidated damages as well as for ascertained debts. Even a liability to costs under a judge's order may be the subject of a set-off.(*k*) It may be made available in an action of trover or trespass, as well as in any other action,(*l*) and probably one set of unliquidated damages may be set off against another of the same nature. "It was" (as stated by Mr. Justice Quain) "the scandal of our past procedure, that A might have a liquidated claim against B, and B a claim for damages against A, and yet B could not set up his counterclaim in an action by A, but must bring a fresh action."(*m*) But the plaintiff might be resident abroad, and there might be difficulty in serving him with the writ in the cross action, or the plaintiff's demand might be indisputable, and he might have judgment and the fruits of it long before the defendant could recover his cross demand.

Again, the plaintiff's action might be for goods sold and delivered, and the only answer to it might be that the plaintiff had been guilty of fraudulent misrepresentation as to the nature of the goods, which might fail him, by way of defence, if it happened that he had accepted and kept the goods,

(*j*) Rule 22 in Schedule, Ord. 19 R. 3, J. A. 1875.
(*k*) See Philpott *v.* Lehain, 20 Sol. Jour. 605 C. P. D.
(*l*) See Seligman *v.* Hutt, W. N. 1875, 249; 20 Sol. Jour. 139.
(*m*) Cappelaus *v.* Brown, W. N. 1875, 231; 20 Sol. Jour. 98.

Set-off and counter-claim.

or made part payment, without prompt repudiation, and in that case he had no defence to the action, although he might, by way of cross action, recover the damages he was entitled to. The statute relieves the defendant from all difficulty, by enabling him to add a counterclaim for damages, in addition to his defence of fraud.(*n*)

So, where an action was brought against an insurance company claiming damages for breach of a contract to execute and deliver a policy of assurance to the Plaintiff, after the company accepting payment of a premium, which they had tendered back on discovery of material circumstances, which they alleged were fraudulently concealed from their knowledge, and the plaintiff having refused to accept the tender, this might probably furnish no defence to the action, and the company were without remedy, except that of filing a bill in Chancery,(*o*) but now the statute enables the defendant to resist the action by a counterclaim to have the agreement set aside on the ground of fraud.

Of course a cross demand on which no action could be maintained, cannot be relied on by way of set-off, *ex. gr.* a debt contracted by an infant, and not ratified in writing (this was before the Act 37 & 38 Vic. c. 62, s. 2),(*p*) or a demand, the enforcement of which by action would be restrained, *ex. gr.* after an order made for the administration of the estate of a deceased person.(*q*)

The counterclaim may sound in damages,(*r*) but

(*n*) See Evans *v.* Gann, W. N., 1875, 199, Lush, J.

(*o*) See Hancock *v.* Macnamara, Ir. Rep. 2, Eq. 486; Deposit Life Assurance Company *v.* Ayscough, 6 El. & Bl., 764.

(*p*) Rawley *v.* Rawley, L. R. 1, Q. B. D. 460; 24 W. R. 995.

(*q*) Newell *v.* National Provincial Bank, L. R. 1, C. P. D., 496; 24 W. R., 458; see Seligman *v.* Hutt, W. N. 1875, 249, 20 Sol. Jour. 139; a case of administration of an estate in Bankruptcy.

(*r*) Manchester and Sheffield Railway Company *v.* Brooks, L. R. 2, Ex. D. 243; 25 W. R. 413.

limited to date when writ issued.(*rr*) Where two or more plaintiffs sue for a joint claim, the defendant is at liberty to set up one or more counterclaims against each plaintiff.(*s*) *Set-off and counter-claim.*

(241.) One of the objects of the subsection 3 is to avoid multiplicity of suits, so that there may be but one action in relation to the same subject-matter. Two actions are converted into one, the claim and the counterclaim being tried simultaneously,(*t*) and the Court is enabled to give the defendant specific relief in regard to his cross claim,(*u*) and to pronounce a final judgment in the one action, both on the original and cross claim.(*v*) If the case be one of pecuniary demands, and the balance prove to be in favour of the defendant, the Court may give judgment for the defendant in respect of such balance, or may otherwise adjudge to him such relief as he may be entitled to upon the merits of the case,(*w*) and on the other hand, if the amount of the counterclaim be less than the plaintiff's demand, the Court will give him credit for it, *pro tanto*, whereas heretofore he was allowed no credit whatever.(*x*) If the plaintiff's claim be reduced by the counterclaim, he recovers only the balance, and the question of costs, under the County Courts Acts, must be decided with reference to that balance.(*y*) One trial and judgment.

(242.) As examples of cases in which cross claims have been allowed, the following may be mentioned. Examples of cross claims.

(*rr*) Original Hartlepool Company *v.* Gibb, L. R. 5 Chan. D. 713, A. C.

(*s*) Manchester Railway Company *v.* Brooks, *ubi supra*.

(*t*) See Norton and Cannock Coal Company *v.* Merriman, W. N. 1875, 219.

(*u*) See Ord. xix, R. 3, English.

(*v*) See Rule 22 of Schedule.

(*w*) See Ord. xxii, R. 10, English, and Rolfe *v.* M'Claren, L. R. 3 Ch. D. 106, 24 W. R. 816.

(*x*) Mostyn *v.* The West Mostyn Coal and Iron Company, L. R. 1, C. P. D. 145; 24 W. R. 401.

(*y*) Staples *v.* Young, L. R. 2, Ex. D. 324, 25 W. R. 304.

Set-off and counter-claim.

Action for rent on a lease, counterclaim for breach of covenant in the lease,(*z*) action for price of shares, counterclaim for fraudulent misrepresentation of value of shares,(*a*) action for price of iron sold and delivered, counterclaim for breach of warranty of quality of the iron, and for damages accrued by defendant's sale of the same iron to third parties, and being obliged to allow certain deductions owing to its inferior quality,(*b*) action for price of goods, consisting of machinery, counterclaim for damages, owing to bad packing of same,(*c*) petition of right against the Crown, for money due as a reward for improvements in artillery invented by plaintiff, counterclaim for expenses occasioned in connexion with same.(*d*)

Counter-claim must not be incongruous.

(243.) The defendant seems to be "entitled to set up any counterclaim that is not so incongruous as to be incapable of being conveniently tried with the original claim."(*e*) Thus, in an action to recover balance of purchase-money on sale of a public house, a counterclaim was allowed, seeking to recover back the deposit paid, on the ground that the sale was induced by false representations of the value of the business made to the defendant, it being considered that both claims might be very conveniently tried together.(*f*) But the Court has a large discretion to disallow a counterclaim where it thinks it ought not to be combined with the original claim, and it certainly would embarrass both the plaintiff and the judge and jury, to consider two claims altogether incongruous in their nature, as for example,

(*z*) Atkinson *v.* Ellison, W. N. 1875, 199.

(*a*) Anon. 20 Sol. Jour. 81.

(*b*) Anon. 20 Sol. Jour. 81, Lush, J.

(*c*) Anon. W. N. 1875, 218.

(*d*) Thomas *v.* The Queen, W. N. 1875, 218.

(*e*) Bartholomew *v.* Rawlings, W. N. 1876, 56; 20 Sol. Jour. 281, *per* Archibald, J.

(*f*) *Ib.*

Set-off and counter-claim.

where in an action for assault and battery of the plaintiff, the defendant attempted to set up a counterclaim against the plaintiff for his seduction of the defendant's daughter.(*g*) So in an action for assault and battery and defamation, a counterclaim for breach of an agreement to repair the premises in regard to which the dispute arose, was considered not sufficiently connected with the plaintiff's cause of action.(*h*) Where, in an action for rent, the defendant pleaded a set-off for price of butchers' meat, and a counterclaim for specific performance of an agreement for lease of the premises, and sought damages for non-performance, the Judge deemed the counterclaim not sufficiently embarrassing to be struck out, and is reported to have said, that to do so would be against the spirit of the Act, to have two proceedings where everything could be decided in one, and that it was not even a case for transfer to the Chancery Division.(*i*) Again, in an action on a bill of exchange, defence that the bill was held by plaintiff as a trustee for A B, a counterclaim was allowed to the effect that A B and the defendant were jointly engaged in one employment, and agreed that their earnings should be jointly divided, and that A B had fraudulently refused to account for his share of the receipts A B, being made a party to the counterclaim.(*j*) On the other hand, where the action was for libel published by a shareholder in a public company on one of its directors, charging the plaintiff with being guilty of conspiracy and fraud, a counterclaim for losses sustained in respect of shares bought

(*g*) See Cappelaus *v.* Brown, W. N., 1875, 231; 20 Sol. Jour. 98, Quain, J.

(*h*) Lee *v.* Colyer, W. N., 1876, 8; 20 Sol. Jour. 177, Quain, J.

(*i*) Alwood *v.* Miller, or Milman, W. N., 1876, 11; 20 Sol. Jour. 218, Lindley, J.

(*j*) Macdonald *v.* Bode, W. N., 1876, 23; 20 Sol. Jour. 241, Lindley, J.

Set-off and counter-claim.

on false representations, involving not only the plaintiff, but the other directors of the company not named, was disallowed, being long and embarrassing, and so the more likely to prejudice the plaintiff in the trial of his action, and rendering it difficult to keep the jury from mixing up the two cases. But the order of refusal was made not only without prejudice to any action the defendant might bring, but on the terms that the plaintiff in the original action should not issue execution on any judgment he might recover without leave of the Court.(*k*) Where a trustee brought an action against his *cestui que* trust, seeking to be indemnified in respect of a sum of money, which the plaintiff had been compelled to pay by reason of an innocent breach of trust, induced by the joint and several covenant of the defendant and the defendant's father to indemnify the plaintiff, the defendant pleaded by way of counterclaim, that the covenant had been obtained by duress and fraud of his father—that plaintiff and one E. S. (made a party) were executors of his father, and had assets sufficient to satisfy the breach of covenant, the Court excluded the counterclaim, as it required in default of an admission of assets, an administration of the estate of the father, and the original action ought not to be stayed for the purpose, and as being also so separated from the original claim as that to allow it would be doing the plaintiff an injustice.(*l*)

Counter-claim: how far confined to same transaction

(244.) The examples of counterclaims given in the forms 10, 14, 24 of the Appendix C to the Judicature Act, 1875 (*m*) are such as had grown out of the same transactions which gave rise to the

(*k*) Nicholson *v.* Jackson, W. N., 1876, 38, 20 Sol. Jour. 259, Lindley, J.

(*l*) Padwick *v.* Scott, L. R. 2, Ch. D., 736; 24 W. R. 723 V. C. H.

(*m*) *Vide infra*, Appendix, Part 2.

plaintiff's claim. Some of the Judges in England, however, seem to have considered that it need not, in any way, relate to, or be connected with, the original claim of the plaintiff. For example—that to an action for the price of timber sold and delivered, a counterclaim might be maintained for damages in respect of an insufficient delivery of timber in respect of other cargoes, and on an earlier contract.(*n*)

Set-off and counter-claim.

CHAPTER XXIV.

Cross Relief against Co-defendants and Third Persons.

Section 27. *Subsection* (3.)

245. Cross relief against co-defendant and third person, p. 199.
246. Must relate to original subject of the suit, 200.
247. Must include relief against the Plaintiff, 202.
248. Other Collateral relief between co-defendants, 203.
249. By way of interpleader, 204.
250. Not for third person, 204.

(245.) Under the latter clause of Subsection (3) of section 27(*a*) the High Court of Justice and the Court of Appeal have power to grant to any defendant in respect of any equitable estate or right or other matter in Equity, and also in respect of any legal estate, right or title claimed or asserted by him, not alone against the plaintiff, but "also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed (*i.e.* properly claimed in his pleading) against any other person whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court, as might properly have been granted

Cross relief against co-defendant and third persons.

(*n*) Cappelaus *v.* Brown, W. N., 1875, 231; 20 Sol. Jour. 98, Quain, J.
(*a*) J. A., 1877, s. 27, sub. 3; J. A., 1873, s. 24.

Cross relief against other persons.

against such person, if he had been made a defendant to a cause instituted by the same defendant for the same purpose; and every person served with any such notice, shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim, as if he had been duly served in the ordinary way by such defendant."

Should relate to original subject of the suit.

(246.) A counterclaim must of necessity relate to or be connected with the original subject of the cause or matter; therefore whether the counterclaim includes a co-defendant or a third person it should be confined strictly to the same specific property and transaction which is the subject-matter of the original action,(*b*) and where it is of such a nature that it would in the opinion of the Court bring in a new subject-matter, which could be better dealt with in a separate action, or if the allowing of it would unfairly prejudice or delay the plaintiff, it will be refused. Thus in a suit for specific performance of a contract for sale of land entered into by the defendant and the plaintiff, where the defendant was only the equitable owner of the property, the legal estate being outstanding in a trustee who (as alleged) improperly refused to concur, and thereby prevented the defendant from fulfilling his contract, in respect of which wrongful refusal the defendant sought indemnity from him, the Court refused to allow a counterclaim to that effect to be filed, but gave liberty to serve the trustee with a notice to bind him under the English Order xvi, R. 18.(*c*) But where the counterclaim set up a case not only closely connected with the original cause of action, but raising a question in which the

(*b*) Harris *v.* Gamble, W. N., 1877, 142, V. C. H.

(*c*) Treleavan *v.* Bray, L. R., 1 Ch. D. 176; 24 W. R. 198; 20 Sol. Jour. 112.

Cross claims against third persons.

plaintiff was materially interested, and had implicated himself by his conduct or consent, and was necessary to enable the Court to decide the plaintiff's contention, and to give the proper relief, the Court refused to set it aside; as where it alleged that the plaintiff, a second mortgagee, was not entitled to the relief he sought against the defendant, a first mortgagee of the same property, seeking an account of what was due to defendant, and a redemption of the property, because the defendant had entered into an agreement to sell the property to a third person, under a power of sale in his mortgage, and that plaintiff had also agreed to concur in the sale and was a necessary party to the conveyance, but had refused to execute it. Thus the matter as between the plaintiff, defendant, and purchaser was at a dead lock until the question was decided whether the plaintiff should or not be ordered to concur, and therefore the defendant was entitled to have the purchaser brought before the Court in a crossclaim for specific performance of the contract of sale, and the whole might be determined in one and the same action.(*d*) So where an action was brought to recover balance of purchase-money on a sale of a public house, in addition to a defence on the ground of fraud, a counterclaim was allowed by the defendant as purchaser, against the plaintiff and a third person, his broker and agent, to recover back the deposit already paid on the sale, on the ground of false representation as to the value of the business made by the plaintiff through his agent.(*e*)

As regards set-off, where a direct relation is alleged to subsist between the plaintiff and a third

(*d*) Deer *v.* Sworder, L. R. 4, Ch. D. 476; 25 W. R. 124 V. C. H.

(*e*) See Bartholomew *v.* Rawlings, W. N. 1876. 56; 20 Sol. Jour. 281, reported manifestly by same hand in both publications and inaccurate in each as to names.

Cross relief against other persons.

person, *ex. gr.*, a trustee and *cestui que* trust, it is competent for the defendant, when sued by the trustee for that third person, under the wide powers conferred by this subsection, to make the *cestui que* trustee a defendant, and, by counterclaim against him and the plaintiff, have the benefit of any set-off which would have been available if the real plaintiff had sued.(*f*)

Must include relief against the plaintiff.

(247.) V. C. Hall is represented to have held, that where a defendant seeks to raise a question as between himself and his co-defendants, to be followed by direct relief in the same action, he may do this by way of counterclaim as against the defendant alone, without making the plaintiff a party to it.(*g*) What was sought in that case was, to raise questions of priority and marshalling as between two sub-mortgagees of a first mortgagee in a foreclosure suit brought by a second mortgagee against mortgagor, first mortgagee and his sub-mortgagee, delivering a copy of the defence and counterclaim to his co-defendant alone. The Vice-Chancellor considered this was the proper course, and not by way of notice under Ord. xvi. R. 17, 18. But this has been questioned and disputed by Sir George Jessel,(*h*) and since repudiated by V. C. Hall himself,(*i*) and it is now quite settled in England that a counterclaim which does not seek relief against the plaintiff but against a co-defendant alone(*j*) or against a third person

(*f*) Macdonald *v.* Bode, W. N. 1876, 23; 20 Sol. Jour. 241, per Lindley, J. See Bottomley *v.* Brooke, cited 1 T. R. 623, as to set-off at law of a debt due to the defendant by the plaintiff and his c. q. t.

(*g*) Shepherd *v.* Deane, L. R. 2, Ch. D. 223; 24 W. R. 363; W. N., 1876, 96; 20 Sol. Jour. 332 V. C. H.

(*h*) Furness *v.* Booth, L. R. 4, Ch. D. 586; 25 W. R. 267, M. R.

(*i*) Harris *v.* Gamble, W. N., 1877, 142 V. C. H.

(*j*) Warner *v.* Twining, 24 W. R., 536 M. R. Furness *v.* Booth, *ubi supra.*

alone *ex. gr.*, for indemnity, cannot be allowed.(*k*) As expressed by Lord Justice Mellish, a counter-claim against a third person, between whom and the plaintiff there is no privity or relation, would be an absurdity, and it would be intolerable that the plaintiff, who might have a perfectly good case against the original defendant, should be kept waiting for his remedy while the defendants were fighting *inter se*.(*l*)

Cross relief against other persons.

(248.) However, it is scarcely to be assumed that the High Court is now precluded from giving collateral relief as between co-defendants, and in the same suit, although in a form and manner not accurately expressed by the term counterclaim, which means *ex vi termini*, a claim counter or in opposition to the claim of the plaintiff, or that this form of relief is not open because it is not a counterclaim against the plaintiff. For example, in a suit against trustees of a marriage settlement, charging them with a breach of trust in lending the trust fund on the personal security of the husband, and making the husband, who was tenant for life of the fund, a party defendant, the breach of trust having been committed at his instance and for his benefit, the Court of Chancery has, without any claim being specifically made or prayed by the plaintiff or by the trustees further than by the latter making the case by their answer, decreed and ordered the defendant the *cestui que* trust for life to recoup the trustees.(*m*) In a later case following the authority of this(*n*) a like decree was made in favour of the trustees and it does not appear whether the case was specific-

Collateral relief between co-defendants.

(*k*) Harris *v.* Gamble, *ubi supra;* Treleavan *v.* Bray, 24 W. R. 198 A. C., per Mellish, L. J.

(*l*) Treleavan *v.* Bray, 20 Sol. Jour. 112; A. C. S. C. in L. R. 1, Ch. D. 176, and 24 W. R. 198, but observation of the Lord Justice is not mentioned.

(*m*) Raby *v.* Ridehalgh, 7 De Gex, M. & G. 109.

(*n*) Keays *v.* Lane, Ir. Rep. 3, Eq. 1, Brewster, L. C.

Cross relief against other persons.

ally raised by the trustees in their affidavits by way of answer; but the Lord Chancellor (Brewster) said, the tenant for life was a necessary party to the suit in order that full justice might be done in it, and relief might be given against him in that suit without hardship or surprise and without a cross bill.

There is another class of cases in which the Court of Chancery was in the habit of deciding questions between co-defendants, *i.e.*, where the decision was requisite to work out the equity to which the plaintiff was entitled, *ex. gr.*, a question as between the devisees and heirs-at-law of a testator.(*o*)

By way of interpleader.

(249.) In one case the Court refused, at least in the absence of the plaintiff, to strike out a counterclaim by a defendant against the co-defendant and plaintiff, which sought to raise a question in the nature of an interpleader, the plaintiff and co-defendant both claiming the same fund from the defendant who counterclaimed, and V. C. Hall is reported to say, the section must not be narrowed down so as to exclude a form of pleading which the plaintiff might think a convenient mode of settling the question and ascertaining the rights of the parties once for all.(*p*)

No counterclaim by a third person.

(250.) It would seem that a third person, made a defendant by way of counterclaim, is not at liberty to introduce a fourth person, nor can he make a counterclaim against the defendant who brought him before the Court by way of counterclaim, on the ground that this would make the record in such a state that it would be untriable.(*q*)

(*o*) See Keogh *v.* Keogh, Ir. Rep. 8 Eq. 201, per M. R. (Sullivan), affirmed in Court of Appeal, *ib.* p. 149; Green *v.* Pledger, 3 Hare, 165.

(*p*) Young *v.* Brassey, 21 Sol. Jour., 48 V.C.H.; and see also Jebbs *v.* Lewis, 20 Sol. Jour. 56, *infra* (254) p. 209.

(*q*) Street *v.* Gorer, W.N., 1877, 145; 24 W.R., 750, Q. B. D.; See Harris *v.* Gamble, W.N., 1877, 142 V.C.H., where the counterclaim was against a co-defendant including other property.

CHAPTER XXV.

Binding Third Persons in a future Action.

Section 27. *Subsection* (3.)

251. Notice of future claim, p. 205.
252. Examples of notices to bind, 205.
253. No direct relief given, 207.
254. By way of interpleader, 209.
255. Notice by a third person, 210.
256. Leave to serve refused, 211.

Notice of future claim.

(251.) The section 27, subsection (3), as interpreted by the Rules of Court, made in pursuance of its intention,(*a*) provides that where a defendant is or claims to be entitled to contribution, indemnity, or other relief, over against any other person (*i.e.*, than the plaintiff), or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or as between any or either of them, the Court or Judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.(*b*) Before, or at the time of making such an order, the Court or Judge may direct such notice to be given by the plaintiff, and at such time, and to such person, and in such manner as may be thought proper; and if made at the trial the Judge may postpone the trial as he thinks fit.(*c*)

Examples of notices to bind.

(252.) The examples given in the Schedule B, Form 1, point to the following cases :—A defendant sued as surety claims to be entitled to contribution from a co-surety. A defendant sued as acceptor of a bill of exchange claims indemnity from the drawer

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(*a*) Ord. xvi. RR. 17, 18, 19, E. (*b*) Ord. xvi. R. 17, E.
(*c*) Ord. xvi. R. 19, E.

Binding third persons by Notice.

for whose accommodation the bill has been drawn.(*d*) A defendant sued, as being an agent, claims indemnity from his principal.(*e*) But it is open to a defendant sued for breach of a contract to provide goods of a certain quality, to notice the person from whom he bought a portion of the same goods under a similar contract, one of the questions being identical though not being the single question in the case. (*f*) It is not necessary that the whole cause of action between the plaintiff and the defendant should be identical with that between the defendant and the third person, but there must be, *prima facie*, a material question in the case which, without prejudicing or delaying the plaintiff, can be advantageously tried and decided as between the defendant and the third person, as well as between the plaintiff and the defendant;(*g*) and where the action was by the owner of a ship against the owner of the cargo for demurrage, and the defendant claimed indemnity from the buyer of the cargo as being the cause of the delay in not unloading with proper despatch, the Court of Appeal (overruling the decision of the Queen's Bench Division) held that the question of delay as between the defendant and the purchaser was the same as that between the plaintiff and the defendant, although the measure of the liability might be very different.(*h*) In one case a defendant sued by a builder for extra work

(*d*) See *In re* Pearson *v.* Lane, W. N. 1875, 248; 20 Sol. Jour. 122, Quain, J., National Provincial Bank of England *v.* Bradley Bridge Co., W.N. 1876, 63; 20 Sol. Jour. 297, a case of partial failure of consideration.

(*e*) See Seligman *v.* Mansfield and White *v.* Mansfield, W. N. 1875, 240; 20 Sol. Jour. 121, Quain, J.

(*f*) Benecke *v.* Frost, L.R. 1, Q. B. D. 419, 24 W. R. 669.

(*g*) *Ib.*

(*h*) Swansea Shipping Company *v.* Duncan, L.R. 1, Q. B. D. 644, 25 W. R. 233; see also Bower *v.* Hartley, L.R. 1, Q. B. D. 652; 24 W.R. 941; 20 Sol. Jour. 743, A.C.

beyond the contract, was allowed to serve notice of indemnity on his architect, on the ground that the latter had ordered the extras without the defendant's authority.(*i*) In another case in equity seeking an injunction against a defendant and five of his tenants permitting sewage from their houses to flow into plaintiff's watercourse, the defendant, a tenant, delivered a counterclaim against the principal defendant on his covenant for quiet enjoyment, and for indemnity against any damages and costs he might be ordered to pay the plaintiff, and the Court held this was not a case for a counterclaim, but for a notice to bind the co-defendant under Ord. 16, R. 17, English.(*j*)

Binding third persons by Notice.

(253.) The language of the subsection (3), is very comprehensive enabling the Court to grant to a defendant in the action, all such relief relating to or connected with the original subject of the cause or matter as might be claimed against his co-defendant, or against any other person duly served with notice in writing of the claim, pursuant to any Rule of Court, as might properly have been granted against the third person, in a suit duly instituted by the defendant for the purpose. It would seem to indicate that the Legislature intended a much more extensive application of this collateral or secondary relief to defendants, than the cases above referred to have carried out; but in making the Rules of Court in England, the Judges (as stated by the late Lord Justice Mellish, who was one of the Committee of Judges who settled the Rules), having very carefully considered the meaning of this provision, came to the conclusion that although there

No direct relief given.

(*i*) Dawes *v.* Thornton, W. N. 1876, 74, 20 Sol. Jour. 299, Archibald, J.; and see Measurer *v.* Thomas, W. N. 1875, 293; 20 Sol. Jour. 55.

(*j*) Furness *v.* Booth, L. R. 4 Ch. D. 586; 25 W.R. 267, M.R.

Binding third persons by Notice.

was power so to do, it would not be advisable to make any rule which would enable one defendant to obtain relief against another, unless in the class of cases in which the plaintiff was directly interested or involved in the relief so given. Accordingly the English, and doubtless the Irish, Rules of Court respecting notice to a co-defendant or a third party, are restricted to the object of making the decision in the particular action between the plaintiff and defendant, binding on third parties conclusively in any future proceeding, and are scarcely available beyond the simple cases of suretyship or agency. There used to be cases in which an action having been brought against a surety on a bond, and the sum being recovered, the surety brought his action against the principal, and the whole question had to be tried afresh.(*k*) It was to prevent this monstrous injustice to defendants of having to litigate the same matters twice over as between different parties,(*l*) and to obviate the scandal of having it differently decided by different juries, this enactment was passed,(*m*) to estop the third party bound to indemnify the defendant from disputing the amount which the defendant may be held liable to pay.(*n*) It also enables a defendant who has no defence to the plaintiff's action, with safety to consent to a judgment against him, and precludes the third person from saying that the case had not been properly defended.(*o*) The object contemplated by these rules, therefore, is merely to bind the third party in a future proceeding; but if the original

Merely bind in future.

(*k*) See Selignan *v.* Mansfield, W. N. 1875, 240, Quain J.; 20 Sol. Jour. 121.

(*l*) Per L. J. Blackburn, Benecker *v.* Frost, L. R. 1 Q. B. D. 419, A.C.

(*m*) *Ex parte* Collie, L. R. 5 Ch. D. 51; 24 W.R. 310; 20 Sol. Jour., 291, A.C.

(*n*) Measurer *v.* Thomas, W. N. 1875, 205; Sol. Jour., Lush, J.

(*o*) Warner *v.* Twing, 24 W. R. 536.

Binding third persons by Notice.

defendant wants to get direct relief, by way of indemnity, or contribution, or otherwise, against the third party, he must bring an action against him for that purpose, because it would be intolerable that the plaintiff, who might have a perfectly good case against the original defendant, should be kept waiting for his remedy, while the defendant and a third person were fighting *inter se*, in a matter in which the plaintiff was indifferent,(*p*) and the plaintiff should not be mixed up in controversies with which he has no natural connexion.(*q*) Of course by consent of the plaintiff and of the third person, direct relief over may be administered in the same action; as where the action was on a bill of exchange, by holder against the acceptor, and the defendant claimed indemnity over against the drawer, on the ground of partial failure of consideration for the acceptance, but which the drawer denied, the defendant offering to pay the amount, the only question remaining in dispute would be between drawer and acceptor, and the acceptor was substituted as plaintiff instead of the holder, on the terms of the defendant paying what he admitted to be due, *i.e.*, the amount of the bill, less the amount of the alleged failure of consideration, and the drawer to pay the difference and to continue the action against the acceptor for same.(*r*)

By way of interpleader.

(254.) In one instance it is stated this provision has been allowed in analogy to the relief by way of interpleader, to give the defendant protection against a double claim, *ex. gr.*, in an action brought against an auctioneer for a return of a deposit on a purchase,

(*p*) See Treleavan *v.* Bray, L. R. 1 Ch. D. 176; 24 W.R. 198; W.N. 1875, 234; 20 Sol. Jour. 112.

(*q*) See *ex parte* Smith, *In re* Collie, L. R. 2 Ch. D. 51; 24 W. R. 310; 20 Sol. Jour. 291, A.C.

(*r*) See the National Provincial Bank of England *v.* Bradley Bridge Co., W. N. 1876, 63; 20 Sol. Jour. 297; Archibald J.

Binding third persons by Notice.

by the purchaser, where the defendant had reason to fear a similar action being brought by the vendor.(*s*) But it is not competent for a defendant in an action of tort, *ex. gr.* for negligence, to bring a third person before the Court by notice alleging that he, and not the defendant, is the party responsible, and thus to raise this question between the third person and the plaintiff; for the plaintiff ought not to have a person made defendant against his will, and the only question in the cause is, is the defendant guilty of the negligence that caused the damage to the plaintiff, and besides there can be no contribution or indemnity or relief over as between wrongdoers.(*t*)

Notice by a third person.

(255.) In one case it was considered in an action for damages for delay in unloading a cargo, a third person served with such a notice and allowed to defend the action conjointly with the defendant might serve a similar notice on and bring in a fourth party against whom the third party considered himself entitled to relief over.(*u*) In another and later case it was held that the rule was not to be read as giving any person brought in as a defendant a right to bring in other persons *toties quoties*, which might hinder the plaintiff indefinitely; but in that case the Court also considered it would not be a wise exercise of its discretion to allow it, as it would prejudice the plaintiff.(*v*)

(*s*) Jebb *v.* Lewis, 20 Sol. Jour. 56, Lush, J., and see Young *v.* Brassey, 21 Sol. Jour., 48, V. C. H., which was the case of a counterclaim; *ante*, (250).

(*t*) Horwell *v.* London General Omnibus Co., 25 W. R. 610, A. C.; see per Cockburn, L. C. J., at p. 613, overruling S. C., 25 W. R. 512; W. N. 1877, p 102, Ex. D.

(*u*) Fowler *v.* Knoop and London Banking Assoc. W. N. 1877, 68, Ex. D., 5 March, 1877.

(*v*) Walker *v.* Balfour, 25 W. R. 511, C. P. D., 11 April, 1877; and see also Harris *v.* Gamble, W. N. 1877, 142, V. C. H.; Street *v.* Gover, W. N. 1877, 145, Q. B. D.—cases of counterclaim.

Binding third persons by Notice.

(256.) The giving leave to a defendant to serve a third person with notice to bind him, is discretionary with the Court or judge, and where the plaintiff might be prejudiced by the introduction of a third person into the action the Court has refused to allow it,(*w*) and it has been granted in some instances conditionally on obtaining the consent of the plaintiff.(*x*)

Leave to serve refused.

CHAPTER XXVI.

Incidental Equities.

Section 27. *Subsection* (4).

257. Incidental Equities to be noticed, p. 211.
258. Probable scope of this, 211.

Incidental equities to be noticed.

(257.) Subsection (4) of section 27,(*a*) provides "that the said Courts (*i.e.*, the High Court of Justice and the Court of Appeal) respectively, and every judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein, before the passing of this (the Judicature) Act."

Probable scope of this.

(258.) The exact purport and application of this subsection are not easy to foresee. The High Court of Justice is required not merely to give effect to the equitable rights of a plaintiff or defendant when specially claimed, but it is bound to recognise and take notice of all equitable estates, titles and rights, duties and liabilities which may

(*w*) See Bower *v.* Hartley, L. R. 1 Q. B. D. 653; 24 W. R. 941; 20 Sol. Jour., 743, A. C.; Walker *v.* Balfour, 25 W. R. 511, C. P. D.

(*x*) Treleavan *v.* Bray, L. R., 1 Ch. D. 176; 24 W. R. 198; 20 Sol. Jour., 112, A. C.

(*a*) J. A., 1877, s. 27, subs. (4); J. A., 1873, s. 24.

Incidental Equities.

appear incidentally in the course of the proceeding in any case or matter. It does not say whether the Court is to give effect to the right or liability as well as recognise or notice it. It would seem that the Court, in a common law action, will recognise and give effect to equitable rights so far, and in the same manner, as a Court of Equity would have done in the like circumstances. But it may be questioned how far it would require or justify the application of the equitable right of a married woman to a settlement out of funds realized in her right, through the action of a Court of Equity, to funds realized in her right in a common law action. Again, whether it will extend the garnishee principle of attaching and impounding funds to answer equitable as well as legal debts, or give effect to a solicitor's lien on the sum recovered by his client in a common law action.(*a*) It may have application, if it should appear that the plaintiff was suing as a mere trustee for another and that the *cestui que* trust was indebted to the defendant in respect of the same or some other transaction, which would have entitled the defendant to a set-off or counterclaim if the real defendant had sued; but in such a case the Court would, probably, require the real owner of the debt to be made a party to the action.(*b*)

An instance of the application of this subsection (4) appears in a case arising on an interpleader summons, where a Sheriff had seized certain goods under an execution against a husband. It appeared that by his marriage settlement he had vested in trustees for the benefit of his wife all his household goods, and also all after-acquired property of a similar nature, to which latter class the goods seized in execution belonged, and which, accord-

(*a*) See Wilson *v.* Dundas, W. N., 1875, 232.

(*b*) See Macdonald *v.* Bode, W. N., 1876; 20 Sol. Jour., 241.

ing to the decision of the House of Lords, in Holroyd *v.* Marshall,(*c*) were bound by the trusts of the settlement. Before the Judicature Act the Court of Law would be bound to hold the execution creditor entitled to the goods brought in since the settlement; but, on application to the Court of Chancery, the Sheriff would have been restrained from interfering with them. Now Mr. Justice Lush considered himself bound to administer equity and follow the decision of the House of Lords and order the Sheriff to withdraw,(*d*) and this decision was followed by Mr. Justice Archibald, considering that the principle of the common law, that a bill of sale, purporting to transfer property acquired since its execution, was now abrogated by J. A., 1873, section 25, subs. 11, and that, as the Sheriff seized subject to the equities attaching on the property, this equity should be noticed and recognised.(*e*)

Incidental Equities.

CHAPTER XXVII.

Equitable Defences in lieu of Injunctions against Legal Claims.

Section 27. (*Subsection* 5.)

259. Proceedings not to be stayed by injunction, p. 213.
260. Exceptions to this, 214.
261. Injunctions from Bankruptcy, 215.
262. From High Court in England, 216.
263. Matter of Equity to be pleaded, 216.

(259.) Section 27, subsection 5,(*a*) enacts as follows:—

Proceedings not to be stayed by injunction.

"No cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by prohibition or

(*c*) Holroyd *v.* Marshall, 10 H. L. C., 191.
(*d*) Anon. W. N., 1875, 203; per Lush, J.
(*e*) Anon. W. N., 1876, 24.
(*a*) J. A. 1877, s. 27, subs. (5); J. A. 1873, s. 24, subs. (5).

Equitable Defence in lieu of Injunction.

injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if this (the Judicature) Act had not passed, either unconditionally or on any terms or condition, may be relied on by way of defence thereto." The remainder of the subsection provides for stay of proceedings by application to the Court in which they are pending.(*b*)

Since the Judicature Act passed, one division of the High Court has no jurisdiction to grant an injunction to restrain proceedings in another (with some exceptions to be mentioned),(*c*) and the Chancery Division cannot even continue an injunction granted before the commencement of the Judicature Act;(*d*) and on such an application being made, the Court directed the cause to stand over to await the trial of the action at law, with liberty to the plaintiff in the injunction suit to apply as he might be advised to the Common Law Division, intimating that if it should direct a transfer of the action to the Chancery Division, the Judge of the latter would not object to try it.

In one case reported in the High Court of Justice an injunction is stated to have been granted by the Chancery Division at the suit of a married woman to restrain a sheriff and parties from removing or selling furniture under an execution in an action at law against her husband, the furniture being purchased out of her savings while living separate from her husband, and although an interpleader summons was pending.(*e*)

Exceptions to this provision.

(260.) Notwithstanding the generality of the enactment that no cause or proceeding pending in

(*b*) *Vide infra*, (267). (*c*) *Vide infra*, (261).
(*d*) Edwards *v.* Noble, 24 W. R., 390; W. N., 1876, 81, V. C. B.
(*e*) Marston *v.* Smith, W. N., 1877; 169, V. C. H.

Equitable Defence in lieu of Injunction.

the High Court shall be restrained by injunction, its application has been limited to injunctions from the High Court of Justice, and it is not to be understood as interfering with the special powers of other Courts, *ex. gr.*, the Court of Bankruptcy or Courts of Equity in England as regards Irish actions, and *vice versâ*, or even the Chancery Division of the High Court itself in special cases, *ex. gr.*, under the Winding-up Acts, to restrain actions pending in other divisions of the High Court.

Injunctions from Bankruptcy.

(261.) The special powers conferred by the Legislature on the Court of Bankruptcy(*f*) to restrain proceedings in any action, suit, or other process against a debtor in respect of whom a petition has been lodged, for the special purpose of duly distributing the assets of the bankrupt, and on grounds wholly irrespective of the merits of the action, have not been in any degree affected or diminished by the above provision in subsection (5).(*g*) Thus it can restrain the execution of a writ of sequestration issued from the Court of Chancery,(*h*) or an action at law against the trustee of the estate in liquidation,(*i*) and a County Court Judge having Bankruptcy jurisdiction may exercise the same jurisdiction.(*j*) How far the Court of Bankruptcy(*k*) can restrain an action for foreclosure of a mortgage pending in the Chancery Division brought by a mortgagee

(*f*) See Bankruptcy (Ireland) Amendment Act, 1872, 35 & 36 Vic. c. 58, s. 68.

(*g*) See *In re* Ditton, L. R., 1 Ch. D. 557; 24 W. R., 289, A. C.; *In re* Collie, L. R. 2 Ch. D. 51, S. C. *nomine*; *Ex parte* Smith *v.* Hopwood, 24 W. R. 310; 20 Sol. Jour., 291, A. C.

(*h*) *Ex parte* Hughes. *In re* Browne, L. R., 12 Eq., 137.

(*i*) *Ex parte* Cohen. *In re* Sparke, L. R. 7 Ch. 20; Morley *v.* White, L. R. 8 Ch. 214; Domvile, a Bankrupt, Ir. Rep. 9 Eq. 456, A. C.

(*j*) See Halliday *v.* Harris, L. R. 9 C. P. 668.

(*k*) See Snow *v.* Sherwell, 25 W. R. 433, A. C.; and *contra*, *Ex parte* Pennell, 25 W. R. 433, A. C. See *In re* Lloyd, *Ex parte*, W. N. 1877, 197; 21 Sol. Jour. 748, A. C.

Equitable Defence in lieu of Injunction.

of the bankrupt, seems to be doubtful. This jurisdiction, of course, is to be exercised according to a sound discretion, and where there happens to be a substantial question to be tried as to the validity of a composition, it should refuse to restrain a creditor's action against the trustee.(*l*) The Court has no power to restrain a suit or action to which the bankruptcy would not be any defence or bar or ground of staying proceedings, *ex. gr.*, to a suit in Equity for repayment of money obtained by fraud.(*m*)

By High Court in England.

(262.) The High Court of Justice in England may grant an injunction against proceedings in the Court of Chancery in Ireland, and give liberty to serve the order in Ireland; and conversely, the High Court of Justice in Ireland can restrain a party from proceedings in England.(*n*) So an injunction has been granted by the Chancery Division in England under the Companies Act to restrain a suit or action in Ireland.(*o*)

Matter of equity to be pleaded.

(263.) As one (and the principal) substitute for the power of restraining causes and proceedings pending in the High Court of Justice by injunction on equitable grounds, the subsection (5) provides "that every matter of equity on which an injunction against the prosecution of such cause or matter might have been obtained either unconditionally or on any terms or conditions, may be relied on by way of defence thereto."(*p*) This subsection (5) seems to deal with equitable defences to legal claims, which formerly were put forward by Bill in Equity for an injunction to restrain further prosecution of the action at law,

(*l*) See *In re* Lopes, 25 W. R. 419, A.C.

(*m*) *Ex parte* Coker, L. R. 10 Ch. 652; 24 W. R. 145, L. J.J.

(*n*) Eustace *v.* Lloyd, W. N. 1876, 299; 25 W. R. 211, V. C. B.

(*o*) *In re* International Pulp and Paper Co., L. R. 3 Ch. D. 594, M. R.

(*p*) J. A., 1877, s. 27, subs. (5).

as subsection (2) seems to apply to equitable defences to equitable claims, which were formerly for the the most part made by way of cross bill.

Equitable Defence in lieu of Injunction.

By the Common Law Procedure Act, 1856,(*q*) the defence to actions at law on equitable grounds was practically limited to the small class of cases in which a Court of Equity would have granted an injunction absolutely and unfettered by conditions, and final in its character, so as to leave nothing to be done after the order was made, *ex. gr.*, to take an acccount.(*r*) This was unavoidable so long as Courts of Law were incapable of adapting their simple unvarying form of judgment so as to adjust the equities between the parties, and while doing equity to the defendant not to disregard the countervailing equities of the plaintiff.(*s*) For example, where an executrix was sued on a promissory note made and given by herself, a defence that the note had been drawn by mistake to charge her personally, it being the intention that the testator's assets alone should be charged, was deemed inadmissible because a Court of Equity would not in such a case have given an injunction absolutely, but on terms, such as that the defendant should give a new note charging her as executrix in her representative capacity.(*t*)

Now the High Court of Justice is competent, in every division of it to pronounce a conditional or qualified judgment and to impose terms, such as may be just, so as to give due effect and no more, to the equity set up by way of defence to a legal claim.

(*q*) 16 & 17 Vic., c. 113, s. 85.

(*r*) See Cochrane *v.* Camack, 7 Ir. C. L. R. 10

(*s*) See Turner *v.* M'Auley, 6 Ir. C. L. R. 245, Q. B.; Daniel *v.* M'Carthy, 7 Ir. C. L. R. 23, Q. B.; Collis *v.* Prendergast, 7 Ir. C. L. R. 542, Q. B.

(*t*) M'Gillicuddy *v.* Galway, Ir. Rep. 2 C. L. 237, C. P.

Equitable Defence in lieu of Injunction.

Thus to an ejectment brought by a mortgagee against his mortgager, the Court can give effect to a defence founded on the Equity of redemption, on condition that the defendant, the mortgagee, shall bring into Court the debt and interest due.(*u*) And where an action is brought on a bill of exchange and the defendant relies on a parol agreement for value, not to sue, instead of applying for an injunction to stay the action, he should plead the equitable defence or file a counter-action for specific performance of the agreement.(*v*) In an action for rent on an indenture of lease, where the defendant relies on an Equity to have the lease set aside or cancelled, on the ground of concealment of material facts affecting the title to part of the premises, the Common Law Division in which the action may be pending is bound to give effect to the Equity so far as it is incidental to the purposes of the defence, and though it may not cancel the lease so as to destroy its effect *in futuro* or *in omnibus*, it may treat it as if cancelled for the purpose of the action.(*w*) So again the defendant may set up by way of defence a case which would entitle him in the Chancery Division to have the lease reformed and rectified, and the Common Law Division though it will not usually reform the deed, nor in any case do so without a counterclaim to that effect properly pleaded, yet may give effect to the defence as an answer to the action, and where the case for reformation is not denied, read the deed is as if it were duly reformed.(*x*)

(*u*) See Hanbury *v.* Noone, W. N. 1875, 260, 20 Sol. Jour. 161, Huddlestone, B.

(*v.*) See Garbutt *v.* Fancus, L. R. 1 Ch. D 154, 24 W. R. 89 A. C.

(*w*) Mostyn *v.* West Mostyn, Coal and Iron Company, L. R. C. P. D. 145, 24 W. R. 401.

(*x*) Mostyn *v.* West Mostyn, Coal and Iron Company, *ubi supra.*

Equitable Defence in lieu of Injunction.

After judgment in ejectment recovered before the Judicature Act came into force, on a forfeiture of a lease for breach of covenant to repair, where the plaintiff had led the defendant to suppose he would not take advantage of the non-performance for covenant, the Court of Appeal (affirmed by the House of Lords) stayed the execution of the judgment on equitable grounds. Some of the Judges doubted whether the application was not too late after judgment, but inasmuch as under the old system this defence was not available in the action of ejectment, they gave the defendant the benefit of it on summary application.(*y*) Henceforth such a case should be made by pleading the matter of Equity as a defence.

CHAPTER XXVIII.

STAY OF PROCEEDINGS.

Section 27, *Subsection* (5.)

264. Application to stay, p. 219.
265. Proper Court to apply to, 220.

Application for stay of proceedings.

(264.) By way of a second substitute for the remedy by way of injunction, subsection (5) of section 27(*a*) makes the following proviso:—"Provided always, that nothing in this (the Judicature) Act contained shall disable either of the said Courts (*i.e.*, the High Court of Justice or the Court of Appeal) from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled if the Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce

(*y*) Hughes *v.* Metropolitan Railway Company, 25 W. R. 680 H. L. S. C. L. R. 1 C. P. D. 120; 24 W. R. 652, A. C.

(*a*) J. A. 1877, s. 27, subs. (5), § 3, J. A. 1873, s. 24, sub. 5.

Stay of Proceedings.

by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion, in a summary way, for a stay of proceedings in such cause or matter, either generally or so far as may be necessary for the purpose of justice ; and the Court shall thereupon make such order as shall be just."(*b*)

Proper Court to apply to.

(265.) Much controversy arose in England at first as to the branch of the High Court to which the application to stay proceedings should be addressed, under this proviso, at least in one class of cases, namely, winding up matters ; *i.e.* where an order had been made for winding up the affairs of a company, whether the application to stay proceedings in an action in a Common Law Division, should be made to that Division or to the Judge of the Chancery Division, to whose Court the winding up matter was attached. The Master of the Rolls(*c*) and the Queen's Bench Division(*d*) both considered the application would be more appropriate to the particular Court or Division in which the action was pending. The Common Pleas Division took an opposite view(*e*), and the Court of Appeal held that, although in all other cases it would be against the letter and the spirit of the Judicature Act, that one Division should stay or enjoin proceedings in another, yet from the special terms of the winding-up statutes, this jurisdiction was attached to and more conveniently exercised by the Vice-Chancellor

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(*b*) J. A. 1877, s. 27, subs. (5), J. A. 1873, s. 24, subs. (5).

(*c*) People's Garden Co., L. R. 1 Ch. D. 44; 24 W.R. 40 M. R. Kingchurch *v.* People's Garden Co., L. R. 1 Ch. D, 45 M. R.

(*d*) Walker *v.* Banagher Distillery Co., L. R. 1, Q. B. D. 129.

(*e*) Kingchurch *v.* People's Garden Co., L. R. 1 C. P. D. 45; 24 W. R. 41.

Stay of Proceedings

or Master of the Rolls, it being unconnected with the merits of the case and more within their cognizance, whether it was expedient to have a double litigation proceeding or not,(*f*) and that they may therefore restrain an action or suit in any of the Common Law Divisions or in the Admiralty(*g*) and in any part of the United Kingdom.(*h*) It was doubted whether the jurisdiction extended to matters of voluntary winding up or liquidation.(*i*) But the doubt seems to have been closed by the English Ord. li. Rule 2*a*. of June, 1876, which enables the Judge of the Chancery Division in which a winding up order or an order for administration of assets is pending, to order the transfer to himself of any action pending in another division. It has not been settled whether a Judge of the Chancery Division, acting in a petition matter under the Solicitor's Act, and making an order for taxation of costs, has authority now to stay an action in a Common Law Division in respect of these costs as he formerly had. It was stated that the Master of the Rolls (Sir Geo. Jessell) said, he had now no power to stay proceedings at Common Law. Mr. Justice Lush thought that whatever Division of the Court made the order for taxation, that Division

(*f*) Garbutt *v.* Fancus, L. R. 1 Ch. D. 154; 24 W. R. 89 A.C. See *In re* Stapleford Colliery Co., 24 W. R. 175, W. N. 1875, 256, 20 Sol. Jour., 132, V. C. B.

(*g*) Australian Steam Navigation Co., L. R. 20 Eq. 325 M. R.

(*h*) *In re* International Paper and Pulp Co., 24 W. R. 535, W. N. 1876, 151 M. R.

(*i*) Moore *v.* City and County Bank, W. N. 1875, 240 Quain, J.; Owens *v.* Steam Coal Co., W. N. 1876, 9 Quain J., but see Needham *v.* Rivers Protection Co , L. R. 1 Ch. D. 253; 24 W. R. 317, V. C. M. where this distinction was not observed, see Belfast and Ulster Brewery Co., Ir. Rep. 7 Eq. 441, M. R. *In re* Poole *v.* Fire Brick Clay Co., L. R. 18 Eq., 542. See South of France Potteries Syndicate, W. N. 1877, 205, 21 Sol. Jour., 768, A. C., action against a surety for contributory not restrained.

Stay of Proceedings.

should restrain the action, such an order not being an injunction order within the meaning of subsection 5, but part of the order to tax.(*j*) However, in a later case Mr. Justice Lindley made such an order at Chambers to stay an action after a summons had been taken out at the Rolls for an order to tax.(*k*)

It seems to have been held that a mortgagee seeking to enforce his mortgage is not to be stayed, because of a winding up under the Companies Act.(*l*)

CHAPTER XXIX.

Legal Rights.

Section 27, *Subsection* (6.)

266. Legal Estates and Rights to be recognised, p. 222.

Legal estates and rights to be recognised.

(266.) The 6th subsection of section 27(*a*) is as follows :—"Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and to the other express provisions of this (the Judicature) Act, the said Courts (*i.e.* the High Court of Justice and the Court of Appeal) respectively, and every Judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities, existing by the Common Law or by any custom, or created by any statute, in the same manner as the same would have recognised and given effect to, if this (the Judicature) Act had not passed, by any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice."

This seems to be equivalent to saying, that while

(*j*) Anon. 20 Sol. Jour. 32.

(*k*) Anon. W. N. 1876, 39.

(*l*) See *In re* D. Lloyd and Co., 21 Sol. Jour. 748; W. N. 1877, 197 A. C. and *ante* (261).

(*a*) J. A., 1877, s. 27, subs. (6); J. A., 1873, s. 24.

Legal Rights.

the giving effect to equitable rights is to be the paramount duty of the Judges of the Hight Court, and while rules of equity are to prevail over and supersede the Rules of Law where they happen to conflict in their application to the same subject-matter, and subject thereto, they are to follow the practice of former Courts of Equity, which while breaking in upon the Common Law, where necessity or good conscience required it, not only recognised but protected all legal claims and titles, estates and duties, as, for example, they protected the marital right of the husband from a conveyance made in fraud of it and followed the analogy of the law in a variety of ways, especially in the devolution of estates created by way of trusts executed. They further allowed possession of the legal estate, a superior force and value as between titles and claims purely equitable, giving to the holder of it preference over the person who had an equal and even an earlier equitable, title.(*b*)

CHAPTER XXX.

PLENARY RELIEF.

Section 27, *Subsection* (7.)

267. All matters in controversy to be disposed of, p. 222.
268. Plenary relief between all parties interested, 224.
269. Controversy to be single, 225.
270. Court may deal with the whole matter, 225.
271. Relief must be properly claimed, 226.

Court to dispose of all matters in controversy.

(267.) Subsection 7 of section 27(*a*) is as follows:— "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this (the Judicature) Act, in every

(*b*) See Rooper *v.* Harrison, 2 Kay and J. at pp. 108, 109, per V. C. Sir Page Wood.

(*a*) J. A., 1877, s 27, subs. (7); J. A., 1873, s. 24, subs. (7).

Plenary Relief.

cause or matter pending before them respectively, shall have power to grant, AND SHALL GRANT, either absolutely or in such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim *properly brought forward by them respectively* in such cause or matter, so that, as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters avoided."

By somewhat of a legal hyperbole it has been said, "If the closing words of this section be verified by experience, this Act will prove a second *Magna Charta* to the suitor.(*b*)

Plenary relief between all parties interested.

(268.) It was a cardinal principle of Chancery Procedure, as exemplified in what was termed distinctively the "plenary suit," to deal with the entire controversy or matter which formed the subject of the suit as a whole, and to endeavour to do complete and exhaustive justice with respect to every part of it; and in order to this it required that everybody who was interested in the subject-matter should be before the Court, either individually or by a suitable representation of his class or interest. Similarly, the High Court is enabled by one of the scheduled rules(*c*) at any stage of the proceedings, and either upon or without the application of either party, to order that the name or names of any party or 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

(*b*) Mr. Charley's Judicature Acts, p. 31.

(*c*) Schedule, rule 19.

adjudicate upon and settle all the questions involved in the action, may be added." By another of the rules in the same schedule, the Chancery plan is adopted, by which numerous parties having the same interest in the action might be represented by one or more of them suing or defending the action on behalf of or for the benefit of all parties so interested.(*d*) *Plenary Relief.*

269. It was another rule of Equity procedure that the suit should be confined to one entire controversy, and the combination of several distinct and separate controversies in one suit was open to the objection (at one time fatal) of multifariousness, or the misjoinder of controversies or matters of litigation in which some of the defendants only were interested. On the other hand, in actions at law considerable latitude was allowed as to the joinder of distinct causes of action, provided the parties to the claims were in all cases the same. Controversy to be single.

(270.) In common law actions, as regards each matter of controversy, the Court could only dispose of the claim of the particular plaintiff as against the particular defendant, whether it were for a debt or for damages or for title to land, without attempting to settle collateral or consequential claims, rights, or duties, or even mutual claims arising out of the same transactions, except by way of set-off. Indeed, the simple form of judgment which a court of law was obliged to pronounce either for the plaintiff or for defendant, absolute and without qualification or condition, and founded mostly on simple issues answered in the affirmative or negative by a jury, rendered it impossible fairly to adjust complex rights or to admeasure justice in exact accordance with the requirements of equity. The High Court Court may deal with whole matter.

(*d*) Schedule, rule 20.

Plenary Relief.

of Justice, however, as now constituted, may, in every action, when so required, enforce a particular claim against a particular person absolutely or, *sub modo*, on such reasonable terms and conditions as shall seem just; and it may, if so required, deal with the whole matter out of which the claim arises, and settle the rights of all parties concerned, that not only the controversy between the original parties may be finally determined, but also all multiplicity of legal proceedings concerning any of the questions in the action may be avoided. With this view the right is given to combine in one action, by way of counterclaim, what would formerly have been the subject of two or more suits, deciding, once for all, several matters in controversy between the same parties, and even introducing third persons, strangers to the suit, where the relief is reasonably connected with the original subject of the claim.(*e*)

Relief must be properly claimed.

(271.) It was scarcely intended that the High Court of Justice, in the exercise of the plenary and almost universal jurisdiction with which it is vested, "to grant all such remedies whatsoever to which any of the parties to the suit may be entitled to in respect of every legal and equitable claim," should do so without regard to the appropriate form of the proceeding. The requisition itself is governed by the words, "properly brought forward by them respectively."

(*e*) *Vide ante* (243), p. 196.

PART V.

AMENDMENT AND DECLARATION OF LAW.

Section 28.

Chapter XXXI.—Administration of Insolvent Assets.

„ XXXII.—Express Trusts and Statute of Limitations.

„ XXXIII.—Equitable Waste.

„ XXXIV.—Merger of Estates.

„ XXXV.—Possessory Actions by Mortgagors.

„ XXXVI.—Assignment of Choses in Action.

„ XXXVII.—Stipulations not of the essence of Contracts.

„ XXXVIII.—Mandamus and Injunction.

„ XXXIX.—Receivers.

„ XL.—Damages for Collision at Sea.

„ XLI.—Infant's Custody and Education.

„ XLII.—General Prevalence of Equity.

CHAPTER XXXI.

Administration of Assets of Insolvent Estates.

Section 28, *Subsection* (1.)

272. Amendment of Law, section 28, p. 228.
273. Rule in Bankruptcy to prevail, 228.
274. Former rule in Chancery, 229.
275. Act not retrospective, 230.
276. Debts and Liabilities, what are, 230.
277. Secured creditors, 230.

Amendment of law for all tribunals.

(272.) The Judicature Act, 1877, section 28,(*a*) recites that "it is expedient to take occasion of the union of the several Courts whose jurisdiction is (hereby) transferred to the High Court of Justice to amend, and declare the law to be hereafter administered in Ireland" in certain matters enumerated under ten heads or subsections, which are intended as amendments and declarations of the law, so as to make it uniform in the several divisions of the High Court and also in all other Courts, inferior or principal, throughout the kingdom, in which, by section 79, the several rules of law enacted and declared by the Judicature Act shall be in force and receive effect so far as the matters to which such rules relate shall be cognizable by such Courts, and with the further object of reconciling different rules on the same subject where they conflict.

Administration of insolvent estates.

(273.) Subsection (1) of section 28 is as follows:—"In the administration by the Court of the assets of any person who may die after the commencement of this (the Judicature) Act, (*i.e.*, after the 1st day of January, 1878), and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be

(*a*) J. A., 1877, s. 28; J. A., 1875, s. 10.

observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupts in Ireland, and all persons who, in any such case, would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this (the Judicature) Act." (*b*)

Administration of Insolvent Estates.

(274.) According to the rule adopted by the Court of Chancery both in England and in Ireland (*c*) and followed by the Landed Estates Court in Ireland, (*d*) a creditor of an insolvent estate, whose debt appeared to be secured either by way of mortgage or lien, might first prove for and receive a dividend out of the general assets in common with other unsecured creditors on the full amount of his debt, and afterwards realize his security for the unpaid balance, handing over the surplus (if any) after payment of his demand, for the benefit of the unsecured creditors. A similar rule was applied by the Court of Chancery in respect to the assets of insolvent companies administered under the Winding-up Acts; the secured creditor, by taking a dividend in common with the unsecured creditors, did not waive the benefit of his security.(*e*)

Former rule in Chancery.

In Bankruptcy the secured creditor was bound to

(*b*) J. A., 1877, s. 28, subs. (1); J. A., 1875, s. 10, subs. (1).

(*c*) See Mason *v.* Bogg, 2 Mylne and Cr. 443; Fottrell *v.* Kavanagh; Ir. Rep. 10 Eq. 256, V. C.

(*d*) *In re* Rooney's Estate, Ir. Rep., 9 Eq., 204, L. E. Ct.

(*e*) Kellock's Estate, L. R., 3 Ch. 769. See Fottrell *v.* Kavanagh, *ubi supra.*

Administration of Insolvent Estates.

elect between resting on his security and being excluded from dividend, or giving up the security and having it valued or realized and taking his share of the general assets,(*f*) but he was not called upon to make the election until the time came for proving his debt.(*g*)

Act not retrospective.

(275.) The analogous provision in the English Act, has been held not to have a retrospective operation, and that it does not withdraw the benefit of the old Chancery Rule from a secured creditor in a winding-up case where he had sent in his claim for the full amount before the Act came into operation.(*h*)

Debts and liabilities, what are.

(276.) The expression, "debts and liabilities," is not defined or expanded by the Judicature Act as it is in the English Bankruptcy Act.(*i*) However, it has been held that it does not comprise obligations of a company in liquidation arising under covenants in a lease before breach has taken place, *ex. gr.*, not to assign without consent.(*j*)

Secured creditors.

(277.) Neither is the expression, "secured creditors," defined by the Judicature Acts. It is defined in both the English and Irish Bankruptcy Acts thus—"Any creditor holding any mortgage charge or lien on the bankrupt's(*k*) estate or any part thereof as security for a debt to him."(*l*)

A creditor having executed an execution by seizure under a *fi fa*, before an act of Bankruptcy was held to be a secured creditor, so far that he might realize his debt.(*m*)

(*f*) *In re* Carmarthen Anthracite Coal Co., 24 W. R., 109, M. R.

(*g*) S. C., and see *ex parte* Hodgekinson, W. N., 1876, 57, Bey.

(*h*) *In re* Joseph Suche and Co., Limited, L. R., 1 Ch. D. 48; 24 W. R., 184; 20 Sol. Jour. 92, M. R. *In re* Phœnix Bessemer Steel Co., 24 W. R. 19; W. N., 1875, 187.

(*i*) It is not defined in the Irish Bankruptcy Act.

(*j*) Westbourne Grove Drapery Co., L. R. 5 Ch. D. 248, V. C. B.

(*k*) "Debtors'" Estate in Irish Act.

(*l*) Bankruptcy Act (England), 1869, s. 16, subs. 5; Bankruptcy (Ireland) Amendment Act, 1872, s. 4.

(*m*) *Ex parte* Rocke; *In re* Hall, L. R., 6 Ch., at p. 800, per Mellish, L. J.

CHAPTER XXXII.

Express Trusts and Statute of Limitations.

Section 28, *Subsection* (2.)

278. Statutes not to apply to express trusts, p. 231.
279. How far declaratory, 231.
280. For charges on land, 233.
281. What are express trusts, 234.
282. Real Property Limitation Act,
283. Other fiduciary relations,
284. Doctrine of Laches,

(278.) Subsection 2 of section 28(*a*) is as follows :— Statute of Limitations not to apply to express trusts.

"No claim of a *cestui que* trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations. This provision, however, is not to affect the enactments contained in the 10th section of the Real Property Limitation Act, 1874,(*b*) when the same shall come into effect."

(279.) Sir George Jessel, M.R., is reported to say, "All the other subsections of the Act relate to alterations in the law, except the second, which is declaratory of the law as it existed before."(*c*) The statute is certainly declaratory as regards claims of a *cestui que* trust against his trustee himself, for property in the nature of real estate, including therein leaseholds and the incorporeal hereditament called rent, held by the trustee upon an express trust. The claim was not barred by any statute of limitation so long as the property continued in the hands of the trustee himself, or of volunteers deriving under him, and in this state of facts the

How far Statute is declaratory

As to property in land.

(*a*) J. A. 1877, s. 28, subs. (1); J. A. 1875, s. 10.

(*b*) 37 & 38 Vic., c. 57.

(*c*) *In re* Joseph Suche & Co., L. R. 1 Ch. D. 48; 24 W. R. 184, 20 Sol. Jour., 92 M. R.

Express Trusts and Statute of Limitations.

right to follow the property was limited only by the ordinary rule of equity as to stale demands.(*d*) The statute 3 and 4 Wm. IV., c. 27, s. 25, introduced no change in this respect. It only gave protection to a purchaser for valuable consideration, by limiting the time within which any claim might be made against him, to twenty years from the date of his conveyance from a trustee who had held on an express trust; but as regards the trustee himself and volunteers claiming under him, the statute, rather by the implication of silence than by express declaration, treated them as entitled to no protection other than such as the ordinary rules of equity might afford.

As to breaches of trust.

The statute is also declaratory in respect of claims by a *cestui que* trust against his trustee himself for breach of trust. In the case of an express trust, lapse of time was no answer to a claim for an account of transactions between *cestui que* trust and trustee, so long as the relation lasted and the transactions were unclosed, or where the delay was attributable to the trustee himself having failed to furnish his *cestui que* trust with the information to which he was entitled.(*e*)

As to representative of trustee.

So, as regards the personal representative of an express trustee, the Statute of Limitations was held in England to be no bar to an action to make good any loss occasioned by a breach of trust to the extent of the assets in his hands.(*f*) An opposite view was taken by the Court of Exchequer in Ireland,(*g*) and followed by Lord Chancellor Brady in

(*d*) See M'Donnell *v.* White, 11 H. L. C. *per* Lord Westbury, at page 579.

(*e*) Wedderburn *v.* Wedderburn; 4 Myl. & Cr., 52.

(*f*) Obee *v.* Bishop, 1 De Gex, F. & Jo., 137; Butler *v.* Carter, L. R. 5 Eq. 276; Brittlebank *v.* Goodwin, L. R. 5 Eq. 545; Woodhouse *v.* Woodhouse, L. R. 8 Eq. 514; Stone *v.* Stone, L. R. 5 Ch. 74.

(*g*) Dunne *v.* Doran, 13. Ir. Eq. Rep. 545.

Chancery,(*h*) and submitted to reluctantly by the Master of the Rolls (Mr. Smith),(*i*) and by the Vice-Chancellor.(*j*) Probably this conflict of authority may be terminated by the direct or indirect effect of this subsection. *Express Trusts and Statute of Limitations.*

As third persons taking a loan of trust moneys from an express trustee, and having notice of the trust, become themselves trustees; they cannot rely upon the Statute of Limitations to bar the trust.(*k*)

Trust for charges on land.

(280.) The provision in section 25 of the statute 3 & 4 Wm. IV., c. 27, applied in terms to suits for recovery of the land and not for recovery of charges on land; but by a liberal interpretation of its meaning, or by analogy to its provision, the same exemption has been worked out as to trusts for securing moneys charged on the land or on a rent in favour of a *cestui que* trust, as if his claim extended to the land or rent itself.(*l*) Such was the final result of the long conflict of authority in Ireland, closed by the House of Lords in Burrowes *v.* Gore,(*m*) which settled that neither section 40 nor section 42 of the statute could be applied where there was an express trust, to secure any particular charge upon the land.(*n*) The only

(*h*) Brereton *v.* Hutchinson, 3 Ir. Chan. Rep. 361.

(*i*) Brereton *v.* Hutchinson, 2 Ir. Chan. Rep. 568.

(*j*) Carroll *v.* Hargreave, Ir. Rep. 5 Eq. 123 V. C.

(*k*) See Ernest Croysdill, 2 De Gex. F. & Jo. at page 198, L. J. Turner; Spickernell *v.* Hotham Kay, 669, and Bridgeman *v.* Gill, 24 Beav. 302.

(*l*) See Lord St. Leonards on Real Property Statutes, 2nd edition, p. 103.

(*m*) Burrowes *v.* Gore, 6 H. L. C. 97, affirming Kelly *v.* Kelly, 6 L. R. N. S. 222 Sir M. O'Loghlen, 1838; Dillon *v.* Cruise, 3 Ir. Eq. Rep. 70, M. R. 1840; Hunt *v.* Bateman, 10 Ir. Eq. Rep. 260 Ex., 1840, overruling Burne *v.* Robinson, 1 D. and Wal., 688 Lord Plunkett, 1839; Knox *v.* Kelly, 6 Ir. Eq. Rep. 288; Blackburn, M. R. 1844; Young *v.* Wilton, 10 Ir. Eq. Rep. 10; Smith, M. R.; Dundas *v.* Blake, 11 Ir. Eq. Rep. 138 Brady, L. C. 1848.

(*n*) See Thompson *v.* Eastwood, L. R., 2 H. L. at p. 239, *per* Lord Cairns, L.C.

Express Trusts and Statute of Limitations.

difficulty was to distinguish between what was a mere charge of debts and what was a trust for payment of the charge.

What are express trusts.

(281.) In the statute 3 & 4 Wm. IV., c. 27, s. 25, and probably in the Judicature Act, the words "express trust" are used by way of opposition to trusts arising by implication, to resulting trusts or trusts by operation of law.(*n*) All trusts, as regards land or rent, were barred by section 24 unless saved by section 25.(*o*) The saving of section 25 did not include trusts by implication of law, such as resulting trusts, nor constructive trusts arising out of principles of equity, such as holding a vendor a trustee for the purchaser in respect of balance of unpaid purchase-money, or a tenant for life a trustee as to renewals taken by way of graft. The definition most approved of an express trustee is that given by Vice-Chancellor Kindersley in Petre *v.* Petre,(*p*) to this effect—"The 25th section is confined to express trusts—that is, trusts expressly declared by a deed or a will, or some other written instrument; it does not mean a trust that is to be made out by circumstances. The trustees must be *expressly* appointed by some written instrument; and the effect is, that a person who is under some instrument an express trustee, or who derives title under such trustee is precluded, how long soever he may have been in enjoyment of the property, from setting up the statute. But if a person has been in possession, not being a trustee under

(*n*) Dickenson *v.* Teasdale, 1 De Gex., Jo. & Smith, at p. 59, *per* Lord Westbury, L.C.

(*o*) Commissioners of Charitable Donations *v.* Wybrants, 7 Ir. Eq. Rep., at p. 587, *per* Sir Edward Sugden, L.C. Perhaps there should be added, "or by section 26 on the ground of concealed fraud," *i.e.* "designed fraud" which could not with reasonable diligence be known to the plaintiff. See V. C. Kindersley in Petre *v.* Petre, 1 Drewry, at p. 397.

(*p*) Petre *v.* Petre, 1 Drewry, at p. 393.

Express Trusts and Statute of Limitations.

some instrument, but still being under such circumstances that the court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply, and if the possession of such a constructive trustee has continued for more than twenty years he may set up the statute against the party, who, but for lapse of time, would be the right owner." In Petre *v.* Petre, the legal tenant for life of a renewable leasehold, it being in settlement, took a renewal in his own name without noticing the trust, and the property was enjoyed by him and those deriving under him for more than twenty years before the commencement of the suit by the remainder man, and this was held to be a constructive trust barred by the statute by the terms of the will. It would seem that a party who becomes an express trustee of land under a will, remains such as well for the undeclared and resulting trusts as for those expressly set forth in the will.(*q*) The trust is an express trust, because it arises on the face of the instrument itself and does not require to be made out by evidence *dehors*.(*r*) In this sense the seeming paradox expressed in Salter *v.* Cavanagh of an implied trust being an express one within the Act, may be understood.(*s*)

As regards personal property in the hands of an executor, a distinction seems to be taken between the general legal trust which exists between an executor and the creditors and legatees of his testator, and a special or direct trust for some creditor or legatee in particular. The former clearly will not

(*q*) See Salter *v.* Cavanagh, 1 Drury and Walsh, 668, *per* Lord Plunkett, at p. 687.

(*r*) See Commissioners of Charitable Donations *v.* Wybrants, 2 Jo. and L. at 196, 7 Ir. Eq. Rep. 388.

(*s*) See Dawkins *v.* Lord Penrhyn, 26 W. R., 6 A. C., a case of an express trust not to bar an estate tail, and Statute of Limitations, see 25.

Express Trusts and Statute of Limitations.

prevent the bar of the Statute of Limitations, and it may be assumed that it is not intended by this subsection (2) to interfere with the pre-existing law on the subject.

Two cases illustrate the distinction. The case of Scott *v.* Jones,(*t*) in the House of Lords, resembled an express trust fastened upon an executor for creditors; a fund being created by a testator for payment of his debts by sale of property which he supposed to be real estate, but which in reality was a chattel interest, or term for years. He vested the property in his executor on trust to sell it and pay his debts. If the property had been freehold, the statute would not have applied, but being personalty it was held to be no more than a legal trust, like that of an executor for creditors under ordinary circumstances, and therefore one that offered no answer to the earlier Statute of Limitations.

On the other hand, in Phillipo *v.* Munnings,(*u*) an executor, by severing a legacy from the general estate, and appropriating it to the particular purpose pointed out by the will, did the same as if he paid it to a trustee, and thereupon he was no longer acting as executor but as trustee, and the suit was regarded not as for a legacy, but to compel the performance of a trust.

Neither the Court of Chancery nor the Landed Estates Court, by holding possession of land or money, the produce of land *in usum jus habentis*, were considered to stand in the relation of a public trustee for the parties interested in the lands sold, so as to arrest the operation of the statute or the analogous rule as to limitation to a creditor's demand on the fund.(*v*)

(*t*) See Scott *v.* Jones, 4 Cl. & F. 382.

(*u*) Phillipo *v.* Munnings, 2 Mylne & Craig, 309.

(*v*) *In re* Nixon's Estate, Ir. Rep. 9 Eq. 7 A. C.; see *contra In re* Colclough's estate, 8 Ir. Chan. Rep. at page 338, *per* L. C. Brady.

Express Trusts and Statute of Limitations.

Real Property Limitation Act.

(276.) Questions as regards the creation and operation of express trust to secure charges upon land or rent, become comparatively unimportant in the future, in consequence of the provision in the Real Property Limitation Act, 1874,(*w*) by which after the commencement of the Act, *i.e.*, 1st January, 1879, "no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest, except within the time within which the same could be recoverable if there were not any such trust."

Nothing well can be more comprehensive than the language of this provision, to destroy every protection which an express trust could afford, to preserve a claim to any sum of money or legacy charged upon or payable out of land or rent, or any arrears of rent or of interest, from the ordinary operation of the Statutes of Limitation applicable to the subject, regarded irrespective of the express trust.

The passage often cited from Lord St. Leonard's Essay on the Real Property Statutes, regarding the intentions of the framers of the Statute of Limitation, 3 & 4 Wm. IV., c. 27, as regards charges on land secured by express trust, must now be read in directly opposite terms as regards the intention of the framers of the new Real Property Limitation Act. "It is plain that the framers of the Act did intend to keep open a remedy against a trustee of land or rent, where the *cestui que* trust is entitled to the very subject, and to close the door against a *cestui que* trust of the produce of the subject, however extensive his right." It can hardly

(*w*) 37 & 38 Vic. c. 59, s. 10.

(*x*) Page 104, 1st Edition; page 103, 2nd Edition.

Express Trusts and Statute of Limitations.

be said any longer "the plaintiff's claim is not to a legacy but to a share of the property specifically given to trustees, to be sold for the beneficial owner."(*y*)

Other fiduciary relations.

(277.) It may be questioned how far subsection 2 was intended to comprehend or exclude from the protection of the Statute of Limitations, a class of persons who, in equity were regarded as trustees, though not acting under an express trust as defined in Petre *v.* Petre. Thus the case of a guardian in socage,(*z*) or of the father of an infant entering on his estate, was treated as acting in fiduciary capacity and not protected by the Statute of Limitations, at least until the infant had attained the age of twenty-one years. In the case of a testamentary guardian of an infant, the statute was held to be inapplicable, where an account of the rents of the infant's estate was sought against him,(*a*) but possibly he might be considered as an express trustee, being nominated to his office by a writing with duties attached thereto by law.(*b*)

The mere relation of a solicitor to his client, although fiduciary, does not, *per se*, involve that of trustee, or *cestui que* trust, so as to exclude the Statute of Limitations.(*c*) But where a solicitor, holding a power of attorney to sell property of his client and invest the proceeds in his name, received moneys under the power and placed them with his own and to his own credit, he was held to be a trustee for his principal and that the Statute of Limitations

(*y*) See Mutlow *v.* Bigg, L. R. at p. 18 Eq. 248, V. C. H.; L. R. 1 Ch. D. 385, A. C.

(*z*) Duke of Beaufort *v.* Berty, 1 P. Wm. 704.

(*a*) Thomas *v.* Thomas, 2 Kay and John, 79.

(*b*) Mathews *v.* Brise, 14 Beav. 341.

(*c*) See Crawford *v.* Crawford, L. R. 1 Eq. 436, M. R. reversed on appeal, S. C. Ch. Ap. Court (Ire.), 13th November, 1867; Mare *v.* Lewis, Ir. Rep. 4 Eq. 219, V. C. affirmed by Ch. Ap. Court, 3rd June, 1870.

had no application and did not bar a suit by the client.(*d*)

Express Trusts and Statute of Limitations.

Doctrine of laches.

(278.) But although time or the Statute of Limitations may be no bar to a claim for performance of an express trust, yet a Court of Equity did not give effect to the claim against the estate of a trustee, when, by reason of the death of parties and other change of circumstances, the means of resisting it, if unfounded, may have perished and the trustee is charged with nothing which he ought to have performed within twenty years before the filing of the bill.(*e*)

The Statute of Limitations, 3 & 4 Wm. IV., c. 27, s. 27, specially declares that nothing in its provisions shall interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by the Act. And though the demands may not be barred, yet the Court in dealing with the question of interest will have regard to the principle of the statute, where a long period of time has elapsed.(*f*)

(*d*) Burdick *v.* Garrick, L. R. 5 Ch. 233.

(*e*) Bright *v.* Legerton, 2 De Gex, F. & Jo. at p. 616, 30 L. J., N. S. 338, *per* Lord Campbell, L.C., S. C. in 29 Beav. 64; Carey *v.* Cuthbert, Ir. Rep., 7 Eq. 542 M. R.

(*f*) Thompson *v.* Eastwood, L. R. 2 H. L. 215.

CHAPTER XXXIII.

Equitable Waste.

Section 28, *Subsection* (3.)

285. Equitable waste by tenant for life, p. 240.
286. Waste at Common Law, 240.
287. Legal waste restrained in equity,
288. Meliorating waste,
289. Tenants dispunishable of legal waste,
290. Equitable waste restrained,
291. Conflict between Law and Equity,

Equitable waste by tenant for life.

(285.) Section 25, subsection 3,(*a*) enacts as follows :—

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

Waste at common law.

(286.) The Common Law idea of waste, was a substantial injury to, or the destruction of, the inheritance by a limited or partial owner, lessee or tenant, of the land. Thus it was legal waste for tenant for life or for years to cut timber trees, open fresh mines, clay pits, or quarries, to cut turf beyond the requirements of the occupation of the land, *ex. gr.*, by sale(*b*) unless bog was demised *ex nomine* and by itself, and could be enjoyed in no other way;(*c*) or to work for profit or sale quarries already open, and neither excepted nor reserved.(*d*) Open mines were under a different category. So generally to

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(*a*) J. A. 1877, s. 28, subs. (3); J. A. 1873, s. 25.

(*b*) Lord Courtown *v.* Ward, 1 Sch. & Lefr. 8; Viner *v.* Vaughan, 2 Beav. 466.

(*c*) Montgomery *v.* Cunningham, 2 Mol. 536; see Lord Waterpark *v.* Austen, 1 Jones, 627 Eq. Ex.; Coppinger *v.* Gubbins, 3 Jo. & Lat. 397; Chatterton *v.* White, 1 Ir. Eq. Rep. 200, M. R.

(*d*) Mansfield *v.* Crawford, 9 Ir. Eq. Rep. 271, M. R.

alter the nature and quality of the land, as by ploughing ancient meadow and converting it into arable land, because years, perhaps ages, must elapse before the sod can be restored to the state in which it was before ploughing.(*f*) *Equitable Waste.*

Land acquired the character, in law, of ancient meadow or pasture, when not broken up for twenty years before the execution of the lease or settlement under which it was being enjoyed.(*g*)

To plough up a rabbit warren and stop or destroy the burrow on the land was legal waste, provided the warren was by charter or prescription, but land only stored with conies or rabbits was not a legal warren,(*h*) although possibly if it were demised as a warren, an injunction might be had in equity to restrain its destruction.(*i*) Again, to convert ordinary land, not let for the purpose, into a cemetery, was legal waste, as being foreign to the purpose for which it was let, and altering its character and value,(*j*) or to convert a stable, yard, and garden attached to a house into a lead factory with a large furnace and chimney.(*k*)

As between landlord and tenant it was waste to burn the land, although not ancient meadow.(*l*)

(287.) To prevent waste of this character, *i.e.* legal waste, in addition to the remedy at law, Courts of Equity lent the assistance of their summary interposition by way of injunction, when the right was clear and the party injured came without delay. But if the damage done was merely nominal, and

Legal waste: when restrained in equity.

(*f*) Simmons *v.* Norton, 7 Bingh. at p. 647, per Tindal, C. J.

(*g*) Murphy *v.* Daly, 13 Ir. C. L. R. 239, Exc. Cham.

(*h*) Jurtings *v.* Conn, 1 Ir. Chan. Rep. 273, M. R.

(*i*) *Ib.*

(*j*) Croly *v.* Mathew, 1 Cr. & Dig, *ab cas.* 86; Hunt v. Browne, San. & Sc. 178; Cregan *v.* Cullen, 16 Ir. Chan. Rep. 339, M. R.

(*k*) Hunt *v.* Hodges, 1 Ir. Jur. 33 L. C.

(*l*) Ware *v.* Ware, 2 Legal Rep. 227, M. R.

Equitable Waste.

the delinquent did not contemplate any repetition of it, or assert a right to do it, an injunction was not usually granted.(*m*)

Meliorating waste.

(288.) Courts of Equity exercised a discretion in granting injunctions to restrain what might be legal waste, and if they found that a harsh or improper use was being made of the legal right, as in the case of meliorating waste, it refused to interfere, as for example building a valuable house upon the land,(*n*) or where a tenant under a lease for 999 years altered a store into dwelling-houses, increasing the security for therent.(*o*)

However, cutting of turf for sale on an allegation that it was intended for the improvement of the land was restrained.(*p*)

Tenants dispunishable of waste.

(289.) The owner of an estate in land might acquire the privilege of being dispunishable of waste at law, either by the express terms of the instrument creating his estate, as for example tenant for life, or by the nature and quality of the estate itself: viz., 1st, by the estate being an absolute estate in fee; 2nd, by his being tenant in tail in possession after possibility of issue extinct;(*q*) and 3rd, probably a tenant in fee-simple subject to an executory devise over.(*r*)

The privilege was at one time claimed for a tenant for lives renewable for ever, and though admitted by Lord Redesdale,(*s*) was denied by subsequent judges,(*t*) but it has been conferred by

(*m*) See Doran v. Carroll, 11 Ir. Chan. Rep. 379, L. C.

(*n*) Coppinger *v.* Gubbins, 3 Jo. & Lat. at page 412, per Sir Edward Sugden, L. C., S. C., 9 Ir. Eq. Rep. 311; and see L. J. Tindal in Simmons v. Norton, 7 Bingh. at page 647.

(*o*) Doherty *v.* Allman, Ir. Rep. 10 Eq. 460, A. C.

(*p*) See Newenham *v.* Cahill, 6 L. R. N. S. 373, M. R.

(*q*) See Turner *v.* Wright, 2 De Gex, F. & Jo. 247.

(*r*) See Story, § 518*a*.

(*s*) Calvert *v.* Gasen, 2 Sch. & Lef. 561.

(*t*) Coppinger *v.* Gubbins, 3 Jo. & Lat. 397.

statute,(*u*) in respect of trees planted by the tenant himself.(*v*) Where possessed by tenant for life simply, of course it arises solely by the permissive terms of the settlement or will creating the estate. *Equitable Waste.*

(290.) But although tenant in tail after possibility, was at law dispunishable of waste, yet Lord Nottingham was clearly of opinion to grant an injunction to restrain his committing waste in timber, which was for the ornament of the mansion house, and this has been followed since as regards tenant for life and other partial owners, unimpeachable of waste at law, attempting to pull down a mansion house, or to cut timber growing for shelter or ornament of the mansion house,(*w*) unless their proximity to the mansion house caused it to be unhealthy, in which case the court would itself direct trustees to cut them down.(*x*) Equitable waste restrained.

What is ornamental timber is a matter for inquiry and depends on the circumstances of the case, and very much on the taste or want of taste of the settlor who planted and left them standing for ornament.(*y*)

The principle of equity, as regards equitable waste, is involved in the proposition, that where a legal right is acquired or exercised by fraud or collusion, or contrary to conscience, the court will enjoin the act or decree a compensation.(*z*) Equitable or unconscientious waste, therefore, is anything tending to the destruction or wanton spoliation of the land, or that which a prudent man would not do in the

(*u*) 5 Geo. III., c. 17; 7 Geo. III., c. 20, s. I, confers same privilege on a tenant in fee-farm.

(*v*) See Pentland *v.* Somerville, 2 Ir. Chan. Rep. 299.

(*w*) Garth *v.* Cotton, 1 Ves. Sen. 546; 1 White & Tudor, L. C. 657.

(*x*) See 1 White & Tudor, notes, p. 691.

(*y*) See Ford *v.* Tynte, 2 De Gex, Jo. & Smyth, at p. 131, *per* L. J. Turner; Bubb *v.* Yelverton, L. R. 10 Eq. 465, M. R.

(*z*) Garth *v.* Cotton; 1 White & Tudor, 654, *per* Lord Hardwicke.

Equitable Waste.

management of his own property, and may include things done without any malicious motive.(*a*)

The principle has been extended from trees planted for ornament of the house to outhouses, and grounds, plantations, vistas, avenues, and all the rides about the estate for ten miles round,(*b*) and to trees planted to exclude objects from view,(*c*) also to cutting timber too young, in an unhusbandlike manner.(*d*)

Permissive waste, such as allowing the mansion house to fall into dilapidation, is not the subject of equitable interference or ground for an account.(*e*) But a voluntary and collusive permission to a third person to commit waste, by one who is dispunishable himself, is equitable waste.(*f*)

Where equitable waste has been actually committed, a Court of Equity would not probably allow the person committing it to have the property in what was wrongfully done or cut.(*g*)

Conflict.

(291.) The conflict, or rather variance, which existed between the rules of Law and Equity as regards the subject of waste, was not confined to the case of tenant for life *sans* waste. Neither had it its origin in that class of partial owners. It arose, equally and primarily, as we have seen, and continued to prevail where the tenant had an estate in fee-simple, subject to an executory devise over; *ex. gr.*, in the event of his dying without issue living at his decease, or was tenant in tail after possibility of issue extinct, or

(*a*) Turner *v.* Wright, 2 De Gex, F. & Jo. at p. 244, *per* Lord Campbell, L. C.

(*b*) Marquis of Downshire *v.* Sandys, 6 Ves. 110, *per* Lord Eldon.

(*c*) 1 White & Tudor, notes, p. 676.

(*d*) Pentland *v.* Somerville, 2 Ir. Chan. Rep. 289.

(*e*) Powys *v.* Blagrave, 4 De Gex, M. & G. 448.

(*f*) See Garth *v.* Cotton, *ubi supra.*

(*g*) See Honywood *v.* Honywood, L. R. 18 Eq. at p. 311, *per* Sir George Jessel, M. R.

was tenant for a term of years, and even against a mortgagor or mortgagee in possession committing or threatening to commit waste. In every such case, though dispunishable of waste at law, the tenant was held answerable in equity for abuse of his legal powers.(*h*) It is, therefore, difficult to see why this enactment, when deemed necessary at all, was confined to the case of a tenant for life; neither does it seem easy to discover what the precise object was, which the legislature had in view in framing this particular enactment, unless it was to direct Courts of Law or their representatives, the Common Law Divisions, to recognise and have regard to the principle of equity, as to the abuse of legal rights or privileges conferred upon limited owners of property, to commit what would ordinarily be treated as waste, and to enable a plaintiff complaining in a Common Law action on the case for waste, who heretofore might be met with a defence relying on the defendant's privilege to commit waste, to reply something to the effect, that the waste committed was not done in the *bonâ fide* exercise of his legal privilege, but wantonly and unconscientiously in abuse of it, and in a manner ruinous to the interests of other parties. *Equitable Waste.*

It might have enlarged the sphere of the old action of waste, founded partly on the Common Law, and partly on the Statute of Gloucester, under which the "tenant who was attainted of waste was adjudged to lose the thing that he hath wasted, and moreover should recompense thrice so much as the waste shall be taxed at."(*i*) But the action of waste was of rare occurrence in modern times, and an action on the case in the nature of waste took its place, whenever a

(*h*) Turner *v.* Wright, 2 De Gex, F. & Jo. at p. 247, *per* Lord Campbell, L. C.

(*i*) See Statutes revised, vol. i., p. 31; Story, Eq. Jur., § 909.

Equitable Waste.

remedy was sought at law, until the old action of waste was wholly abolished by the statute 3 & 4 Wm. IV., c. 27, s. 36, and probably the remedy will now rather be sought by action in the nature of a Bill in Chancery to restrain waste, for under it not only can an account of the waste done and compensation for the injury be obtained, but also all future waste may be prevented.

Damages.

For the thing commonly (although with no great propriety of language) called equitable waste, the measure of compensation was such an amount as a jury could reasonably award to the reversioner for the injury done to the inheritance. If no real damage was done the claim was usually dismissed with costs.(*j*) The rule settled in Garth *v.* Cotton,(*k*) and cases following it, that if timber is wrongfully cut by tenant for life, the produce at once becomes the property at law of the tenant of the first vested remainder of inheritance, who might bring an action of trover for it, or file a bill in Equity for an account; but this was subject to be controlled in favour of contingent remainder-men not yet in *esse* by their trustees, when there is collusion between the tenant for life and remainder-man entitled to the first vested estate of inheritance. Lord Romilly laid down a different rule, viz., that so long as there was a possibility of a prior tenant in tail coming into *esse*, the later tenant in tail had no such rights; but Sir George Jessel, M. R., has restored the old rule.(*l*)

(*j*) See Bubb *v.* Yelverton, L. R. 10 Eq. 465, M. R.

(*k*) Garth *v.* Cotton, 1 White & Tu. 633, 3rd Edition.

(*l*) Cavendish *v.* Mundy, W. N. 1877, 198, M. R.

CHAPTER XXXIV.

Merger of Estates.

Section 28. *Subsection* (4.)

292. Merger of Estates by operation of Law, p. 247.
293. Merger and extinguishment, 247.
294. Merger at Law, 248.
295. Merger in Equity, 248.
296. Merger of Estates, 250.
297. By operation of Law, 250.
298. Merger of charges, 252.

(292.) Section 28, subsection 4, enacts as follows:— Merger of estates by operation of law.

"There shall not after the commencement of this Act be any merger, by operation of law only, of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

(293.) Merger has been defined to be the annihilation by act of law, of the less in the greater of two vested estates meeting, without any intervening estate, in the same person and in the same right, or if in different rights meeting in the same person by act of the party, and not by mere act of law, and so that the person in whom the estates thus meet in different rights by act of the party, shall have an absolute power of alienation over both estates.(*a*) Merger and extinguishment.

"Extinguishment" expressed a different thing, viz., the annihilation of a collateral subject, right or interest, in the estate out of which it was derived, as a rentcharge in the fee of the inheritance on which it was charged.

There was also at law what was called a merger of securities, *i.e.* of one security in another of higher order, as a bill of exchange in a bond.

Subsection 4 is confined to the first of these subjects, viz., the merger of estates, whilst the other

(*a*) 6 Cruise's Digest, 467, 4th Edition.

Merger of Estates.

subjects, the extinguishment of charges and merger of securities, not being estates, so far as there may happen to be any conflict between the rules of law and equity in regard to them, are remitted to the general scope of subsection 11.

Merger of estates at law.

(294.) At law the intention of the parties did not prevent the legal consequence of the union of two estates in the same person, in the same right, whether by act of the parties or by act of law. Merger was an operation of law which took place in either case irrespective and sometimes in spite of the intention. By the express saving of the Statute of Uses, an estate in a relessee, or feoffee, or grantee, to uses for a third person did not merge by its momentary union with the seizin of the freehold, and so also by the statute *de donis*, an estate tail did not merge in a remainder or reversion in fee, although the two estates happened to unite in the same person and in the same right.(*b*)

Merger in equity.

(295.) But although in this and in other cases, merger was the inevitable consequence of the union of two estates as between the parties to the transaction themselves, yet where third persons had interests derived out of the estate merged, Equity interfered in their behalf to preserve the benefit of the charge or other interest, although at law merger had taken place as regards the estate out of which the charge or interest was derived. Thus equity, to protect the interest of third persons, would either decree possession of the land for the period of the estate merged, or decree a conveyance to revive the legal estate, so as to answer the purposes of justice, and this whether the merger took place by direct conveyance or act of the party, or by act of law such as by descent.(*c*)

(*b*) 6 Cruise Dig. 481.

(*c*) 6 Cruise's Dig. 493, Saunders *v.* Bournford, *cas. temp.* Finch, 424.

Merger of Estates.

In contemplation of equity, merger was said to be "odious," and never allowed to prevail, unless for special reasons.(*d*) Two estates might meet without any intervening estate, in the same person and in the same right without merger, and on the other hand between estates separated by an intervening estate, merger might take place according to the intention or the interest of the parties. On the same principle, equity would not permit interests in personalty, or in equitable choses in action to coalesce, or become extinguished contrary to the intent of the settlors or the interest of the parties, as for example, where a married woman, who is disabled by the ordinary rules of equity from parting with her reversionary interest in a fund in Court during coverture, attempted to accelerate the accruer of her interest in possession, by accepting a conveyance of the previous interest in the fund, in order to alien her property, contrary to the intention of the settlement, equity would not permit this to be done, or allow the previous interest to be deemed extinguished.(*e*)

So, as regards the union of estates at law, if the two estates met in the same person by his own act, there was merger at law, although the owner of the estate was a trustee for others, whereas in equity the beneficial interest would be maintained and preserved, and the effect of the statute seems to be to preserve and maintain the legal estate as a subsisting estate, as if it had been assigned to a trustee for the legal owner, instead of to the legal owner himself of the greater estate. Thus where the trustee of a term for years acquires the estate of inheritance in the same lands by his own act, *ex. gr.*, by purchase, inasmuch as the beneficial interest in the lease

(*d*) 1 Phillips *v.* Phillips, 1 P. Wm. 41.

(*e*) See Whittle *v.* Henning, 2 Ph. 731.

Merger of Estates.

would not be suffered to merge or be extinguished in equity, so now there shall be no merger of the legal term for years by operation of law only. "A trust of a term for years would be supported in equity though the term was merged in the inheritance."(*f*) "A mere merger of the estate in the lease, in the reversion in fee, will not in equity affect or alter the rights of persons claiming under the lessee during the continuance of the lease."(*g*) Now it is presumed the legal estate in the lease will be held to be subsisting and not merged.

Merger of estates, legal or equitable.

(296.) The subsection speaks of the merger "of any estate," having in view, probably, rather the merger of one legal estate in another legal estate. A similar result, *i.e.*, merger, was the consequence of the union of two equitable estates in the same person, as where the beneficial ownership of a lease became vested, whether by descent or conveyance in the owner of the reversion upon that lease.(*h*) But where an equitable fee and a particular legal estate, or the legal fee and a particular equitable estate met in the same person there was no merger by operation of law, simply because courts of law did not recognise equitable estates. Now, however, they must do so, but as there had been no merger formerly in such a conjunction of estates, so neither will there be now.

By operation of law only.

(297.) The subsection says there shall be no merger "by operation of law only," an expression which seems open to some ambiguity, as to whether it is applicable to the mode by which the estates meet, *i.e.*, by *act* of law (as distinguished from by act of the party), or to the legal consequence of their meeting,

(*f*) Saunders *v.* Bournford, Finch's Repts. *temp.* Finch, 424.

(*g*) Fulton *v.* Creagh, 9 Ir. Eq. Rep., at p. 294, *per* Sir Edward Sugden, L. C.

(*h*) 6 Cruise Dig. 481, sect. 60.

as an act or operation of law independent of intention. *Merger of Estates.*

In the latter sense, and that which seems most to accord with the grammatical structure of the sentence, the subsection would include every case in which merger actually took place, whether the estates met by act of the parties, *ex. gr.*, by direct conveyance or by act of law, as by marriage, descent, or devise. In the former but more probable sense, the provision would be confined to a single one of the three possible combinations or classes of cases in which merger did take place, namely, that class of cases in which two estates meet in the same person, in different rights, and by act not of law, but by act of the party. In respect to the merger of estates meeting in the same person, they might meet either by act of the party, or by act of law, and they might meet either in the same right or in different rights. There are thus four combinations or classes of cases in which two estates can meet in the same person. In the first class, the estates meet in the same person and in the same right, and by act of the party, and here merger took place, and will still take place. In the second class the estates meet in the same person and in the same right, but by act of law. There also merger took place and will still take place. In the third class the estates meet in the same person, but in different rights, and by act of law. There no merger took place either at law or in equity, and of course the subsection does not apply, as where one estate was held by the party in his own right, whilst the other was *in autre droit, ex. gr.*, as husband and wife, executor or administrator, or as a member of a corporation aggregate. In the fourth and last class, the estates meet in the same person in different rights, but by act of the party. There merger took place at law, but frequently in contem-

Merger of Estates.

plation of a Court of Equity, the estate was not merged, but was deemed to subsist in order to support the beneficial interest of the person entitled to the benefit of the legal estate in the estate merged.

(298.) Perhaps the chief importance of the doctrine of merger appeared with reference to charges on estates. An intending purchaser, apprehensive of further and unknown incumbrances turning up, used to take a conveyance of the earlier incumbrances paid off out of his purchase-money to a trustee for himself, in order to protect him as with a shield against other estates or claims.

If the purchaser took an assignment of the charge to himself, becoming the owner of the charge and of the estate, the charge became extinguished at law, but would in many cases be preserved in equity. So if the owner of the charge became the purchaser of the estate charged, the charge was extinguished at law. Thus as regards legal charges, such as judgments, mortgages, and portions secured by legal terms, "upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united."(*a*) The doctrine has been expressed in a recent case in Ireland.(*b*)

"The entire doctrine of equity is founded not merely on the circumstances or expressed intention of the party who pays off the charge, but further on the condition and position of the estate itself,

(*a*) Forbes *v.* Moffat, 18 Ves., at page 390, *per* Sir Wm. Grant, M. R.

(*b*) See Keogh *v.* Keogh, Ir. Rep., 8 Eq. at page 195, *per* Sullivan, M. R.

whether they are such as to make it for the benefit of the owner that the charge should remain; and case after case establish that the union of the ownership of the charge and the estate, whether in tail or in fee, will not, apart from express intention, cause the charge to merge, if it is for his benefit, having regard to the circumstances of the estates and other charges existing thereon it should not merge."(*c*) *Merger of Estates.*

Henceforth it is presumed that the equitable doctrine of intention as regards the merger of charges will be recognised at law, and it may no longer be so necessary to incur the expense of assigning legal charges or terms to trustees, for the benefit of the owner of the inheritance.

CHAPTER XXXV.

Possessory Suits by Mortgagor.

Section 28. *Subsection* (5).

299. Mortgagor in possession, p. 253.
300. Position of Mortgagor at Law, 254.
301. Equitable views, 256.
302. Statutory powers conferred, 256.
303. Exceptions to these powers, 257.
304. Terminate with notice from Mortgagee, 258.

(299.) Section 28, subsection 5, enacts as follows :— Mortgagor in possession.

"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 sign*(*a*) *and cause to be served,*

(*c*) See also Richards *v.* Richards, John. 766; Morley *v.* Morley, 5 De Gex. M. & G. 610; Lord Compton *v.* Oxenden, 2 Ves. Jun. 261.

(*a*) The passages in italics are not in the corresponding subsection of the English Act.

Suits for Possession by Mortgagor.

notices to quit, determine tenancies, or accept surrenders thereof, and sue for the 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; *and such action, suit, or proceeding shall not be defeated by proof that the legal estate in the lands, the possession of which is sought to be recovered or in respect of which the rents and profits are sought to be recovered, or in respect to which the trespass or other wrong has been committed, is vested in such mortgagee.*

"*Provided always that a mortgagor shall not be at liberty to exercise any of the powers hereby conferred if an express declaration that they shall not be exercised is contained in the mortgage.*"(*b*)

Position of mortgagor at law.

(300.) At common law after the execution of a legal mortgage, the mortgagee was regarded as the owner of the estate and of the title deeds, and as such, entitled immediately to enter into possession or receipt of the rents, and to have and to withhold the title deeds, and to refuse to produce them until his debt was paid. But notwithstanding this legal right, for convenience sake, and from the natural reluctance of mortgagees to encounter the serious responsibilities attaching on the position of a mortgagee in possession, it was customary, either by tacit consent or by express provision in the deed of mortgage, to permit the mortgagor to retain the possession or receipt of rents till default has been made in payment of the interest on the mortgage debt.

Where, by the express terms of the deed, the

(*b*) J. A. 1877, s. 28, sub. 5; J. A. 1873, s. 2.

Suits for Possession by Mortgagor.

mortgagor is allowed to remain in possession until default, this may be regarded as in the nature of a redemise by the mortgagee to the mortgagor during the currency of the period given for repayment of the mortgage money.

Where the mortgagor retained possession without any such special provision, his right to the possession was more precarious than that of any other *cestui que* trust, for the mortgagee might resume the possession whenever he pleased; and even in equity the mortgagor in possession was regarded as only tenant at will to the mortgagee, or rather in the still lower position of tenant at sufferance, liable to be treated as a tenant or as a trespasser at the option of the mortgagee, and ejected without notice to quit, or demand of the possession.(*c*) On the other hand he was not regarded as a bailiff or receiver to the mortgagee, inasmuch as he was not bound to account with him for the rents received. He was in fact, as one who having parted with his estate, remained in possession at the pleasure and consistently with the rights of the mortgagee, and liable to be treated as a tenant or a trespasser at his pleasure.(*d*)

As regards the tenants of the estate in mortgage, their position was also anomalous. If a new tenancy were created by the mortgagor after the execution of the deed of mortgage, the tenant was ordinarily estopped from disputing his lessor's title at law, but on the other hand the tenant was liable to disturbance and eviction at the hands of the mortgagee, the mortgagor being at the same time liable for breach of his covenant for quiet enjoyment.

As regards pre-existing tenants, the mortgagor

(*c*) 2 Cruise Dig. 80, note (*a*); see Doe *v.* Giles, 5 Bingh. 431; Cholmondeley *v.* Clinton, 2 Meriv. 359.

(*d*) See Fisher on Mortgages, 2nd Ed. 464.

Suits by Mortgagor in Possession.

having departed with his reversion, became as it were a stranger in law to the estate and the tenantry. He had no right to serve a notice to quit, or to sue for any rent, or for breaches of covenant in the lease, or to distrain, unless so far as authority in that behalf could be proved or implied from the mortgagee, to act as his agent or his bailiff and in his the mortgagee's name.

Thus a mortgagor although suffered to remain in possession as the ostensible proprietor of the estate, was, by reason of the mortgage, which might not be for one-half its value, by certain rules of law seriously hindered in the management of his property, and prevented from getting rid of an unskilful or dishonest tenant, or punishing trespassers, except under colour of an authority from an absent and passive incumbrancer, and the mere relation of mortgagor and mortgagee did not in itself imply an authority from the latter to the former to give a notice to quit to any tenant on the estate, although the mortgagor was allowed to remain in possession as the ostensible owner of the estate.(*e*)

Equitable views enforced at law.

(301.) On the other hand, in Equity the mortgagor was regarded as the real owner and the mortgagee as the merely nominal owner of the estate, and even at Common Law Judges in latter times have struggled, as far as they possibly could, to relieve a mortgagor in possession from the anomalous consequences of the position in which he stood at law, and in doing so have been driven to exercise their utmost ingenuity in looking out for circumstances sufficient to establish a sort of general authority from the mortgagee enabling the mortgagor to act on his behalf.(*f*)

Statutory powers conferred.

(302.) This subsection 5 confers upon a mortgagor,

(*e*) See Miles *v.* Murphy, Ir. Rep. 5 C. L. 382, Q. B.

(*f*) See Stacpoole *v.* Parkinson, Ir. Rep. 8 C. L. 561, Ex.

Suits by Mortgagor in Possession.

while suffered to remain in possession or receipt of the rents, valuable proprietory rights in the nature of statutable powers, enabling him to manage and protect his estate, and sue in his own name as the ostensible owner, and not as the mere agent or representative of his mortgagee.

Under these powers he may sign and cause to be served a notice to quit to determine tenancies in his own name; he may bring an ejectment to recover the possession in his own name, and he may sue for the rent and probably distrain for it(*g*) in his own name. He may also apply for an injunction to restrain waste or trespass on the estate, or sue for damages in respect of it in his own name, and probably he may also sue for a breach of covenant in the lease, although running with the land, and hitherto in the right of the legal assignee of the reversion.

Exceptions to powers.

(303.) The subsection (5) excludes from its operation cases in which the cause of action arises upon a lease or other contract made with the mortgagor jointly with any other person. This seems to be somewhat strange, and would exclude a case like that of Stacpoole *v.* Parkinson,(*h*) where the lease was made by both mortgagor and mortgagee. Even at common law, where the covenants were made with the mortgagor himself, he was entitled to sue in his own name, the covenants being in the gross, (*i*) and when they were made with mortgagor and mortgagee jointly, the mortgagor might possibly be entitled to sue in his own name, when the mortgage money had been paid off, provided the reddendum and the covenants in the lease were framed with that view(*j*).

(*g*) See Trent *v.* Hunt, 9 Ex. 14.

(*h*) Stacpoole *v.* Parkinson, *ubi supra.*

(*i*) Stokes *v.* Rupell, 3 T.R. 678.

(*j*) Harold *v.* Whitaker, 11 Q. B. 147.

Suits for Possession by Mortgagor.

(304.) The statutory rights conferred by subsection 5 on the mortgagor in possession terminate with notice given by the mortgagee of his intention to take possession or to enter into the receipt of the rents and profits.

Terminated by notice from mortgagee.

The statute does not say to whom the notice is to be given whether to the mortgagor or to the tenants; nor does it prescribe any particular form of notice, or state whether it should be in writing or by parol.

CHAPTER XXXVI.

Choses in Action, Assignment of.

Section 28. *Subsection* (6).

305. Assignment of Debts, and Choses in Action, p. 258.
306. What are Choses in Action, 259.
307. Confined to Legal Choses, 260.
308. How far assignable hitherto, 261.
309. Future Assignments Effectual, 262.
310 Is Statute Compulsory, 263.
311. Writing under hand of Assignor, 264.
312. Absolute and not by way of Charge, 264.
313. Notice to Debtor, 265.
314. Notice to be express, 267.
315. Notice to be in writing, 268.
316. Notice by Whom, 268.
317. Notice to Whom, 268.
318. Notice aliunde to subsequent Assignee, 269.
319. Effectual from date of Notice, 269.
320. Assent of Debtor not necessary, 270.
321. Subject to Equities affecting Assignor, 270.
322. Equities between Assignees, 270.
323. Debtor called to Interplead, 271.
324. Lodgment under Trustee Relief Acts, 272.

Assignment of debts and legal choses in action.

(305.) Section 28, subsection (6), of the Judicature Act enacts as follows:—

"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 legal right to such debt or the 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 anyone claiming under him, or of any other opposing or conflicting claims, to such debt or chose in action, he shall be entitled, if he think 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."(*a*) *Assignment of Choses in Action.*

(306.) As to what is a chose in action besides ordinary debts, bills of exchange and promissory notes, policies of life insurance, &c., may be mentioned the debentures of a public company, *e.g.*, a mining company undertaking to pay a certain sum on a fixed day, and though they propose to give a charge on the property of the company, they are not therefore the less choses in action.(*b*) *What are choses in action.*

But shares in a public company, transferable in the books of the company, are not things in action at all, and are regarded as goods and chattels, at least within the meaning of the order and disposition clause of the English Bankruptcy Act, 32 & 33

(*a*) J. A., 1877, s. 28, subs. 6. J. A., 1873, s.

(*b*) *Ex parte* Rensbury, 25 W. R. 432 V. C. B.

Assignment of Choses in Action.

Vic. c. 71, s. 15, subs. 5.(*c*) An interest in real estate, like the equity of redemption, is not an equitable chose in action, but merely an estate in the land,(*d*) and a transfer of it does not require notice to be given to the trustee or mortgagee to perfect the transfer or to secure its priority,(*d*) but a money fund vested in trustees ultimately raisable out of land by way of charge is not an equitable estate in land as regards the *cestui que* trusts of it.(*e*)

Confined to legal choses in action.

(307.) The subsection (6) appears to draw the distinction between debts and other legal choses in action recoverable in a court of law and equitable claims in the nature of choses in action recoverable only in a court of equity, and it seems to deal exclusively with the former, leaving the transfer of equitable interests as it was before. Some apparent ambiguity would seem to arise as to this by the introduction of the word "trustee" twice in the subsection, when speaking of the person chargeable or from whom the assignor would be entitled to receive or claim the debt or chose in action, and to whom the notice of the assignment is to be given. This expression would suggest the idea that the subsection was intended to apply to equitable debts and claims as well as legal, but such a construction seems to be scarcely reconcileable with the general expression "debt or other legal chose in action," in the early part of the clause, and which seems to govern the entire provision. Besides this, equitable interests were already assignable under conditions almost similar to those annexed now to

(*c*) *Ex parte* Union Bank of Manchester, 12 Eq. 354, C. J. B., L.R.

(*d*) Rochard *v.* Fulton, 7 Ir. Eq. Rep. 131, 1 Jo. & Lat., 413; Dearle v. Hall, 3 Russ. 1; Loveridge v. Cooper, 3 Russ. 35.

(*e*) Daniel *v.* Freeman, Ir. Rep. 11 Eq. at p. 248; Dearle v. Hall, *ubi supra.*

the assignment of legal choses in action by this provision. *Assignment of Choses in Action.*

How far assignable hitherto.

(308.) At the Common Law, with some few exceptions, a possibility, right, title, or thing in action could not be transferred to a third person by assignment. Hence, a debt or other chose of action was said not to be assignable, or rather the assignment was not recognised at law as valid or effectual to pass title to the debt or to confer a right of suit in respect of it. However, if the debtor assented to the transfer, the right was conferred on the assignee to maintain a direct action against the debtor, but this was upon an implied promise to pay the debt resulting from the assent.(*f*) Bills of exchange and promissory notes became an exception to this rule by the custom of merchants and the necessities of trade and commerce, and by various statutes, bailbonds, replevin, Exchequer and railway bonds, bills of lading endorsed, and at one time Irish judgments, and more recently policies of life assurance(*g*) and marine insurance.(*h*)

Courts of Equity, on the other hand, long since took notice of such assignments, and enforced rights growing out of them, acting in accordance with the principles of the civil law and the jurisprudence of the modern commercial nations of Continental Europe, by which the assignment of debts and contracts is recognised as free from objection, and effectual to pass the property and to entitle the assignee to sue in his own name.

In Courts of Equity, assignments of legal choses in action, and of equitable interests went under the common designation of equitable assignments and were allowed to transfer the property

(*f*) See Story, Eq. Jur. § 10, 39. (*g*) 30 & 31 Vic. c. 144.
(*h*) 31 & 32 Vic. c. 86.

Assignment of Choses in Action.

so effectually that the assignee might sue for and recover them in their courts in his own name, subject only to reasonable conditions for the protection of the party chargeable. But the assignment of a bare right of action for a tort was void both in law and equity. (*g*) There must be some substantial possession and capability of personal enjoyment in the matter transferred,(*h*) and the assignment of a bare right to file a bill for fraud committed on the assignor was held void as being contrary to public policy and savouring of the offence called maintenance.(*i*) Lately the assignment of a debt, together with the right to proceed with a petition to wind up a public company in respect of the debt, was considered to be such as could not be permitted, from the mischief and oppression that might be occasioned if a person were allowed to come in and buy up the right to proceed.(*j*)

Future assignment to be effectual at law.

(309.) The subsection (6)(*k*) with some little variation extends to the Common Law Divisions of the High Court the doctrine held by Courts of Equity as to the transferability of debts and other legal choses in action, by enacting that any absolute assignment thereof, of which express notice in writing shall be given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose of action, shall be deemed to be effectual in law to pass the legal right to the debt or chose in action from the date of the notice, and all legal and other remedies for the same, and to the power to give a good dis-

(*g*) Story, Eq. Jur. § 1040 h.

(*h*) Prosser *v.* Edmonds, 1 You. and Col. Ex. 481.

(*i*) Story, § 1040 h.

(*j*) *In re* Paris Skating Rink Co. L. R. 5 Ch. D. at p. 962, *per* L. J. James, A.C.

(*k*) J. A., 1877, s. 28, subs. (6). J. A., 1873, s. 25.

charge for it without the concurrence of the assignor. The precise effect of this provision may not be immediately apparent, since by reason of the extension of equitable jurisdiction to every branch of the High Court of Justice, the substantial difference between a legal and an equitable assignment and the remedy by way of suit in law and equity has greatly lessened if it has not altogether disappeared. But there may be a difference in the remedy if not in the right, of an assignee of a legal chose in action suing in the High Court of Justice, as compared with his position hitherto in a Court of Equity, viz., that whereas formerly the assignor was a necessary party to the suit, and the assignee had no right to go into equity unless the assignor had refused to allow him to use his name, or had done some act to his prejudice at law, and the mere equitable(*l*) title to the money secured by the chose in action was not of itself sufficient to entitle the party interested to sue the debtor in equity for payment of his money.(*m*) Now the assignee having the legal right and the power to give a discharge without the concurrence of the assignor, may it is presumed sue the debtor without making the assignor a co-defendant, and probably if the debtor claims to have the benefit of any equity between himself and the assignor he should ask to have him made a party to the action. Where a married woman was entitled to choses in action settled to her separate use an assignment might be made by her in equity(*n*) and semble now at law.

Assignment of Choses in Action.

(310.) It may become a question as regards certain legal choses in action already made assignable at

Is the statute imperative.

(*l*) Hammond *v.* Messenger, 9 Simons, 327. Fletcher *v.* Fletcher, 4 Hare, 67.

(*m*) See Rose *v.* Clarke, 1 You. and Col. N. S. 534.

(*n*) See Proudley *v.* Fielder, 2 Myl. and K. 57.

Assignment of Choses in Action.

law by particular statutes or in some particular manner, how far any such choses in action may be also effectually assigned in the manner prescribed by subsection 6.

But it would seem that its provision is permissive and not compulsory, and that absolute assignments of legal choses in action so far as they were competent and effectual before by any particular mode or process of assignment, will continue to be so independently of the Judicature Act. Thus a bill of lading may be transferred by simple indorsement, with the absolute right in the indorsee to sue for and give a legal discharge, and free from or subject to equities, according as the indorsement was before or after the bill became due.

In other cases where the assignments were hitherto merely equitable assignments, and the provisions of the Judicature Act are not strictly followed, it is presumed that the assignment will amount to nothing more than an equitable assignment as it was understood before the Act, but will be good so far and operate as such.

Assignment by writing under hand of assignor.

(311.) The subsection 6 does not prescribe any particular form of assignment, or define in terms what is an assignment further than that it must be by writing under the hand of the assignor, and not purport to be by way of charge only.(*n*)

A judgment creditor is therefore not an assignee in any sense, having an equity until he obtains a charging order; but having done so if he omits to give notice of it by means of a stop order, in case of a fund in Court, a subsequent purchaser for value may acquire a preferable title by notice.(*o*)

Absolute and complete.

(312.) The assignment mentioned by subsection

(*n*) See Chowne *v.* Baylis, 31 Beav. 351, as to equitable assignments.

(*o*) See Scott *v.* Lord Hastings, 4 K. & J. 633.

6 must be "absolute" and "not purporting to be by way of charge only," and query if by way of mortgage. It would seem that it should purport to pass the entire interest of the assignor, and that a partial assignment of his interest will not operate as a legal assignment under the Act, although it may be a good equitable assignment *pro tanto* as before. *Assignment of Choses in Action.*

(313.) "Express notice in writing" of the assignment to be given to the debtor or person chargeable, seems to be made essential to the efficacy of the assignment in law, to the transfer of the legal rights and remedies of the assignee and to the power to give a good discharge independently of the assignor. Notice would therefore seem to hold a different place in legal from what it did in equitable assignments. In legal assignments under this provision, notice is matter of title essential to the validity of the transfer, and not merely material as regards security and priority in reference to other transfers. In equitable assignments notice to the trustee or debtor is not necessary to validate or complete the transfer, as against the assignor, but only to secure the assignee against the title of some third person who by his superior diligence in giving notice might acquire an earlier equity,(*p*) and the absence of notice exposed the assignee to the risk of payment being made of the debt to the assignor in the interval between the assignment and the notice of it.(*q*) Notice to debtor essential to legal title.

The absence of notice as regards legal assignments opens the question of "consent and permission" in reference to "the order and disposition" clause in the Bankruptcy Acts. Notice after bankruptcy may be too late(*r*) although given before the

(*p*) See Hobson *v.* Bell, 2 Beav. 23, Dearle *v.* Hall, 3 Russ. 1; *In re* Pryce, 25 W. R. 432, V. C. B.

(*q*) Donaldson *v.* Donaldson, Kdy. 719.

(*r*) *In re* Webb's Policy, 36 L. J. Chan. 341, V. C. M.

Assignment of Choses in Action.

assignee in Bankruptcy gives notice. The omission on the one hand leaves the chose in action in the power of the assignor to assign to another assignee, and leaves it on the other as a chattel in danger of being confiscated under the order and disposition clause in bankruptcy, and seized and sold for the benefit of the creditors of the bankrupt.(*t*) Under the Bankruptcy Acts in force in Ireland, and in the earlier English Acts,(*u*) choses in action are doubtless goods and chattels which may be left in the order and disposition of a bankrupt, with the consent and permission of the true owner, an assignee for value, whose neglect to give notice may be *primâ facie* evidence of *laches*, or consent; but the general assignee acquires no title to the chattel, until an order for sale and disposition has been made by the Court of Bankruptcy, though once a sufficient order has been made, it seems to relate back to the date of the bankruptcy, and possibly although made after action brought or bill filed.(*v*) But an order giving assignee leave to litigate the question or to intervene in a pending suit does not amount to an order determining that the goods were, at the time of the Bankruptcy, in the order and disposition of the Bankrupt, with the consent of the true owner and for sale (*w*).

So far in the event of bankruptcy the title of the particular assignee who neglects to give notice, is liable to be jeopardized if not divested by an order for sale under the reputed ownership clause—provided the order made, be specific, and be pro-

(*t*) See *In re* Hickey, a bankrupt, Ir. Rep. 10 Eq. 117, A. C.; also Bartlett *v.* Bartlett, 1 De Gex. & Jo. 127, *per* L. J. Turner; Daniel *v.* Freeman, Ir. Rep. 11 Eq. 233, M. R.

(*u*) 12 & 13 Vic. c. 107, Ir.; 20 & 21 Vic. c. 60, s. 313 Ir.; 12 & 13 Vic. c. 106, Engl.; but they are excluded by the last Act, 32 & 33 Vic. c. 71, s. 15 sub. 5, Engl.

(*v*) See Heslop *v.* Baker, 8 Ex. 411.

(*w*) Bradley *v.* James, Ir. Rep. 10 Com. Law 441, E.

duced in proper time.(*x*) How far an order by way of express adjudication made by the Court of Bankruptcy under its extended jurisdiction, and not appealed from, is conclusive upon the true owner, does not appear to have been expressly decided. *Assignment of Choses in Action.*

It is to be noticed that under the English Bankruptcy Act, 32 & 33 Vic. c. 71, s. 15, sub. 5, choses in action (other than debts due to the bankrupt in the course of his trade) are no longer to be deemed goods and chattels within the meaning of the order and disposition clause, or as such distributable among creditors.

In the Irish statutes the(*b*) order and disposition clause is declared not to apply to any transfer or assignment of any ship or vessel or share thereof made by way of security, duly registered; but there is nothing, as far as we can find, corresponding to the exempting clause in the English Act.

Notice by an assignee of an equitable chose in action to the trustee, was necessary under the earlier statutes to prevent the assignor assigning over, even after his bankruptcy or insolvency, and in the latter case if the subsequent assignee gave formal notice, he might oust the title, not only of the first assignee, but also of the general assignee in bankruptcy or insolvency who neglected to give notice before-hand.(*c*)

(314.) The notice spoken of, in order to give effect to an assignment of a legal chose in action, must be "express" notice and not constructive notice. In equitable assignments notice to the trustee should be direct notice, and the casual knowledge of it acquired aliunde *e.g.* by the solicitor *Express notice.*

(*x*) Daniel *v.* Freeman, Chan. Ap. Ct. (Ire.) 30 April, 1877, reversing on latter point S. C. *ubi supra*, and see Bradley *v.* James, *supra*.

(*b*) See 12 & 13 Vic., c. 106, s. 125; 20 & 21 Vic. c. 60, s. 313.

(*c*) Holt *v.* Dewell, 4 Hare 447; *In re* Brown's Trusts, L. R., 5 Eq. 90. V. C. W.; Lloyd *v.* Banks, L. R., 4 Eq. 222; Sowerby *v.* Brooks, 4 B. & A., 523.

Assignment of Choses in Action.

of the trustees was not sufficient.(*d*) Where the trustee had actual notice of the prior assignment, it did not matter whether the knowledge was acquired in the same transaction or in a different one.(*e*)

Notice must be in writing.

(315.) Although no particular form of notice is prescribed by the Act, yet it must be in writing. This was not necessary in regard to equitable assignments. Parol notice to a trustee was sufficient if it was express.(*f*) It was made so as regards the legal transfer of policies of life insurance by the statute 30 & 31 Vic., c. 144, s. 3.

By whom.

(316.) Subsection (6) does not say by whom the notice in writing is to be given. It is presumed it should be given by the assignee, and for safety sake it had better be signed by him, though probably a notice given by a person acting as his agent or solicitor on his behalf might be deemed sufficient, and if so, notice given by the assignor might be taken to be notice given by or on behalf of the assignee.

To whom.

(317.) The notice must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action. In case of an equitable assignment of a legacy charged on a particular fund but to be paid out of the assets, notice given to the executor was held sufficient.(*g*) Where a fund was in the Court of Chancery to the credit of a cause, notice should be given to the Accountant-General and only by means of a stop order, restraining transfer without notice to the assignee.(*h*) Where the funds stood

(*d*) See *In re* Brown's Trusts, L. R., 5 Eq. 88 V. C. W.; Lloyd *v.* Banks, L. R., 4 Eq. 222; *In re* Tichener, 35 Beav. 317.

(*e*) Meux *v.* Bell, 11 Hare 73.

(*f*) *In re* Tichener, 35 Beav. 317; Allertson *v.* Chichester, L. R. 10, C. P. 329.

(*g*) Molloy *v.* French, 13 Ir. Eq. Rep. 261, L. C.; but see Holt *v.* Dewell, 4 Hare, 446.

(*h*) Stuart *v.* Cockerell, L. R. 8 Eq. at p. 609; but see Livesay *v.* Harding, 28 Beav. 141.

in the books of the Bank of England in the name of a sole trustee who was dead and without a representative, a distringas lodged at the bank was deemed sufficient.(*i*) *Assignment of Choses in Action.*

In equitable assignments where there were several trustees, notice to one was equivalent to notice to all, so long as circumstances remained unaltered, as for example, by the death or retirement of that trustee.(*j*)

(318.) The notice spoken of, *i.e.*, to the debtor or trustee is of course a different thing from actual notice of the prior assignment reaching a second assignee before his purchase. The doctrine of Dearle *v.* Hall assumes that neither the incumbrancer giving the notice, nor the trustee at the time of such notice being given, has not notice of any prior incumbrance affecting the fund.(*k*) Notice aliunde to the subsequent assignee.

(319.) The assignment if duly made, and notice given to the debtor, is effectual in law to pass and transfer the legal right to the debt or chose in action from the date of such notice. The statute, however, does not say whether from the date of the notice being given or being received. It is presumed from the latter, and it seems doubtful whether a notice duly posted but never received, would be effectual for *this* purpose.(*l*) Effectual from date of service.

The notice should for prudence sake be given at the earliest possible moment.

If the debt be in presenti payable in futuro, of course the assignee can acquire no earlier right to sue than the assignee had.

As between the assignor and assignee, an assignment perfected by notice would seem to take the property in the chose in action out of the assignor,

(*i*) Etty *v.* Bridges, 2 You. and C. C. C. 486.

(*j*) Meux *v.* Bell, 1 Hare, 73.

(*k*) See Meux *v.* Bell, 1 Hare, at p. 84, *per* V. C. Wigram.

(*l*) See *In re* Hickey, a bankrupt, Ir. Rep. 10, Eq. 117, Chan. A. C., L. J. Christian.

Assignment of Choses in Action.

and divest him of the right to recover payment or give a valid discharge for it.

Assent of debtor not necessary.

(320.) The assignment of a debt under subsection (6) becomes effectual at law without the assent of the debtor, so far following the analogy of the rule in equity.(*m*) The rule at common law was otherwise, and an assignee of a legal debt could not sue the debtor without his assent, and as on a fresh contract and assumpsit.(*n*)

Subject to equities between assignor and debtor.

(321.) The assignment though effectual at law is made "subject to all equities which would have been entitled to priority over the right of the assignee if this (Judicature) Act had not passed." The assignee takes subject first to the existing equities between the original parties to the debt or chose in action(*o*) provided they arise in the same transaction, and are not collateral or subsequent to the transfer.(*p*)

The chief equities between assignor and debtor are part payment, set off, calls by a public company, lien of a solicitor or an executor, and right of stoppage in transitu. However, the debtor may by his original contract with his creditor, or by the subsequent dealings between him and the assignee, limit or lose this right to set up an equity.(*q*)

Equities between assignees.

(322.) As between several assignees for value of the same chose in action, the assignee who first gives notice will, *cæteris paribus*, render his assignment effectual against all others; but if he has notice of a previous assignment for value, although the latter be imperfect in law from want of notice

(*m*) See *ex parte* South 3 Swanst. 393; M'Fadden *v.* Jenkyns, 1 Phil. 157. (*n*) Tibbits *v.* George, 5 Ad. and El. 116.

(*o*) *In re* Natal Investment Co. L. R. 3 Ch. 355; Jennings *v.* Bond, 2 Jo. and Lat. 720, 8 Ir. Eq. Rep. 755.

(*p*) Molloy *v.* French, 13 Ir. Eq. Rep. 261; but see Hopkinson *v.* Owens, 1 Mol. 562.

(*q*) See Higgs *v.* Northern Assam Tea Co., L. R., 4 Exch. 387; *In re* Northern Assam Tea Co., L. R. 10 Eq. 458.

Assignment of Choses in Action.

to the debtor or trustee, the second assignee may probably be held to have taken subject to the equitable title of the previous assignee for value.(*s*)

A volunteer could raise no equity as between himself and a later assignee for value whether notice was given to the debtor or not(*t*), although against the assignor himself if the gift or trust was fully executed and complete, his title was good, and also against persons deriving under him as volunteers, even without notice, although probably not against creditors under the statute of Elizabeth, and the later volunteer by giving notice did not make his title the better.(*u*) In fact, as between volunteers notice to the debtor did not affect priorities.(*v*) Whichever assignment was the earlier in date took priority.(*w*) As between two volunteers, if the one that was puisne had, by diligence and without fraud, realized the fund, the Court probably would not interfere or deprive him of the fruits of his diligence.(*x*) Now if with knowledge of a previous assignment to another person, although a volunteer, a second voluntary assignee first gives notice it may be a question how far he can acquire advantage thereby.(*y*)

Debtor may call for interpleader.

(323.) The subsection (6), for the further security of the debtor contains this proviso, viz.—"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 anyone claiming under him, or of any other opposing or conflict-

(*s*) See Justice *v.* Wynne, 12 Ir. Chan. Rep. 309, *per* Ball, J. and cases cited there.

(*t*) See *per* Ball, J. at p. 308. L. C. at p. 305.

(*u*) Justice *v.* Wynne, 12 Ir. Ch. Rep. 287, C. A.

(*v*) Rice *v.* Rice, 2 Drewry 85 ; Justice v. Wynne, *ubi supra.*

(*w*) See Justice v. Wynne, 12 Ir. Chan., Rep. 309, *per* Mr. J. Ball, and cases cited there.

(*x*) S. C. per Blackburne. L. J. A. at p. 299, 300.

(*y*) See *Ib.* p. 300.

Assignment of Choses in Action.

ing claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto, to interplead concerning the same."

Debtor may lodge money under Trustee Relief Acts.

(324.) So also the debtor or trustee chargeable, having notice of an assignment being disputed, or of conflicting claims to the debt or chose in action, is enabled by subsection (6), (*z*) if he thinks fit, to pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."(*a*) Hitherto a debtor had no such right, and an insurance company in ordinary cases could not lodge the amount of the policy in court.(*b*)

CHAPTER XXXVII.

Stipulations not of the Essence of Contracts.

Section 28. *Subsection* (7).

325. Stipulations not of Essence of a Contract, p. 272.
326. Conflict between Law and Equity, 273.
327. Stipulations as to time, 273.
328. Stipulations as to Quantity, 274.
329. Relief against Penalties, 275.
330. What is Penalty and what Liquidated Damages, 276.
331. Relief against Forfeitures, 278.
332. Liquidated Damages and Option to do the Act, 279.

Stipulations not of the essence of contracts.

(325.) Section 28 of the Judicature Act, Subsection (7), (*a*) enacts as follows:—

"Stipulations in contracts, as to time or otherwise, which would not, before the commencement of the Judicature Act, have been deemed to be, or to have become of the essence of such contracts in a Court of Equity, shall receive in all courts the same

(*z*) J. A., 1877, s. 28, sub. 6; J. A., 1873, s. 25.
(*a*) See 10 & 11 Vic., c. 96; 12 & 13 Vic., c. 74.
(*b*) *Vide In re* Haycock's Policy, L. R., 1 Ch. D. 611, M. R.
(*a*) J. A. 1877, s. 28, sub. (7); J. A. 1873, s. 25, sub.

construction and effect as they would have theretofore received in Equity."

Stipulations not of Essence of Contracts.

(326.) The divergence of equity from law was nowhere more marked than in the way in which a Court of Equity dealt with stipulations in contracts, as to time or otherwise, and the consequent relief it afforded in cases of mortgages, forfeitures, penalties, and misdescriptions in contracts generally. The common law was supposed to act on the literal terms and language of contracts; equity to regard the spirit and not the letter, to look to the intent rather than the form of the contract,(*b*) and a Court of Equity frequently decreed specific performance of contracts where the action at law had been lost, by the default of the party seeking the specific performance; *ex. gr.*, where the terms of the agreement had not been strictly performed, and where to sustain an action at law performance should be averred according to the very terms of the contract, and yet it would be unconscientious that the agreement should not be carried out.(*c*)

Conflict between equity and law.

(327.) Stipulations as to time were not ordinarily regarded in Equity as of the essence of a contract, although time might be made essential by express stipulation of the parties; *ex. gr.*, a stipulation that in consideration of punctual payment on or before a certain day a reduced rent or amount of interest should be received.(*d*) It may also appear from the general character of the property, the subject of the contract,(*e*) where lapse of time changed the value and nature of the thing contracted for, or affected the persons to participate in the benefit

Stipulations as to time.

(*b*) See Peachey *v.* Duke of Somerset, 2 White & Tudor, L. C. 979.

(*c*) Davis *v.* Hone, 2 Sch. & Lef., at p. 437, per Lord Redesdale.

(*d*) See Hudson *v.* Temple, 29 Beav. 536.

(*e*) See Patrick *v.* Milner, 25 W. R. 790, C. P. D.

Stipulations not of Essence of Contracts.

of it; *ex. gr.*, a reversion expectant on a life annuity or an ecclesiastical lease,(*f*) or where the property was of a fluctuating variable character, and was sold for some immediate purpose of trade, as a public house sold as a going concern, with a certain amount of customers attached to it,(*g*) or where the object of one party to the contract would be defeated by the delay, it being to meet some particular exigency, as where an immediate sale was contracted for with a view to pay off incumbrances bearing a high rate of interest out of the purchase money.(*h*) In a recent case(*i*) a party contracted to purchase a residence, and that possession should be given by a certain day, and the vendor tendered the possession, but failed to show title by that day. The Court of Chancery held that the stipulation as to time was of the essence of the contract, and the construction of it, as regards giving possession, should be the same in a Court of Equity as in a Court of Law, and therefore the possession spoken of must be held to be possession with a good title previously shown.

Stipulations as to quantity.

(328.) In equity, stipulations as to quantity, even in land, when arising in mistake or unintentional misdescription, were not regarded as of the essence of a contract, provided the amount was so far small and unsubstantial, that the deficiency might be reasonably compensated for in money. Thus where the acreage of an estate sold, as described in the contract is slightly inaccurate,(*k*) or term of years contracted for as being twenty-one years, proves short by an insignificant amount such

(*f*) Carter *v.* Dean of Ely 7 Sim. 211.

(*g*) Cowles *v.* Gale, L. R. 7 Ch. 32.

(*h*) See Popham *v.* Eyre, cited in Crofton *v.* Ormsby, 2 Sch. & Lef. 604.

(*i*) Tilley *v.* Thomas, L. R. 3 Ch. 61.

(*k*) See M'Kenzie *v.* Hesketh, W. N. 1877, 249, Fry, J.

as a quarter, these defects, though they might defeat an action at law, lay so clearly in compensation that a Court of Equity would enforce the execution of the contract.(*j*) But where the misdescription was in a material point of the contract such that it may be reasonably supposed the party might never have entered into it if he had been aware of the misdescription, it could not be relieved against either in equity or at law.(*k*) A misdescription of the tenure of the estate contracted to be sold, *ex. gr.*, as copyhold, whereas it proved so be partly freehold, was always fatal in equity,(*l*) so where the contract was for a lease, whereas the contractor could only give an under-lease.(*m*)

Stipulations not of Essence of Contracts.

(329.) Penalties inserted in contracts to secure performance of some act or the enjoyment of some right, although considered at law absolute, were relieved against in equity, in cases in which all the material parts of the contract were or might still be performed, the Court requiring the covenantee or obligee in such case to be satisfied with the substantial performance of his contract, giving him by way of recompense all that really was expected or desired according to the intention of the parties.(*n*)

Relief against penalties

Relief from penalties, *ex. gr.* of a larger sum of money for the non-payment of a smaller sum on a particular day, was the most ordinary instance of the exercise of this jurisdiction. A court of law

(*j*) See Seton *v.* Slade, 7 Ves. 265; 2 White & Tudor, 468. Halsey *v.* Grant, 13 Ves., at p. 77, Lord Erskine, L. C. Vignoles *v.* Bowen, 12 Ir. Eq. Rep. 194, M. R.

(*k*) Flight *v.* Booth, 1 Bingh., N. C., at p. 377, Tindal, C. J. Dimmock *v.* Hallett, L. R., 2 Ch. 21, L. JJ.; and see cases cited in Addison on Contracts, 7th Ed., 402-3.

(*l*) Ayles *v.* Cox, 16 Beav. 23.

(*m*) Madeley *v.* Booth, 2 De Gex & Sma. 718.

(*n*) Peachy *v.* Duke of Somerset, 1 Strange, 447, 2 White & Tudor, 977. See Thompson *v.* Hudson, L. R., 4 H. L., at p. 15, *per* Lord Hatherley.

Stipulations not of Essence of Contracts.

would award judgment for the full amount mentioned in the bond, and a Court of Equity issued its injunction to restrain execution, the plaintiff in equity offering to pay the amount actually due for debt and damages. This led to the enactment of the statutes, 9 Wm. III., c. 10, Ir.; 8 & 9 Wm. III., c. 11, s. 8, Engl., making the penalty of a bond or other penal sum for the non-performance of any covenant or agreement contained in any deed or writing, a security only for the damages really sustained and providing that no more should be recoverable at law than would be allowed to be recovered in equity. Accordingly, the statute requires the plaintiff to assign particular breaches, and take the opinion of a jury as to the amount which he ought under the circumstances be permitted to levy. It applies, however, only to penalties for non-performance of contracts or agreements, to bonds conditioned for the payment of one sum *in globo*, and where the agreement is to pay by instalments, *ex. gr.*, an annuity, it did not apply.(*o*)

What is a penalty and what liquidated damages.

(330.) A penalty is a punishment or infliction for not doing or for doing something,(*p*) but an engagement for full payment of money actually due on an existing contract, in case of failure to pay a smaller sum on a certain day cannot be treated as a penalty.(*q*) So where a creditor agrees to receive his debt with interest by certain instalments, with a proviso that in default of punctual payment of any instalment the entire unpaid portion of the debt shall become immediately payable, this proviso is not a penalty.(*r*)

(*o*) See Preston *v.* Daniel, L. R. 8 Exch. 19; Gorman *v.* Hinks, Batty, 527; and see cases cited, Ferg. Prac., pp. 447, 448.

(*p*) See Thompson *v.* Thompson, L. R., 4 H. L. at p. 28, *per* Lord Westbury.

(*q*) *Ib.* at p. 23; and see Kemble *v.* Farren, 6 Bingh. 141.

(*r*) Sterne *v.* Beck, 1 De Gex, Jo. & Smith, 595.

Stipulations not of Essence of Contracts.

Neither is it a penalty where damages are of an uncertain nature, and the parties choose to stipulate beforehand, each to deposit a specific sum to be forfeited by way of liquidated damages on failure to complete the agreement; this agreement being an independent part of the contract may be enforced according to its terms, and the liquidated damages as such assessed at law.(*s*) So where a tenant agreed with his landlord not to raise a certain building higher under a penalty of double rent to be recovered by distress, even a Court of Equity treated that as not in the nature of a penalty but of liquidated damages.(*t*) So where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages.(*u*)

On the other hand, where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end, to be paid on breach of performance of any of them, this must be considered as a penalty,(*v*) as where a contractor agrees to pay £1,000 as liquidated damages in case his contract shall not be in all things duly performed.(*w*)

The question of "penalty" or "liquidated damages" is one of intention to be gathered from a consideration of the entire instrument and decided by the judge as a question of law, and Courts

(*s*) Lea *v.* Whitaker, L. R., 8 C. P. 70.

(*t*) Gerrard *v.* O'Reilly, 3 Dru. & War. 414; see Lessee of Ashtown *v.* White, 11 Ir. L. R., 400, M. R.

(*u*) Astley *v.* Weldon, 2 B. & P. 353, *per* Mr. Justice Heath, approved of by L. J. James in *In re* Newman *ex parte* Capper, L. R., 4 Ch. D. at p. 731.

(*v*) Magee *v.* Lavelle, L. R., 9 C. P. 107, *per* Lord Coleridge, C. J. Kemble *v.* Farron, 6 Bingh. 141.

(*w*) *In re* Newman *ex parte* Capper, L. R., 4 Ch. D. 724; 25 W. R. 244, A. C.

Stipulations not of Essence of Contracts.

do not feel themselves bound by the parties themselves calling a thing "liquidated damages" where the nature of the thing and the manifest intention is that it shall be a penalty;(*x*) nor conversely by their calling that a "penalty" which is plainly intended as liquidated damages.(*y*)

Relief against forfeiture.

(331.) As regards relief against forfeitures the principal instances of such relief as given in equity arose in case of mortgages of estates, which at law were forfeited for non-payment of a specific sum of money on a certain day, but which in equity were redeemable on reasonable terms until foreclosure. The ejectment statutes follow this analogy in respect to the forfeiture of leases for non-payment of rent, limited by certain conditions. The statute 22 & 23 Vic., c. 35, s. 4, extends it to forfeitures for breaches of covenants or conditions to insure against loss or damage by fire, in cases where no actual loss or damage has happened, and the breach has in the opinion of the Court been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant. The ordinary principle of a Court of Equity was, not to relieve against forfeitures incurred by breach of covenants in leases where a money payment was not complete compensation; *ex. gr.*, a covenant to repair,(*z*) or to build within a given time,(*a*) or to cultivate in a husbandlike manner,(*b*) unless the forfeiture was brought about by surprise, mistake, or

(*x*) Boys *v.* Ancell, 7 Scott, 364; Magee *v.* Lavelle, L. R., 9 C. P. 107. *In re* Newman *ex parte* Capper.

(*y*) Sparrow *v.* Paris, 7 Hurl. & Norm. at p. 597, *per* Channell, B.; Sainter *v.* Ferguson, 7 C. B. 727.

(*z*) Gregory *v.* Wilson, 9 Hare, 683.

(*a*) Croft *v.* Goldsmid, 24 Beav. 312.

(*b*) Hills *v.* Rowland, 4 De Gex, Mac. & G. 430.

Stipulations not of Essence of Contracts.

inevitable accident, or conduct on the part of the landlord, by which the lessee was misled into supposing that the covenant would not be insisted on, and it would be inequitable for the landlord to do so.(*c*)

Liquidated damages and option.

(332.) But where there is an express covenant or agreement not to do a certain act, *ex. gr.*, not to plough up more than a given number of acres within a certain time, and a penalty or penal rent is attached to the doing of the act; in such a case equity would prohibit the party from violating his contract, and would not give him an option which the contract did not intend to give him, of paying the penalty in order to do the act covenanted against. If the act is already done, the penalty must be paid and the amount is unimportant.(*d*)

The general rule of equity is, that if a thing be agreed upon to be done, although there is a penalty annexed to secure its performance, yet the very thing itself must be done, and the party will not be allowed to pay the forfeit and avoid his agreement. So if a man covenant to abstain from doing an act, just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract.(*e*) This had been decided by the House of Lords in the City of London *v.* Pugh,(*f*) on the ground that if a man covenants not to do an act, his payment of a penalty, annexed to his doing that act, does not oust the Court of Equity of its juris-

(*c*) See Hughes *v.* Metropolitan Railway Company, L. R. 1 C. P. D.; 24 W. R. 652, A. C.; S. C. 25 W. R. 680, H. L.

(*d*) See French *v.* Macale. 2 Dru. & War. at pp. 274-5. *per* Sir Edward Sugden, L. C., S. C. 4 Ir. Eq. Rep. 512; see Maxwell *v.* Mitchell, 1 Ir. Eq. Rep. 368, M. R.; French *v.* Macale, 2 Dr. & War. at p. 284.

(*e*) *Per* Sir Edward Sugden, L. C., French *v.* Macale, 2 Dru. & War. at pp. 274-5.

(*f*) City of London *v.* Pugh, 4 Bro. P. C. 395, Toml. Ed.

Stipulations not of Essence of Contracts.

diction to prevent his doing the act, and the amount of the penalty cannot influence the Court.(*g*) In the case of Molony *v.* Quail,(*h*) where a lease contained a clause that it should not be lawful for the tenant to till or turn up more than ten acres of the land at any one time without the landlord's consent, under a penalty of £12 for each acre to be turned up, was treated as liquidated damages, and an interlocutory injunction to restrain the breaking up was refused; but Sir Edward Sugden considered it in direct opposition to all the decisions, including that of the House of Lords.(*i*)

The amount of the sum to be paid, however disproportionate to the damage contemplated, ought to have no operation on the action of the Court in restraining an act which the defendant covenants not to do.(*j*)

On the other hand, where the contract allows the party to do such an act on payment of an additional rent as an equivalent, whether it be called penalty or liquidated damages, equity in that case would neither restrain the doing of the act, nor the enforcement of the (so-called) penalty, because in fact it was intended as stipulated damages.(*k*) In certain cases a statute imposes a penalty for breach of a duty, to be recovered by a common informer, and this may affect the right of an individual who has suffered injury from the neglect to sustain an action for damages for breach of the same duty.(*l*)

(*g*) *Per* Sir Edward Sugden, in French *v.* Macale, 2 Dru. & War. p. 281.

(*h*) Molony *v.* Quail, 4 L. R., N. S. 107, M. R.

(*i*) French *v.* Macale, at p. 283.

(*j*) S. C. See *per* Sir Edward Sugden, at p. 280.

(*k*) French v. Macale, *ubi supra*; Forbes *v.* Carney; Wallis by Lyne, 38.

(*l*) See Atkinson *v.* Newcastle Waterworks Company, 25 W. R. 794, A. C., where this subject is discussed.

CHAPTER XXXVIII.

Mandamus and Injunction.

Section 28. *Subsection* (8).

Mandamus.

333. Mandamus, Injunction and Receiver, p. 281.
334. Prerogative Mandamus, 282.
335. Statutory action of Mandamus, 282.
336. Mandamus under Judicature Act, 283.

Injunction.

337. Injunction under Common Law Procedure Act, 284.
338. Mandatory Injunction, 285.
339. Injunction under Judicature Act, 287.
340. Against Waste or Trespass, 288.
341. Distinction between Waste and Trespass, 288.
342. Trespass by defendant in possession, 289.
343. Trespass on Plaintiff in possession, 291.
344. In Protection of other legal rights, 292.
345. Application for Mandamus or Injunction, 293.
346. By Defendant, 294.
347. Not against Third Person, 295.
348. On Terms, 296.

Mandamus, injunction, and receiver.

(333.) The section 28 of the T. A.(*a*) subsection (8) enacts that:—

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

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(*a*) J. A., 1877, s. 28, subs. (8); J. A., 1873, s. 25, subs. (8).

Mandamus and Injunction.

whether the estates claimed by both, or by either of the parties are legal or equitable."

Prerogative mandamus.

(334.) The Prerogative Writ of Mandamus issued from the Court of Queen's Bench only, to compel the performance of some particular duty, where a public inconvenience or a private wrong, was occasioned by the omission of a public or official duty, or one imposed by Act of Parliament for the benefit of individuals, and where no sufficient remedy was afforded by action of damages. Thus, in more recent times, it has been applied to compel railway and other public companies to do certain works for the benefit of individuals—to make communications between lands intersected, to make roads, and as directed by their private acts. The Common Law Procedure Act, 1856, sec. 78, authorized the Court of Queen's Bench to make the rule absolute for a mandamus in the first instance, if it thought fit without the tedious and expensive form of a preliminary application for a return, and an action at law brought to try its falsity. The writ might bear date on the day of issue, and be made returnable forthwith, and the provisions of the Common Law Procedure Act, 1853, as to pleading and practice, were made applicable to the Prerogative Mandamus by Common Law Procedure Act, 1856, s. 79.(*b*)

Statutory action of mandamus.

(335.) By the Common Law Procedure Act, 1856, sec. 70, a plaintiff might in any Writ of Summon and Plaint in any personal action, *i.e.*, other than for replevin or ejectment, claim a Writ of Mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff was personally interested, and by the non-performance of which he showed he sustained or might sustain damage.(*c*)

(*b*) See Ferg. C. L. Pro. Act, 2nd Ed., p. 366.

(*c*) *Ib.*, p. 360.

Mandamus became, in fact, a new form of personal action which might be brought in any of the Common Law Courts, by means of which the court might give redress similar to what a Court of Equity formerly did, to protect or vindicate common law rights. But in practice the Statutory Writ of Mandamus was held applicable to enforce fulfilment of duties of a public nature only, as distinguished from such as arise simply by personal contract, such as an agreement to execute a lease, the enforcement of which belonged to Courts of Equity.(*e*) Whilst it did apply to compel a public company to enter the name of a party on a register as a shareholder as required by their charter.(*f*) The plaintiff should be personally interested in the duty and have no other equally effectual remedy.(*g*) It was not, however, necessary that actual damage had been already sustained.(*h*) The writ could only be issued after judgment, and seemed to be almost conterminous in its scope with the Prerogative Writ. *Mandamus and Injunction.*

(336.) The statutory action seems to be open still and may be instituted by Writ of Summons with an indorsement claiming damages and a Writ of Mandamus.(*i*) *Mandamus under Judicature Act.*

To what class of cases the subsection (8) was intended to apply is not so clear, nor whether it will be confined to the cases in which the Writ of Mandamus has been used in the Common Law Courts under the Common Law Procedure Act.

Under the terms of the subsection (8) the writ may be issued by every branch of the court, in all cases in which it shall appear to the court just or

(*e*) See Benson *v.* Paul, 6 El. and Bl. 273.
(*f*) Norris *v.* Irish Land Co., 8 El. and Bl. 512.
(*g*) Bush *v.* Beavan, 1 H. and C. 500.
(*h*) Fotherby *v.* Metropolitan Railway Co., L. R., 2 C. P. 188.
(*i*) See Form, Schedule A, part 2, sec. iv.

Mandamus and Injunction.

convenient by an interlocutory order as well as by a final judgment and probably without it being claimed by the writ or by the pleadings.

A Vice-Chancellor in a winding up matter can order a Writ of Mandamus to issue to compel the directors of the company to convene a meeting of shareholders.(*j*)

Injunction under Common Law Procedure Act.

(337.) The Common Law Procedure (Ireland) Act, 1856,(*k*) enabled the Common Law Courts or a Judge, in all cases of breach of contract or other injury, where an action could be maintained and had been brought by the party injured for damages, to grant an injunction against the repetition or continuance of the breach of contract or other injury, or the committal of any breach of contract or injury of the like kind arising out of the same contract or relating to the same property or right, or an *ex parte* application, either before or after judgment, on such terms as to the duration of the writ, keeping an account, giving security or otherwise, as the Court might think reasonable and just.

This statutory injunction was confined to cases in which an injury had actually been committed and not merely threatened, and an action brought to recover damages in respect of it. It could hardly be had in an independent action seeking it and nothing more.

The Patent Amendment Act, 1852,(*l*) likewise enabled Courts of Law in any action for infringement of letters patent, to make such order for an injunction, inspection, and account, as it thought fit.(*m*) The statute 25 and 26 Vic., c. 88,(*n*) gave

(*j*) Paris Skating Rink Co., L. R., 6 Chan. D. 731; 25 W. R. 767; 168, V. C. H.

(*k*) 19 & 20 Vic., c. 102, s. 84.

(*l*) 15 & 16 Vic., c. 82, s. 42.

(*m*) See in Equity, Calcraft *v.* West, 2 Jo. & Lat. 123, 8 Ir. Eq. Rep. 74.

(*n*) S. 2.

like power as to trade marks, similar to those exercised by the Court of Chancery(*o*) in case of fraudulent imitation of trade marks,(*o*) or violation of copyright.(*p*) *Mandamus and Injunction.*

(338.) It is probable that the subsection (8) intends to confirm and extend the valuable jurisdiction claimed by Courts of Equity, and exercised somewhat indirectly in the form of what was called a mandatory injunction, partaking of the character both of the mandamus and of the injunction; a jurisdiction, at one time somewhat doubtful and always exercised in a roundabout form; for example, to abate a nuisance by removing a dam across a river,(*q*) to restore land to its original condition,(*r*) to permit plaintiff to go on defendant's land to repair a watercourse.(*s*) The most common instance of this form of injunction was in respect of the obstruction of ancient lights, and it usually assumed the shape of a decree or order enjoining the defendant not to continue the wrongful act, or to keep erected so much of his wall or building as was opposite to the premises of the plaintiff so as in any manner to obstruct any of the ancient lights or windows of the same. Where the buildings have been fully or substantially completed before the bill was filed,(*t*) or before the interlocutory order has been made, a mandatory injunction to pull them down was not usually granted, although an inquiry as to damages Mandatory injunction.

(*o*) See cases in Equity, Foot *v.* Lea, 13 Ir. Eq. Rep. 484, M. R.; Kinahan *v.* Bolton, 15 Ir. Chan. Rep. 75, L. C.

(*p*) See Turner *v.* Robinson, 10 Ir. Chan. Rep. 121, M. R. S. C.; *Ib.* 510 A. C. copying picture of the death of Chatterton.

(*q*) Laird *v.* Murray, 3 Ir. Jur. 244, L. C.

(*r*) Armstrong *v.* Waterford Railway Company, 10 Ir. Eq. Rep. 60, M. R.

(*s*) M'Swiney *v.* Haynes, 1 Ir. Eq, Rep. 322, M. R.

(*t*) Isenberg *v.* East India House Estate Company, 3 De Gex, Jo. & Smith, 263; Lady Stanley of Alderley *v.* Earl of Shrewsbury, L. R. 19 Eq. 616, V. C. H.

Mandamus and Injunction.

might have been given,(*u*) and where they are actually completed, even so late as at the time of the hearing of the cause, it was not a matter of course to grant such an order.(*v*) But it may be where works were continued after due notice from the Court on an interlocutory application that it was at the peril of the party, and that the cause should be heard as if no further progress had been made,(*w*) the application for the injunction being directed to stand for the hearing, and the defendant being put under terms to abide such order as the Court may make at the hearing, to remove any portions of the building in course of erection. In a recent case where the building of a porch was actually complete before bill filed, but after express notice from the plaintiff, the Court ordered its removal.(*x*)

In a certain class of cases instead of a mandatory injunction the Court has a discretion under Lord Cairns' Act to substitute damages instead of an injunction not on interlocutory motion but at the hearing, as where the injury done was of a comparatively trifling nature compared with the injury which would be inflicted on the defendant by the granting of the injunction, and to prevent a plaintiff from practising oppression or extortion on the defendant by the exercise of his legal right.(*y*)

But acquiescence, or unwarrantable delay amount-

(*u*) Curriers' Company *v.* Corbett, 2 Dru. & Sma. 360; See Lady Stanley of Alderley *v.* Earl Shrewsbury, *ubi supra*, where an inquiry was directed though not prayed by the Bill.

(*v*) Aynsley *v.* Glover, L. R. 18 Eq. 544, *per* Sir Geo. Jessell, M. R.; Curriers' Company *v.* Corbett, 2 Dr. and Sm., *ubi supra*.

(*w*) See Mackey *v.* Scottish Widows' Fund Company, Ir. Rep. 10 Eq. 116, V. C. S. C. Ch. Ap. Ct. 7 July, 1877.

(*x*) Morris *v.* Grant, 24 W. R. 55 V. C. H.

(*y*) See Smith *v.* Smith, L. R. 20 Eq. at p. 504, *per* Sir Geo. Jessell, M. R.; Aynsley *v.* Glover, L. R. 18 Eq. at p. 555, Sir Geo. Jessel, M. R.

ing to acquiescence, on the part of the plaintiff would be no reason why the court should reduce the greater to the lesser remedy, because if the plaintiff has lost the right to a mandatory injunction he has also lost his right to damages.(*z*) Nor, on the other hand, in granting a mandatory injunction the court does not mean that a man injured could not be compensated by damages, but that the case was one in which it is difficult to assess damages, and in which, if it were not granted, the defendant would be allowed practically to deprive the plaintiff of his property whether he wished or not, provided only he gives him a price for it. Since Lord Cairns' Act, though the court has a discretion to substitute damages for the injunction, it will be so exercised as to prevent the defendant doing a wrongful act, and thinking he can merely pay damages for it.(*a*) *Mandamus and Injunction.*

On the other hand, even since the Judicature Act, an injunction to restrain obstruction of ancient lights will not be granted unless the plaintiff proves substantial damage.(*b*)

(339.) Under the Judicature Act, section 28, sub. (8), an injunction may be granted by every branch of the High Court, by an interlocutory order in all cases in which it shall appear to the court to be just or convenient that such order should be made, either unconditionally or upon such terms and conditions as the court shall think just. How far this is intended to enlarge the jurisdiction of the court in issuing writs of injunction and to extend it to new classes of rights, and new subject-matter may be doubtful. It is probable it will still be confined to cases of injury to property or health or enjoy- *Injunction under Judicature Act.*

(*z*) See Smith *v.* Smith L. R., 20 Eq., at p. 503, per Sir Geo. Jessel, M. R.

(*a*) *Ib.*

(*b*) Kind *v.* Rudkin, L. R., 6 Chan. D. 160, Fry, J.

Mandamus and Injunction.

ment of life in which damages at law would not be a complete compensation for the wrong complained of, or to prevent the continuance of vexatious acts, leaving mere personal injuries of a character such as libel or slander to be redressed as heretofore, and otherwise than by the extreme remedy of injunction. As for example the publisher of a pamphlet drawing unfavourable conclusions with regard to the plaintiff (a company), and alleged to be injurious to their trade or business,(*d*) or an advertisement stating that an article introduced by the plaintiff was an infringement of the defendant's patent(*e*).

As we have seen no injunction can now be granted by the High Court of Justice to restrain proceedings in any cause or matter pending in the High Court itself or the Court of Appeal, but the matter of equity on which an injunction might have been had before the Judicature Act is to be relied on by way of defence to the action.(*f*)

Against waste or trespass.

(340.) If an injunction is asked either before, or at, or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the court think fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title or whether the estates claimed by both or by either of the parties are legal or equitable.(*g*)

Distinction between waste and trespass.

(341.) The Common Law notion of waste rested on the privity of estate, whereas spoliation or injury

(*d*) See Prudential Assurance Company *v.* Knott, L. R., 10 Ch. at p. 144.

(*e*) See Hammersmith Skating Rink Company *v.* Dublin Skating Rink Company, Ir. Rep., 10 Eq., 235, V. C.

(*f*) *Vide* ante (259), p. 213.

(*g*) J. A., 1877, s. 28, sub. (8); J. A., 1873, s. 25, sub. (8).

to property by strangers, in no privity of estate with the complainant, was regarded as a mere trespass. The ground of relief by way of injunction in regard to the former, *i.e.*, waste, originated in the position of confidence and duty in which the person rightfully in possession of a particular estate stood towards others, to protect the inheritance, and when this trust was abused, by the tenant himself committing acts injurious to the property, equity interposed by injunction and by giving an account against the party guilty of the waste. On the other hand where there was an entire want of privity, or equity affecting the conscience, between a plaintiff entitled at law and a defendant, the Court of Chancery did not interfere, and as regards ordinary acts of spoliation committed by persons claiming by adverse title, it suffered redress to be sought at law by way of damages. The tendency of modern decisions, however, had been to break down this rather refined distinction between waste and trespass in these respects.(*a*) Originally in equity, and at law always, as regards things excepted from the demise, the tenant in possession was regarded as a stranger, without privity of estate with his landlord, and his wrongful acts of injury to the things excepted were regarded as mere trespass and not as acts of waste to be prevented by injunction.(*b*)

Mandamus and Injunction.

(342.) The cases of injunctions against trespass, have been classified under two heads, first where the defendant is in possession, second where the plaintiff is in possession and asks the court to protect his estate.

Trespass by defendant in possession.

In the former case, *i.e.*, where the defendant is in possession, the court was more reluctant to entertain

(*a*) Lowndes *v.* Bettle, 33 L. J. N. S. Ch. 451; 12 W. R., 399; 10 Jur. N. S. 226.

(*b*) Peters *v.* Vivian, 8 East. 190.

Mandamus and Injunction.

a suit for an injunction than where he was not in possession. In Talbot (Earl) *v.* Hope Scott,(*a*) the plaintiff was out of possession claiming under title of law, pending a claim to the peerage which was then before the House of Lords, and he sought a Receiver over the rents and an injunction to restrain waste against the defendant who was in possession, and the court held that it would not interfere at the instance of a person so claiming, there being no privity between the parties, or restrain waste except malicious or destructive waste, such as stripping the estate of its timber, pulling down the mansion house upon it, or other like acts, which no owner would do, or which would destroy the property before the acts could be arrested at law; but in the latter class of cases it would interfere, although the plaintiff was out of possession, and his title was denied on oath by the defendant.(*b*) In such a case the plaintiff should satisfy the court that there was an action pending at law between him and the defendant in possession which will try the right as between him and the defendant.(*c*) Where the defendant acquired possession by fraud or collusion with the tenants of the estate, the court might interfere to restrain acts of trespass in the nature of waste; but what Sir Anthony Hart called "a possession by favour of the occupiers"(*d*) as wanting the quality of an authorized possession, where a devisee was let into possession by the occupying tenants to the prejudice of the heir-at-law, has been criticised and disputed unless it be confined to the case of a fraudulent or forcible possession which the law will not recognise; but would be

(*a*) Talbot (Earl) *v.* Hope Scott, 4 K. and J. 96., V. C. Wood.
(*b*) Haigh *v.* Jagger, 2 Coll. 231, V. C. K. Bruce.
(*c*) Talbot (Earl) *v.* Hope Scott, 4 K. and J. at p. 135, *per* V. C. Wood.
(*d*) Lloyd *v.* Lord Trimleston, 2 Mol. 81.

Mandamus and Injunction.

inapplicable to the case of a devisee obtaining possession merely by the tenants attorning to him in the ordinary way, under which he acquires a right and title at law, to hold the estate until some other person can show that he, as heir or otherwise, has a better right to possession.(*b*) The case of a tenant to the plaintiff entering and committing waste upon a neighbouring bog belonging to the plaintiff upon which he had no right to enter or cut turf, would come nearer to that of a fraudulent entry and such has been restrained by injunction.(*c*)

Trespass on plaintiff in possession.

(343.) Where the plaintiff is himself in possession the defendant may either claim under colour of right or he may be an absolute stranger.(*d*) If the defendant be a mere stranger and trespasser, an injunction used not to be granted unless the stranger was in collusion with the actual tenant, or the mischief threatened was irreparable, or taking away of the substance of the inheritance.(*e*)

Where the plaintiff being in possession the trespass is done by invading his possession under colour of right or title, *ex. gr.*, a railway company taking lands under the compulsory powers given by Parliament,(*f*) or as in Lowndes *v.* Bettle,(*g*) where plaintiff and his ancestors were in possession for eighty years, and defendant claiming as heir-at-law entered upon it, and exercised acts of ownership by felling timber, he was restrained.

(*b*) Talbot (Earl) *v.* Hope Scott, 4 K. and J. at p. 117, *per* V. C. Page-Wood.

(*c*) See Wrixon *v.* Condran, 1 Ir. Eq. Rep. at p. 381. *per* Sir M. O'Loghlen, M. R.; but see Sandys *v.* Murray, 1 Ir. Eq. Rep., 29 Eq. Ex.

(*d*) Lowndes *v.* Bettle, 33 L. J., Ch. 451, *per* Kindersley, V. C.

(*e*) See cases mentioned by V. C. Kindersley in Lowndes *v.* Bettle.

(*f*) See Davenport *v.* Davenport, 7 Hare, 217, V. C. Wigram.

(*g*) Lowndes *v.* Bettle, 33 L. J., Ch. 531.

Mandamus and Injunction.

In some cases it is difficult to say which party is in possession as in Robinson *v.* Lord Byron,(*h*) where plaintiff was in possession of his own water-mills, and defendant was the owner of the water above the mills, and to vex the plaintiff, sometimes kept back the water from the mills and sometimes deluged them, and there the Court restrained Lord Byron from so using the stream as to do mischief to the plaintiff's mills.

In Stanford *v.* Hurlstone(*i*) the plaintiff was in possession for twenty years, and defendant claiming title to the estate had brought an action of ejectment against him in which, however, he elected to be non-suited. He afterwards cut down a tree and threatened to cut down more in assertion of his right of ownership, the Court granted an injunction to restrain him, approving and following in this respect Lowndes *v.* Bettle.

In a case since the Judicature Act the trespass complained of was the erection of a building, *i.e.*, a buttress, by a defendant on his own land, but encroaching on the land of the plaintiff, and an interlocutory injunction was refused,(*k*) and as regards other acts of trespass by defendant's carts passing over plaintiff's lands, the injury not being shown to be sufficiently permanent or substantial was left to be compensated by damages.(*l*)

In protection of other legal rights.

(344.) Where an injunction was sought to restrain the invasion of a legal right other than to land, *e.g.*, to copyright, and there was any doubt as to the exclusive legal right of the plaintiff, the Court would not exercise jurisdiction without giving an opportunity of trying the legal title by proceedings

(*h*) Robinson *v.* Lord Byron, 1 Brown C. C. (Belt) 588.

(*i*) Stanford *v.* Hurlstone, L. R., 9 Ch. 116, coram, L. C. Selborne and L. J. J. James and Mellish.

(*k*) Makin *v.* Barrow, W. N., 1876, 105. (*l*) *Ib.*

at law,(*a*) to where the right depended on the construction of a doubtful covenant.(*b*) *Mandamus and Injunction.*

As regards land, a possessory title was generally sufficient as against a mere trespasser, *ex. gr.*, to prevent cutting turf on plaintiff's bog.(*c*) Latterly the Court of Chancery itself determined the legal right, and when reasonably clear enforced it without requiring an action to be brought.(*d*)

(345.) An application for a mandamus or injunction may be made to the court or judge by any party. If the application be by the plaintiff it may be made either *ex parte* or with notice.(*e*) *Application for injunction.*

It has not been the practice in Chancery to grant injunctions in Chamber when the Courts were sitting. It was considered to be a kind of business which ought not to be conducted in Chamber,(*f*) and probably the practice of the Court of Chancery will be followed by the Common Law Divisions. Unless in cases of emergency, an injunction was not granted *ex parte* and without hearing both sides, and ordinarily notice is required to be given for an early day.(*g*)

In Ireland the practice has been on *ex parte* applications of a character so urgent that delay might be dangerous, to give a conditional order restraining the proceedings, with a direction to stay in the meanwhile, *i.e.*, until cause shown.

In some cases of special urgency, in where the object

(*a*) Bramwell *v.* Holcomb, 3 Myl. & C. 737; Bridson *v.* M'Alpine, 8 Beav. 229.

(*b*) Lowe *v.* Lucey, 1 Ir. Eq. Rep., 93, Cr. & Dix, Ab. Car. 634.

(*c*) Lifford *v.* Quinn, Ir. Rep. 7 Eq. 347; see as to trespassers on foreshore, Corporation of Hastings *v.* Ivall, L. R., 19 Eq. 558, V. C. M.

(*d*) Mulville *v.* Fallon, Ir. Rep., 6 Eq. 458, V. C.

(*e*) Ord. 52, R. 4, Engl.; Ord. 51, R. 4, *infra*.

(*f*) See English *v.* Vestry of Camberwell, W. N. 1875, 256, V. C. M., 20 Dec., 1875.

(*g*) Anon. W. N., 1876, 12; 20 Sol. Jour. 219, Lindley, J.

Mandamus and Injunction.

of the injunction would be frustrated by giving notice, the application may be made *ex parte, ex. gr.*, to prevent a bill of exchange being negotiated(*a*) or a house being pulled down.(*b*) In such cases it would be well that the writ should be endorsed specially as for an injunction.(*c*) To this it would seem defendant can now plead.(*d*)

In some cases an order has been made *uno flatu* to substitute service of the writ and for an injunction.(*e*) In certain cases an injunction has been granted before filing of the bill, the offices being closed.(*f*)

By defendant.

(346.) A defendant may now apply for an injunction against a plaintiff even before judgment, and in a case where the plaintiff had also served notice for a like purpose, an order was made on the two motions, and the conduct of the proceedings in general given to the plaintiff.(*g*) A defendant in a common law action having by way of counterclaim prayed for an injunction was held at liberty to abandon it and bring an independent action for an injunction in the Chancery Division.(*h*)

Not against third persons.

(347.) In ordinary cases an injunction cannot be granted against third persons, not being parties to the action or servants or agents of a party, and in an action on certain bills of exchange an injunction to restrain third persons, purchasers of property

(*a*) Anon. W. N., 1876, 21, Lindley, J.

(*b*) Drake's Patent Concrete *v.* Demer, W. N., 1875, 230; 20 Sol. Jour. 98, Quain, J.; Fenner *v.* Bedford, W. N. 1875, 238; 20 Sol. Jour. 120, Quain, J.

(*c*) Colebourne *v.* Colebourne, L. R., 1 Ch. D. 690, V. C. H.; see Form No. 9, in Appendix A.

(*d*) See Booth *v.* Taylor, 4 H. & C. 70.

(*e*) Anon. W. N., 1876, 21, Lindley, J.

(*f*) Carr *v.* Morice, L. R. 16 Eq. 125; Thorncloe *v.* Skoines, L. R. 16 Eq. 126.

(*g*) Sargent *v.* Read, L. R. 1 Ch. D. 600, M. R.

(*h*) Anon. 20 Sol. Jour. 391, Q. B.

belonging to the defendant, from paying the purchase-money to the defendants was refused as being an attempt to get an attachment of a debt before judgment.(*i*) *Mandamus and Injunction.*

(348.) The order for an injunction may be made on terms, such as the plaintiff undertaking to speed the action, and consenting that if the jury find for the defendant, the plaintiff will, if so ordered, pay to the defendant any sum of money which the Court or the jury may award as compensation for the damage sustained by reason of the injunction.(*j*) Where the action stayed or restrained was on a bill of exchange the terms usually were that the party applicant should lodge the amount in Court.(*k*) On terms.

CHAPTER XXXIX.

RECEIVERS.

Section 28. *Subsection* (8.)

349. Receiver, appointment of, p. 295.
350. Ordinary grounds for, 296.
351. Where plaintiff has legal estate or power of distress, 296,
352. Power of sale, 298.
353. Against mortgagee in possession, 298.
354. On disputed title, 299.
355. Over personal estate, 299.
356. *Pendente lite*, 300.
357. At instance of defendant, 300.
358. Application *ex parte*, 300.
359. Indorsement of claim, 301.
360. Appointment by Judge, 301.
361. Immediate appointment, 301.
362. Security for, 302.
363 Extending Receivers, 302.
364. Appeals from Orders, 302.

(349.) A Receiver may be appointed by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient Receiver may be appointed.

(*i*) Anon. W. N., 1876, 8; 20 Sol. Jour. 298, Quain, J.

(*j*) See Longfield *v.* Cashman, 11 Ir. Com. L. R. App. 23, Q. B.; Tozer *v.* Walford, W. N. 1875, 250; 20 Sol. Jour. 140, Quain, J.

(*k*) Carter *v.* Uniake, 4 Ir. Chan. Rep. 30, M. R.

Receivers.

that such order should be made: and any such order may be made either conditionally or upon such terms and conditions as the Court shall think just.(*a*)

Ordinary grounds for appointment.

(350.) The Court of Chancery used to appoint a Receiver to protect property in land or goods requiring special protection, as the estate of an infant, in the absence of a testamentary guardian, and even when there were one, if from any cause his receipt of the rents of the estate was likely to prove injurious to the interests of the infant. So again when trustees were appointed to take charge of the estate the Court did sometimes, though not on light grounds, appoint a Receiver; as, for example, on account of the misconduct, mismanagement,(*b*) neglect, bankruptcy,(*c*) or absence as the sole trustee or guardian for nurture of the infant.

Where plaintiff has legal estate or powers of distress.

(351.) Although the last clause in subsection (8), viz., "And whether the estates claimed by both or either of the parties are legal or equitable" would seem to be added in reference to the remedy by way of injunction rather than to that by Receiver, yet the extensive words used in the previous sentence, "In all cases in which it shall appear to the Court to be just or convenient" would enable the High Court to grant a Receiver at the instance of a plaintiff though he possessed the advantage of having the legal estate and its powers possibly may not be limited by the old rule in Equity which was not, except under special circumstances, to appoint a Receiver at the instance of a person who has a legal title, *ex. gr.*, as legal mortgagee, which he might enforce by ejectment, or one who, being an equitable incumbrancer had his charge secured by a trust term or a power of distress and entry vested in himself or a trustee

(*a*) J. A., 1877, s. 28, § 8.

(*b*) See *in re* Cormacks, Minors, 2 Ir. Eq. Rep. 264, M. R.

(*c*) Steele *v.* Cobham, L. R. 1 Ch. 325.

for him, and this although the remedy at law was full of difficulties,(*d*) or in the case of a rentcharger or an annuitant who could have recovered his arrears by distress.

In Ireland the supposed power of a legal rentcharger to help himself by entry and distress was usually very difficult to enforce at law from the embarrassments of title and the multitude of incumbrancers, and the legal remedy was at best less complete and effectual than the remedy by Receiver, and by a sort of local equity, courts in Ireland adopted a less strict rule in granting Receivers in annuity cases. In some cases a Receiver was appointed for recovery of a fee-farm rent although the grant contained powers of distress and re-entry for non-payment of it.(*e*) In a later case(*f*) Lord Chancellor Brady departed from this view, and considered that Courts of Equity had not a concurrent jurisdiction to relieve a party by Receiver, who had a power of distress and no substantial difficulty to prevent him availing himself of it.

But where a mortgagee was obliged to make advances to prevent an eviction for non-payment of rent of the leasehold premises mortgaged, a receiver was appointed although no interest was due on the mortgage.(*g*) It doubtless will not be deemed "just or expedient" to exercise the power merely to save a mortgagee from the risk of entering into possession of the mortgaged property, or to assist a landlord seeking to eject his tenant, by appointing a receiver to take care of the property *pendente lite*,

(*d*) Berkly *v.* Sewell, Jae. and Wal. 647. See Sollory *v.* Seaver, L. R. 9 Eq. 22; Kelsey *v.* Kelsey, L. R. 17, Eq. 495. V. C. M.

(*e*) Stevelly *v.* Murphy, 2 Ir. Eq. Rep. 448. Fay *v.* Fay, 2 Jones, 359.

(*f*) Brady *v.* Fitzgerald, 12 Ir. Eq. Rep. 273, founded on Cremen *v.* Hawkes, 2 Jo. and Lat. at p. 680; 8 Ir. Eq. Rep. 153.

(*g*) Kelly *v.* Staunton, 1 Hogan, 393.

Receivers.

and it has been refused on an allegation that the premises were being allowed to fall into disrepair in breach of a covenant.(*h*) But in a proper case the jurisdiction has been recently exercised on behalf of a mortgagee seeking to foreclose his mortgage, where the property was a mining concern, a receiver and manager being appointed to secure the property.(*i*) So, where the applicant was legal mortgagee of some part of the property, and equitable mortgagee of the other parts, so intermixed that it would be inconvenient if a receiver were appointed over the property equitably mortgaged, the appointment was made over both, although there was no adverse possession, the order being made without prejudice to the prior incumbrancers taking possession under their securities, if so advised.(*j*)

Powers of sale.

(352.) The court was slow to appoint a receiver over rents and profits where the applicant had the right of sale, especially if he was proceeding to exercise his right. But if his security was insufficient, or insecure as a charge or a life estate, or a leasehold liable to be evicted, or heavily incumbered by prior creditors, it has done so.(*k*) So where a mortgagee might be placed in serious difficulty by withholding his interest money for an unreasonable period, *ex. gr.*, two years, a receiver was granted pending a sale, although the security was adequate.(*l*)

Against mortgagee in possession.

(353.) The court did not appoint a receiver at the instance of a second mortgagee an equitable incumbrancer, where the first mortgagee was in pos-

(*h*) Habershon *v.* Gill, W. N., 1875, 231; 20 Sol. Jour. 98, Quain, J.

(*i*) Peck *v.* Trinsmaran Iron Company, L. R. 2 Ch. D. 115, M. R.

(*j*) Pease *v.* Fletcher, L. R. 1 Ch. D. 273; 24 W. R. 158; 20 Sol. Jour. 152, V. C. B.

(*k*) See M'Craith *v.* Quinn, Ir. Rep., 7 Eq. 324, M. R. See Herbert *v.* Greene, 2 Ir. Chan. Rep. at p. 274, per M. R.

(*l*) Scottish Amicable Life Insurance Company *v.* Barker, Ir. Rep., 9 Eq. 510, V. C.

session, so long as anything was due to him on his mortgage security, if he swore to the fact, unless the second mortgagee offered to pay what was claimed to be due, or unless special circumstances existed and were proved at the hearing, such as gross mismanagement.(*m*) *Receivers.*

(354.) So, where the title to an estate was in dispute between two parties, the Court of Chancery did not grant a receiver at the instance of the party out of possession as against the party in possession, in the absence of fraud or privity of estate between them,(*n*) and, generally speaking, the Court of Chancery declined to appoint a receiver in a simple case of disputed heirship, or in case of a disputed will,(*o*) but if neither the devisee nor the heir was in actual possession of the rents, possibly the court might appoint a receiver.(*p*) On disputed title.

(355.) The Court of Chancery used to appoint a receiver over personal estate or chattels only in rare and exceptional cases, *ex. gr.*, where the chattels were of peculiar value, or the property was a trust fund in risk of immediate loss ; but in an ordinary action of trover for goods (even since the Judicature Act), it has been refused.(*q*) In an action for specific performance of an agreement to give a bill of sale of furniture on the faith of which plaintiff signed a bill of exchange, enabling defendant thereby to raise money, the court did grant a receiver to protect the property, it being a case of immediate danger to personal chattels.(*r*) So the Over personal estate.

(*m*) Berry *v.* Sewell, 1 Jac. and Walk. 647.

(*n*) Talbot, Earl of, *v.* Hope Scott, 4 K. & J. 96.

(*o*) See Hitchen *v.* Birks, L. R. 10 Eq. 471. Carrow *v.* Ferrior, L. R. 3 Ch. 719.

(*p*) See Parker *v.* Seddons, L. R. 16 Eq. 34.

(*q*) See Anon. 20 Sol. Jour. 101, Quain, J.

(*r*) Taylor *v.* Eckersley, L. R. 2 Ch. D. 302 ; 24 W. R. 420 ; 20 Sol. Jour. 391, A. C.

Receivers. court has formerly appointed a receiver over personal estate pending grant of probate.(*t*)

Pendente lite. (356.) The Court of Chancery sometimes used to exercise jurisdiction to appoint a receiver to preserve moveable property *pendente lite* in another Court, but declined, unless under very special circumstances, to do so, where the Court of litigation had itself power to appoint one, or had already granted administration.(*u*) But since the Judicature Act application for an order for a receiver under subsection (8) should be made to that division of the Court in which the action is pending; and where an action was brought in the Chancery Division for a receiver over real estate of a testator pending proceedings in the Probate Division to determine the validity of the will, the action and motion were both transferred to the Probate Division.(*v*)

At instance of a defendant. (357.) An application for a receiver may be made by any party to the action, *ex. gr.*, by a defendant, without his bringing a cross action;(*w*) and where applications were made by both plaintiff and defendant, the order was made on both motions, but the conduct of the proceedings was given to the plaintiff who had first given notice.(*x*)

Application when ex parte. (358.) A receiver has been appointed *ex parte*, and before defendant has appeared to the writ,(*y*) and even before service of the writ in a case of a great and immediate risk of loss.(*z*)

(*t*) Parkin *v.* Seddons, L. R. 16 Eq. 34.

(*u*) Hitchen *v.* Berks, L. R. 10 Eq. 471; Veret *v.* Duprey, L. R. 6 Eq. 329; see Tichborne *v.* Tichborne, L. R. 1 Pro. & Div. 730; L. C. L. R. 2 Pro. & Div. 41.

(*v*) Barr *v.* Barr, W. N. 1876, 44; 20 Sol. Jour. 291, M. R.

(*w*) See formerly Robinson *v.* Hadley, 11 Beav. 614.

(*x*) Sargent *v.* Read, L. R. 1 Ch. D. 600, M. R.; and see Shephard *v.* Beane, W. N. 1876, 61 V. C. H.

(*y*) Taylor *v.* Eckersley, 24 W. R. 430, W. N. 1876, 115; 20 Sol. Jour. 391, A. C.

(*z*) *In re* H.'s Estate, L. R. 1 Ch. D. 276 V. C. H.; H. *v.* H., 24 W. R.

Receivers.

(359.) A receiver may be appointed in an action though not claimed in the indorsement of the writ.(*a*)

Indorsement of claim.

Where the substantial object of the action is for a receiver, the writ had better be indorsed with a claim for a receiver.(*b*)

Appointment of receiver by judge.

(360.) Though ordinarily, receivers are to be appointed by the Receiver Master, or after his release by one of the Land Judges, notwithstanding this, any Judge of the High Court, or the Lord Chancellor in Lunacy, may himself appoint a receiver over land or over personal estate other than land, in any case in which he may think it expedient so to do; and he may also, by order, direct that all subsequent proceedings with regard to such receiver, shall be taken in his own court; and thereupon all such proceedings shall be taken before such Judge or his officers.(*c*)

In case the receiver is appointed over personal estate other than land,(*sic*) the order should direct the subsequent proceedings to be taken in the judge's own Court.(*c*)

Immediate appointment.

(361.) Occasionally an immediate appointment is made *ad interim* of a person named in the order, *ex. gr.* of the plaintiff himself, for a given number of days, without giving security, and usually on the plaintiff undertaking not to deal with the property except under the direction of the Court, and to abide any order it may make as to damages or otherwise.(*d*)

Security for.

(362.) Where a receiver is appointed upon his giving security in the usual way, the person is not

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317, Anon. W. N. 1875, 236; 20 Sol. Jour. 9 V. C. H.; see as to administrator *pendente lite*. Brand *v.* Matson, 24 W. R. 534, Prob. Meluish *v.* Milton, 24 W. R. 679; 20 Sol. Jour. 562 Prob.

(*a*) Colebourne *v.* Colebourne, L. R. 1 Ch. D. 690, V. C. H.

(*b*) Norton *v.* Gover, W. N. 1877, 206 M. R.

(*c*) J. A., 1877, s. 75, § 5. (*d*) Taylor *v.* Eckersley, *ubi supra*.

Receivers.

a receiver until it is certified he has given security, at least so far as to entitle him to take possession of the property or demand rent.(*a*)

The security of a guarantee society has been received, subject to the Judge or proper officer being satisfied of its solvency(*b*); and in Ireland, that the company shall have assets which can be made available in Ireland.

Extending a receiver.

(363.) The Court of Chancery in Ireland would order a Receiver appointed in a creditor's suit to pay an annuity charged on the lands according to its priority without requiring a fresh bill to be filed by the annuitant.(*c*) This was not done in England, unless it were for the benefit of the parties, to save expense, or with the consent of the creditors who obtained the Receiver originally.(*d*) Under the Judicature Act, 1877,(*e*) it will not be necessary for any party claiming to be entitled to or interested in the rents of lands over which a Receiver has been appointed to file any bill(*f*) or to institute any other cause or matter to extend the Receiver, but the party may apply to a Land Judge to extend the Receiver already appointed.

Appeals from orders as to receiver.

(364.) Appeals from orders made by the Land Judges with regard to matters connected with Receivers or the management of land lie to the Court of Appeal and not to the Court or Judge by whom the reference to appoint or take the accounts of a Receiver may have been made, and no order so made shall require to be confirmed by the latter Court or Judge.(*g*)

(*a*) See Edwards *v.* Edwards, 24 W. R. 713, W. N. 1876, 107 V. C.; Merry, S. E. L. R. 1 Ch. D. 454 and 24 W. R. 201, V. C. M.

(*b*) Menzies *v.* Lord Grantley, 20 Sol. Jour. 252 Prob.

(*c*) Foss *v.* Foss, 15 Ir. Chan. Rep. 215. M. R.

(*d*) See Sanders *v.* Lord Lisle, Ir. Rep. 4 Eq. 43. V. C.

(*e*) J. A., 1877, s. 40; see *ante* (182). (*f*) *Sic* in statute.

(*g*) J. A., 1877, s. 75, § 6.

CHAPTER XL.

Damages by Collision of Ships at Sea.

Section 28. *Subsection* (9).

365. Damages by Collision, p. 303.
366. Conflict of law respecting, 303.
367. Limitation of Liability by Merchant Shipping Act, 304.

(365.) Section 28 of J. A., 1877, subsection (9), enacts as follows :(*a*)— Damages by collisions at sea, subs. (9).

"In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the High Court of Admiralty, so far as they have been at variance with the rules in force in the Common Law Courts, shall prevail."

(366.) By the rules of the Common Law in an action for negligence by the master and crew of the defendant's ship, the plaintiff could not recover if his own ship were in any degree in fault in not endeavouring to prevent the collision. In other words, if the mischief was the result of the combined negligence of the two ships, they should both remain *in statu quo*, and neither party could recover against the other.(*b*) Conflict of law respecting.

In such a case "the Law Maritime required that as the sufferer was not herself blameless, the damage should be divided equally between them."(*c*) That is, the plaintiff would recover half his loss from the defendant, and the defendant might recover half his from the plaintiff in a cross suit, each ship thus bearing a moiety of the aggregate damage done to both, although one ship might be much more to blame than the other.(*d*) If the Common Law rule

(*a*) J. A., 1877, s. 28, sub. (9); J. A., 1873, s. 25, sub. (9).

(*b*) See *per* Bayley, B. in Vennall *v.* Garner, 1 Cromp & Mee at p. 22. See Bridge *v.* Grand Junction Railway Company, 3 Mee & Wels. 48; *per* Parke, B., to contributory negligence in ordinary cases.

(*c*) The Meteor, *In re* Ir. Rep. 9 Eq. at p. 579, *per* Christian, L.J.A.

(*d*) Hay *v.* Le Neve, 2 Shaw, Scotch Ap. Cas. 395. The Meteor, *ubi supra.*

Damages by Collision at Sea.

was a hard one, the Admiralty rule scarcely awarded a full measure of justice. "I think," said a learned Judge in respect of this rule, "it is to be regretted that the Admiralty doctrine is so rigid as to subject all cases alike to a procrustean rule in Equity. It strikes me it would be better if some regard could be had to the relative degrees of misconduct."(*e*) It is curious, if true, that in the earlier prints of the Judicature Bill of 1873 the Common Law rule was preferred to that of the Admiralty.(*f*) But *qua cunque via* the subsection has produced uniformity of rule between the two branches of the High Court. But it would seem that the Common Law Divisions of the High Court of Justice in England are not disposed to apply the principle of the rule one step beyond its strict terms, and decline to follow the Admiralty rule as to costs where damage arises from a collision, and the verdict is given on the ground of compulsory pilotage, in which case the Admiralty Court would give no costs.(*g*)

Limit of liability by Merchant Shipping Act.

(367.) The Merchant Shipping Act, 1854,(*h*) imposes certain limits to the liability of owners of sea-going ships for loss or damage which may happen without their actual fault or privity in regard to certain matters, and also(*i*) enables the Court to entertain proceedings at the suit of any owner to determine the amount of the liability and the distribution of such amount rateably amongst the several claimants, and with power to stop all actions and suits pending in any other Court relating to the same subject-matter.(*j*)

(*e*) The Meteor, *ubi supra*. (*f*) Trower's Manual of Equity, p. 80.

(*g*) General Steam Navigation Company *v.* London and Edinburgh Shipping Company, 25 W. R. 694. W. N., 1877, 156. Ex. D.

(*h*) 17 & 18 Vic., c. 104, s. 503. (*i*) *Ib.*, s. 514.

(*j*) See Hill *v.* Audus, 1 Kay & J., 263, a bill of this nature.

CHAPTER XLI.

Custody and Education of Infants.

Section 28. *Subsection* (10.)

368. Custody and Education of Infants, p. 305.
369. Several kinds of Guardians, 305.
370. Guardian by nature, 305.
371. Guardian for nurture, 306.
372. Guardian by testament, 308.
373. Guardian by election, 310.
374. Guardian by Court of Chancery, 311.
375. Mother's right of access, 311.
376. Illegitimate children, 312.
377. Right to custody at law, 312.
378. Right in equity, 314.
379. Right to direct Religious Education at Law, 316.
380. Right in Equity, 317.
381. Effect of contract, 318.
382. Effect of acquiescence, 319.
383. Rules of equity to prevail, 321.
384. Conditions necessary to exercise, 322.

(368.) The J. A., 1877, section 28, subsection (10), (*a*) enacts as follows:— Questions as to custody and education of infants.

"In questions relating to the custody and education of infants, the rule of equity shall prevail."

The custody and education of infants involve considerations as to the appointment and duties of guardians and access to and management of the infant.

(369.) Of guardians there are several kinds recognised by the law of England, of which it is only necessary to mention the following:—1st, by nature; 2nd, by or for nurture; 3rd, by testament; 4th, by election; and 5th, by appointment of the Court of Chancery, or, as we are now to call it, by the Chancery Division of the High Court of Justice, to which "the wardship of infants, and the care of infants' estates" are assigned. Several kinds of guardians.

(370.) Guardianship by nature was of feudal origin, and belonged to the father or mother or Guardians by nature.

(*a*) J. A. 1877, s. 28, sub. 10; J. A. 1873, s. 24, s. 10.

Custody and Education of Infants.

other ancestor in regard to his or her heir apparent. The expression, guardian by nature, when applied to children other than the heir, was used in a sense not strictly accurate.(*a*) This guardianship continued until the infant attained twenty-one years.(*b*) It extended only to the infant's person, and conferred no right to retain the profits of his lands as guardianship in socage did. It was defeated by the appointment of a testamentary guardian.

Guardian for nurture.

(371.) Guardianship by nurture, or "for nurture," arose where the infant was without other guardian. None could have this except the father or mother of the infant. It extended no further than the custody and government of the infant's person and education, and had nothing to do with his lands. It might be where there were no lands.(*c*) The father is, in this sense, the legal guardian of his child by title paramount, and while he lives. Even the Court of Chancery did not appoint another person to be guardian in his stead, though in certain cases it nominated something like a curator, to take care of the child and protect him against some prejudice during the life of the father.(*d*)

The father is entitled to the guardianship for nurture although he resides abroad,(*e*) and though the child is born and resident abroad,(*f*) and as such, he has the right to the custody, and to direct the education of his children. On the death of the father, without appointing a testamentary guar-

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(*a*) Co. Lit. 88 B. Hargr. note 12, 1 Thomas Co. Lit., p. 154.

(*b*) *In re* William Connor, an Infant, 16 Ir. Com. L. R. 112, *per* O'Brien, J., *ib. per* Fitzgerald, J., at p. 121.

(*c*) Co. Lit. 88 B. Hargr., note 12.

(*d*) Barry *v.* Barry, 1 Mol. 210, *per* Lord Manners, *Ex parte* Mountford, 15 Ves. 447, *per* Lord Eldon.

(*e*) See 1 White *v.* Tudor, L. C. 97.

(*f*) Hope *v.* Hope, 8 De Gex, Mac. and Gor. 731; but see Wellesley *v.* Duke of Beaufort, 2 Russ. 1, where the child is made a ward of Court.

dian, the mother surviving was regarded at Common Law, as guardian for nurture, with the same right to custody of the child, and to direct its education, subject, however, to this, that it is her duty, whether as guardian for nurture or as testamentary guardian, under ordinary circumstances, to conduct the religious education of the child according to the wishes and intention of the father, and *primâ facie* according to his profession of religious doctrine.(*g*)

Custody and Education of Infants.

Guardianship for nurture terminates like that of socage, at fourteen years as regards boys, but at sixteen years as to girls.

The Statute 4 and 5 Ph. and Mary, c. 8, made a boy of fourteen years responsible for the abduction of a female, and at the same time made the abduction of a female infant of sixteen years a crime,(*h*) and in terms which implied that the custody of the female (*i.e.* a maiden under sixteen), should belong to the father or mother of the child;(*i*) and that at fourteen the boy should become responsible for his acts for all purposes of the criminal law.(*k*) Short of these periods the infant had no discretion to consent to leave its guardian;(*l*) and a Court of Law would, without any examination of the child, order it to be delivered to its legal guardian;(*m*) and any person endeavouring to baffle the order of the Court, and keep back a girl under this age, might become liable to conviction on an indictment for the offence of abduction.(*n*)

(*g*) *In re* Hunt, 2 Con. and Law, 373.

(*h*) See also 10 Geo. 3, c. 34, s. 24; 9 Geo. 4, c. 31, s. 20, both now repealed; and see 24 & 25 Vic. c. 100, s. 53, in which the age of the female is raised to twenty-one.

(*i*) See The Queen *v.* Howes, 3 El. and El., at p. 334, *per* Blackburn, J.

(*k*) And see *In re* Connor, an Infant, 16 Ir. Com. Law Rep., at p. 121, *per* Fitzgerald, J.

(*l*) Queen *v.* Howes, *ubi supra*, p. 337, *per* Cockburn, C. J.

(*m*) Regina *v.* Clarke, 7 El. and El., p. 193. (*n*) *Ib.*

Custody and Education of Infants.

Guardian by testament.

(372.) The Statute 12 Car. 2, c. 24, s. 8, Engl.; and 14 & 15 Car. 2, c. 19, s. 6, Irish, enables a father by deed or will, attested by two witnesses, to appoint who shall be guardian after his decease of his children born or to be born, and being unmarried and under the age of twenty-one years at the time of his death.

This power is conferred exclusively on the father, and does not devolve on the mother surviving,(*a*) or on the grandfather, nor is it conferred on the putative father of an illegitimate child, whose appointment was ineffectual;(*b*) but the Court of Chancery notwithstanding, so far respected his wishes so expressed, that it usually adopted his nominee (if a suitable person) where he has settled property on the infant,(*b*) and so an assumed appointment by a mother would be taken into consideration by the Court of Chancery.(*c*) Under the Statute 4 & 5 Ph. & Mary, c. 8, it was held that a father had power to appoint a guardian to his illegitimate child.(*d*)

The question as to what terms will constitute an appointment of a testamentary guardian was lately considered by the Lord Chancellor of Ireland, and it was held that naming a person guardian of the estate of an infant child was not sufficient to constitute the person testamentary guardian.(*e*)

Where the will was not admitted to Probate by reason of there being no property to administer, and any serious question arose as to the validity of the will, or the capacity of the father to make one,

(*a*) *In re* Hunt, 2 Con. & Law, 373; *In re* Kaye, L. R., 1 Ch. 387, L. JJ.

(*b*) Barry *v.* Barry, 1 Mol. 211, Davey's Infants, 11 Ir. Com. Law R. 298, and see Cairncross Minors, 4 L. R. O. S. 113, Lord Plunket.

(*c*) *In re* Kaye, *ubi supra.*

(*d*) Rex *v.* Corneforth, 2 Strange1162.

(*e*) *In re* Lord Norbury, a Minor, Ir. Rep., 8 Eq. 145, Ball, L. C.

or of the will being his own voluntary act, the Court of Law on an application for *Habeas Corpus* would not determine the question on affidavits, but required the person claiming the guardianship to take an issue to establish the will by the verdict of a jury.(*a*)

The testamentary guardian, when appointed, superseded the guardian by socage and the rights of the next of kin.(*b*) The statute enables him to manage the estate of the infant, and he can make leases of his lands during the minority,(*c*) and even the Court of Chancery did not interfere with him unless it became absolutely necessary to do so.(*d*)

Although by the statute the appointment of a testamentary guardian continues, until the infant attains twenty-one years, unless the father directs otherwise, yet this does not regulate the right of the guardian to the custody of the child on an application for a *Habeas Corpus*, as the Court would not hand a child over even to its father, after it had attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. If the child has attained this age, it may elect his own guardian and his place of residence. But before this period(*e*) has arrived the Court of Law on an application for *Habeas Corpus* had no discretion but to order the child to be delivered to

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(*a*) See *In re* Andrews, L. R. 8 Q. B., at pp. 158–160, Archibald, J.; The Queen *v.* Marsten, Ir. Rep., 4 Com. Law, 52 Q. B.; *In re* Byrnes Infants, Ir. Rep. 7 Com. Law, 199 Q. B.

(*b*) Rex *v.* Islay, 5 Ad. & El. 441.

(*c*) See Shaw *v.* Shaw, Ver. & Scri., 607, but see Roe *v.* Hodgson, 2 Wils. 129.

(*d*) *In re* Goods Minors, 1 Ir. Chan. Rep. 256; and *In re* Swifts Mi., 2 Mol. 330; *In re* M'Colloch *v.* Drury, 276, 6 Ir. Eq. Rep. 393.

(*e*) Connors Infants a tp. 118, *per* Fitzgerald, J.; The Queen *v.* Howes, 3 El. & El. at p. 336, *per* Cockburn, C. J. and see *infra*.

Custody and Education of Infants.

the testamentary guardian if he was not a very unfit person.(*a*)

Guardian by election.

(373) Guardianship by election arose originally when from defect of law the infant had no guardian, as happened in case of guardian in socage after fourteen years, or guardianship for nurture after it ceased, *i.e.*, when the infant reached years of discretion, at which he was allowed to choose his own custody. This age of discretion was not affected by the intellectual deficiency or precocity of the individual infant, and was neither hastened nor retarded thereby; but the Court, (*i.e.*, of Common Law), following the guide afforded by the statutes of Ph. & Mary, fixed the age of sixteen as regards females and fourteen as regards males—short of which a child had no discretion to consent to leave his legal guardian.(*b*) But when the infant was of years to elect for itself, the Court of Law merely interfered so far as to get it free from illegal restraint, leaving it then at liberty to go where it pleased.

A deaf mute arrived at this age was consulted as to his own desire in the matter, and electing to remain in the public school in which he had been placed, the Court refused to remove him.(*c*)

In the case of an illegitimate child after it has passed the period of tender years entitling its mother to apply for access or custody, it seems there is no legal guardian or custody except what it may choose for itself.(*d*)

(*a*) The King *v.* Islay, 5 Ad. & El. 441; *In re* Mary Ellen Andrews an infant, L. R., 8 Q. B. 153.

(*b*) See The Queen *v.* Howes, 3 El. & El. at p. 337, *per* Cockburn, C. J., and *In re* Connors, 16 Ir. Com. L. R. 112; *In re* Andrews, L. R., 8 Q. B. 158; Cartledge *v* Cartledge, 2 Swa. & Tris. 567; Mallinson *v.* Mallinson, L. R., 1 Pro. & Div., 221.

(*c*) *In re* Shanahan, a Minor, 5 Ir. Jur., 58 Q. B.

(*d*) See *In re* Alicia Race, 7 El. & Bl. 198, *per* Lord Campbell, C. J.

Custody and Education of Infants.

Guardian by Court of Chancery.

(374.) Where an infant ward of Court had no father or testamentary guardian, or the guardian refused to act, the Court of Chancery exercised jurisdiction to appoint a suitable person to be guardian of the person and fortune, and also where the legal guardian, even the father, was unfit to have the direction of the character or morals of the child,(*a*) or had neglected his duty or abused his trust,(*b*) the Court of Chancery might appoint a person to act *qua* guardian.(*c*)

Mother's right of access.

(375.) Latterly the legal guardian's right to the custody was made subject to the mother's right of access to the child, being of tender years. Talfourd's Act, 2 & 3 Vic., c. 54, extended by 36 & 37 Vic., c. 12, enabled the Court of Chancery to order that the mother of the child should have access to or have the custody of the child, being under sixteen years.(*d*)

A Roman Catholic child has been allowed to remain in the care of a Protestant mother uncontrolled until it arrived at the age of seven years, after which she should be instructed in the doctrines of the Roman Catholic Church, and further directions given.(*e*) By the statute the matter is placed absolutely in the discretion of the Judge, and the interests of the child are primarily to be considered by him.(*f*)

The Act if it does not enable a mother to resist

(*a*) *Ex parte* Mountford, 15 Ves. 447.

(*b*) Shelley *v.* Westbrooke, Jac. 266; Wellesley *v.* Wellesley, 2 Bligh., N. S. 104.

(*c*) *In re* Kaye, L. R., 1 Ch. 387. *In re* Cormicks Mi., 2 Ir. Eq. Rep., 264, M. R.; Hamilton *v.* Hector, L. R., 6 Ch. 701; Andrews *v.* Salt, L. R., 8 Eq. 622.

(*d*) See *In re* Fynn, 13 Jur. 483. *In re* Taylor an infant, L. R., 4 Ch. D. 157; 25 W. R., 69 M. R.

(*e*) Austin *v.* Austin, 34 Beav. 257.

(*f*) *In re* Taylor, L. R., 4 Ch. D. 157 M. R.

Custody and Education of Infants.

her husband's application for the custody of the child at law, enables her to apply for an order of access;(*a*) and a Court of Equity would bear in mind that were the child to be placed in the father's custody to-day, the mother would be entitled to present a petition to-morrow under the statute, and probably with effect.(*b*)

Illegitimate child.

(376.) The putative father of an illegitimate child can assert no legal right to its custody, even though he may become chargeable in respect of it under the Poor Laws.(*c*) Nor has he any right to appoint a testamentary guardian to it.(*d*) So neither has the mother of the illegitimate child any right to its custody as guardian,(*e*) although she may have a mother's right of access to it while of tender years.(*f*) In such a case there seems to be no person legally entitled to the custody or guardianship of the child, and there is no other criterion to enable the Court to determine in whose custody it should remain, except the choice and wishes of the child itself.(*g*)

Right to the custody of an infant at law.

(377.) We have seen that by the rules of the Common Law the guardian of the infant, whether by nature or for nurture, or by testamentary appointment, has the legal right to the custody of the infant until the infant reached years of discretion, when the child was deemed of sufficient age to choose its own custody; and a Court of Law was bound to deliver the child to its legal guardian.(*h*) Upon

(*a*) Corsellis *v.* Corsellis, 1 Dru. & War. 235.

(*b*) *In re* Fynn, 2 De Gex & Sm., at p. 475; *per* Sir L. Shadwell.

(*c*) *In re* Lloyd, 3 Man. & Gr. 547. See The King *v.* Moses Soper, 5 T. R., 278.

(*d*) *Vide ante*, (372). But see *In re* Cairncross, 4 L. R., O. S. 113.

(*e*) *In re* Lloyd, *ubi supra.*

(*f*) See Courtois *v.* Vincent, Jae. 268, note; see Cairncross Minors, *ubi supra.*

(*g*) See *In re* Alicia Race, 7 El. & Bl. 198; *per* Lord Campbell, C. J.; *In re* Lloyd, *supra.*

(*h*) Rex *v.* Isley, 5 Ad. & El. 441; *In re* Andrews, L. R., 8 Q. B., at p. 158.

an application for a writ of *habeas corpus*, all that a Court of Common Law could do was to determine the legal custody of the child at the particular time when its aid was invoked.(*a*) If the child was detained from the custody of the legal guardian it was unlawfully imprisoned, and when delivered to its guardian it was supposed to be set at liberty.(*b*) It had no discretion but to enforce the right of the legal guardian, unless the infant had reached years of discretion to judge for itself as to its custody. It had no machinery enabling it to select a fit and proper person to be guardian of the child.(*c*)

However, the guardian, even a father, might at the Common Law forfeit his right to the custody of his child, if acts of cruelty on his part, or on that of the person to whom he had entrusted the child,(*d*) or any well grounded apprehension of cruelty, or of contamination in consequence of his criminal(*e*) or gross profligacy exhibited before the child, were substantiated.(*f*)

But short of this, even where the father was living in open adultery, so long as the child was not brought into immediate contact with the paramour, but had been placed by the father in a position otherwise unobjectionable, a Court of Law could not remove the child from his control.(*g*)

(*a*) See *In re* Moore an Infant, 11 Ir. Com. Law Rep. 1 Q. B.

(*b*) The Queen *v.* Clarke, 7 El. & Bl., at p. 193; *per* Lord Campbell, C. J.

(*c*) *In re* Moore, *supra*, *per* Hayes, J., at p. 15.

(*d*) See Lord St. Leonards' Handy Book of Property, p. 83.

(*e*) *In re* Moore, 11 Ir. Com. Law Rep. 1, as to perjury; *per* Lefroy, C. J., and Hayes, J.

(*f*) Wellesley *v.* Duke of Beaufort, 2 Russ. 1; *In re* Andrews, L. R., 8 Q. B., at p. 158; *per* Archibald, J., Anon. Jacob, 254; *per* Lord Eldon.

(*g*) See Rex *v.* Greenhill, 4 Ad. & El. 624; *In re* Alicia Race, 7 El. & Bl. 200; *per* Lord Campbell, C. J.

Custody and Education of Infants.

And it would seem that a mere habit of intemperance or incontinence in itself would not justify the interference of the Court.(*a*)

Therefore Courts of Law had no discretion but to declare the custody of the child in any other hands than those of the guardian to be illegal. In many cases this caused the Courts of Law to act with great regret and apparent harshness, and they have expressed the desire to have the discretion which the Court of Chancery possessed. They have also sometimes(*b*) stayed their order to enable an application to be made in Chancery to have the child made a ward of that court, and obtain an injunction to restrain the legal guardian from interfering with the custody or education of the infant, and for a settlement of a proper scheme for its education and the appointment of a person to act as guardian. In fine, Courts of Law could enforce the rights of the father or other guardian, but they were not equal to the office of enforcing the duties of the father. They could neither compel him to give the child a moral and religious education,(*c*) nor could they appoint a fit and proper person to do so in his stead.

Right of custody in equity.

(378.) But the Court of Chancery, exercising the prerogative of the sovereign as *parens patriæ*, had a more extensive jurisdiction than belonged to the Courts of Law or to the Lord Chancellor himself when acting under his Common Law jurisdiction in an application for a writ of *habeas corpus;* and while paying regard to the rights and wishes or assumed wishes of the father or other guardian as

(*a*) In Skinner, 9 B. Moore, 278, the father was in gaol and living in adultery; as to same rule in Equity, see Ball *v.* Ball, 2 Sim. 35.

(*b*) See The King *v.* Islay, 5 Ad. & El. 441. Andrews *v.* Salt, L. R. 8 Q. B. 153; Grimes, an infant, Q. B. (Ireland), Trinity Term, 1877.

(*c*) See Wellesley *v.* Duke of Beaufort, 2 Russ. 1.

Custody and Education of Infants.

to the custody and education of the child, assumed authority to control these rights and wishes when they came in conflict with the welfare and real interest of the infant coming within its wardship.

In the Court of Chancery the guardian's rights were deemed to be in the nature of a trust, and if not solely for the benefit of the child, certainly not for his own gratification, but with reference to his duties and the public welfare,(*a*) and whenever the exercise of those rights was calculated to become prejudicial to the health or happiness(*b*) or welfare, and in certain cases to the pecuniary interests of the child, they might be controlled. Where the legal guardian (even the father) was unfit to have the direction of the character or morals of the child, or had neglected his duty or abused his trust;(*c*) and if a father were living in habitual drunkenness, incapacitating himself from taking care of his children's education, he will be dealt with as unable to discharge the duties of a parent.(*d*) Again, where the father had willingly handed over the custody of his child to a stranger in consideration of pecuniary advantage to the child or to himself, and it would be detrimental to the interests of the child for him to resume it, the Court of Chancery would prevent him from doing so, and from withholding from the child the education to which it was entitled.(*e*)

But when a father has not forfeited or abused his natural right to the custody of his child, the Court would not deprive him of it on the ground

(*a*) Hope *v.* Hope, 8 De Gex, Mac. & G. at p. 743, *per* Turner, L. J.

(*b*) See *In re* Browne, 2 Ir. Chan. Rep. 161.

(*c*) Wellesley *v.* Duke of Beaufort, 2 Russ. at p. 30, Lord Eldon.

(*d*) *Ib.*

(*e*) Lyons *v.* Blenkin Jacob, 245.

Custody and Education of Infants.

of poverty merely, unless it was manifestly prejudicial to the child's interests.(*a*) Latterly the Court of Divorce in England has been armed with powers of saying, whenever it sees the necessity for a divorce, what is right and proper to be done with the children.(*b*)

Even in the most ordinary case where a child was made a ward of the Court of Chancery, the Court so far controlled the father's or testamentary guardian's rights as to prohibit him from removing the child from the jurisdiction of the Court without its special leave.

But, in order to deprive a father of the custody of his child, the Court should be satisfied that he has conducted himself so as to render it not merely better but essential to its safety and welfare that the father's rights should be interfered with.(*c*)

Religious education at law.

(379.) On an application for a writ of *habeas corpus* the Court of Law could not enter into the question of religion—what was the religion of the deceased father, or in what religion the mother or other relative may intend to educate the child.(*d*) Lord Campbell, C.J.,(*e*) expressed it thus:—"The Court knows no distinction between different religions, and will not interfere with the discretion of guardians as to the faith in which they educated their wards."

So, where an application was made to the Lord

(*a*) *Ex parte* Fynn, 2 De Gex & Smale, 457; *In re* Curtis, 28 L. J. Ch. 458; See *In re* Moore, 11 Ir. Com. Law Rep. at p. 38, *per* O'Brien, J.

(*b*) See Hamilton *v.* Hector, L. R. 6 Chan., 701.

(*c*) *In re* Curtis, 28 L. J. Chan. 458, 5 Jur. N. S. 1147; *In re* Fynn, 2 De Gex & Smale, 457; see *In re* M'Cormicks, Mi., 2 Ir. Eq. Rep. 264, M. R.

(*d*) Regina *v.* Clarke, 7 El. & Bl. at p. 193; *In re* Darceys, Infants, 11 Ir. Com. Law Rep. 298.

(*e*) Regina *v.* Alicia Race, 7 El. & Bl. at p. 202.

Chancellor (Eldon) for a *habeas corpus*, in his Common Law jurisdiction, and questions arose as to religious impressions of the child, he directed a petition to be presented to him in Chancery in the minor matter, because it is only where the infant becomes a ward of the Court that such circumstances could be attended to.(*a*) *Custody and Education of Infants.*

(380.) The Court of Chancery also knew no rule as to religion but that of the highest morality and the preservation of those sacred relations which existed between father and child, and no form of the Christian faith is inconsistent with that rule of morality or the observance of the right which Providence has conferred upon the parent of superintending, directing, and taking upon himself the sole responsibility of the religious education of his child.(*b*) Religious education in equity.

As expressed in the most recent case on this subject, the position of a Court of Equity in relation to morals and to religion is different. It assumes as incontrovertible the great principles of morality, and so assuming it protects them in the child, and prohibits the parent from disturbing them. Of religious systems—how far true, how far in error—it pronounces nothing; it neither favours nor condemns any, and views the claims and rights of all with perfect impartiality.(*c*) The court has held it to be no abuse of the parental authority if the father exercise his right to educate his child in his own religion—although the court might think that the child would be more happy and contented or better Rights as to religion in equity.

(*a*) Lyons *v.* Blenkin Jacob, 245; see Lord St. Leonards' Handy Book, pp. 82, 83.

(*b*) Davis *v.* Davis, 10 W. R. 245, V. C. Wood, and see Lord Eldon, Lyons *v.* Blenkin Jacob, 245; *In re* Grimes, an Infant, Chancery, L. C. Ball, Ir. Rep. 11 Eq. 465.

(*c*) *In re* Grimes, *ubi supra*, at p. 470.

Custody and Education of Infants.

provided for, if left to those who might have had the care of it,(*a*) or merely because the father refuses to abide by a contract or agreement to that effect.(*b*)

So again, although the father has not the power of regulating after his death the faith in which his children are to be brought up, yet the Court of Chancery considered that the child being a ward of court, must be brought up according to the wishes or in the religion of the father in the absence of special circumstances to the contrary, and that neither the mother nor the testamentary guardians can be permitted to bring up the child in any other religion.(*c*) However, a Protestant parent appointing a Roman Catholic guardian to his child, cannot more distinctly indicate the faith in which he wishes his child to be brought up.(*d*)

Effect of contract and acquiescence.

(381.) The Court of Chancery regarded the rights of a guardian, especially of a father, as being so much of a trust with duties annexed to it, that it cannot be waived or renounced or divested by contract merely;(*e*) and, indeed neither at law(*f*) nor in equity can a father by any covenant or agreement either ante-nuptial or post-nuptial, deprive himself of the right to the custody or to control the religious education of his infant children.(*f*) Such agreements ought, however, to have weight in considering whether a father has abdicated his right to have the custody and to direct the education of his

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(*a*) Andrews *v.* Salt, L. R. 8 Ch. 622.

(*b*) *In re* Browne, 2 Ir. Chan. Rep. at p. 160.

(*c*) Andrews *v.* Salt., L. R. 8. Ch. at p. 627.

(*d*) Talbot *v.* Earl Shrewsbury, 4 M. and Co. 486, *per* Lord Cottenham.

(*e*) Hope *v.* Hope, 8 De Gex, Mac. and Gord. 731; *In re* Browne, 2 Ir. Chan. Rep. 150; Andrews *v.* Salt, L. R. 8 Ch. 622.

(*f*) *In re* Alicia Race, 7 El. & Bl. 204; *In re* Andrews, L. R. 8 Q. B. p. 158, *per* Archibald, J.; *In re* Moore, 11 Ir. Com. Law. Rep. 1 Q. B.

children in his own religion ;(*a*) and the court will pay attention to, and sometimes enforce any reasonable agreement entered into as to the child spending part of his time or holidays with particular relatives,(*b*) It appears to have been held that a deed of separation giving the custody or control of infants to their mothers may be enforced if it be for the benefit of the infants.(*c*)

Custody and Education of Infants.

(382.) And a father may abdicate his authority or right to direct the religious education of his children, by acquiescence in their being brought up in a religion from which he dissents, provided the child has arrived at that period of life when he or she would be capable of forming particular religious impressions of a permanent character. If such impressions have been actually formed even a father's interference with them would be regarded as an abuse of the parental authority,(*d*) inasmuch as an attempt to alter the religious opinions of the child might lead to fatal results in unsettling its religious faith altogether, and landing it in scepticism or infidelity,(*e*) and, moreover, to imperil the happiness and tranquillity of the child by raising a conflict between conscience and obedience.(*f*) Even if a child had been stolen from its parents for the sake of proselytism, and had been brought up in a particular form of religion, after a certain age even in such a case, the court would hardly compel the child to be educated in a different religion,(*g*) and the same rule was observed by the court where

Acquiescence in acts done.

(*a*) Andrews *v.* Salt, *ubi supra.*

(*b*) See Hamilton *v.* Hector, L. R. 6 Ch. 701. (*c*) Swifte *v.* Swifte, 11 Jur. N. S. 458.

(*d*) *In re* Browne, 2 Ir. Chan. Rep. at p. 161. See Kellers, Mi., 5 Ir. Chan. Rep. 328, M. R.

(*e*) Hawksworth *v.* Hawksworth, L. R. 6 Chan. at p. 542; James, L. J.; Witty *v.* Marshall, 1 You. and Col. Ch. Ca. 68.

(*f*) *In re* Grimes, *ubi supra*, p. 471.

(*g*) Hawksworth *v.* Hawksworth, at p. 545, *per* L. J. Mellish.

Custody and Education of Infants.

the child was surreptitiously taken abroad from its control and in defiance of its order, and educated in a religion different from what the court had directed.(*a*) So far, Courts of Equity both in England and Ireland have felt bound to protect the conscientious convictions of a minor, although adverse to the religion or even the declared wishes of the father, living or deceased, looking to the welfare of the child, in which are involved health, happiness, and tranquillity essential to moral improvement.(*b*)

But nothing but the most coercive case can justify interference with the authority of a father over his child and a jurisdiction to do so, imperatively demands extreme caution in its exercise, and the Court must see that it is not dealing with transitory impressions, easily adopted and readily abandoned, and it requires that it be established with reasonable certainty that opinions of this character have some root,(*c*) and where the child has varied considerably in its professions the Court can scarcely make any confident prediction what will be the views it may ultimately adopt, and the conditions indispensable to justify its interposition do not exist.(*c*.)

The Court must be judicially satisfied that its ward is competent to form and has formed settled religious convictions, and usually ascertains this by a personal examination of the child, and having ascertained the fact it is its duty to provide that they shall be respected in good faith by all who have access to it(*d*) and not overborne by paramount authority.

The question has been raised as to the earliest

(*a*) *In re* Brownes, Minors, 8 Ir. Chan. Rep. 172.
(*b*) *In re* Grimes, an Infant, *ubi supra*, at p. 471.
(*c*) *Ib.*
(*d*) *In re* Browne, 8 Ir. Chan. Rep. 176.

Custody and Education of Infants.

time when it is advisable to attempt, by a personal interview with a child, to ascertain if permanent impressions have been made on its mind. The age of seven was considered too early,(*a*) and so eight years and six months in another case.(*b*) In the celebrated case of Stourton *v.* Stourton,(*c*) the child was nine and a half years, of precocious intellect, and prematurely instructed by a proselytizing mother in matters of religious controversy, but subsequent Judges have declared that experiment had been carried to the very verge of safety.(*d*) At the ages of nine and eight the Lord Chancellor has examined children.(*e*) In one case(*f*) V. C. Wood, after examining a child of twelve years and finding it had unquestionably strong religious impressions, nevertheless treated them as not necessarily permanent and irrevocable, so as to overbear the high and sacred right of the father. At these early ages the Court has sometimes contented itself with a modified form or order, not removing the child from its former custody with a near relative, but directing it should be brought up and educated in the religion of its father and under a resident governess of the same faith.(*f*) In one case this indulgence resulted in the defeat and disappointment of the intentions and authority of the Court, by the removal of the child to France, until its religious views had been irrevocably fixed.(*g*)

Rules of equity to prevail.

(383.) The sub-section 10 of section 28 directs

(*a*) *In re* Browne, 2 Ir. Chan. Rep. p. 161.

(*b*) Hawksworth *v.* Hawksworth, L. R. 6 Chan. 539, L. J.J.

(*c*) Stourton *v.* Stourton, 8 De Gex, Mac. & Gor. 760.

(*d*) Hawksworth *v.* Hawksworth, *ubi supra*, *per* L. J. James and L. J. Mellish, at pp. 543, 544.

(*e*) Meades, Minors, Ir. Rep. 5 Eq. 98.

(*f*) Davis *v.* Davis, 10, W. R. 245, V. C. W.

(*g*) See *In re* Browne, 8 Ir. Chan. Rep. 172; *See* also Lyons *v.* Blenkin Jacob, 245.

Custody and Education of Infants.

that in all such questions relating to the custody and education of infants the rules of equity shall prevail, and accordingly in a case occurring since the English Judicature Act,(*a*) where a father applied for a writ of *Habeas Corpus* to get the possession of his child from the custody of his maternal grandmother, and it appeared that the applicant was a person of intemperate habits and vicious life, in the habit of using gross and disgusting language as well as personal violence to his wife, the Queen's Bench Division of the High Court refused to interfere with the custody of the child, considering that to do so could not but be seriously prejudicial to the moral safety and welfare of the child. And so far the action or rather inaction of the Court was easy and clear. But if the application had been to remove the child from the custody of its father or other legal guardian, the action of the Court would be more or less dependent on conditions such as these:—The ability to provide another fit and proper guardian over whom the Court could exercise a proper surveillance with suitable directions, and the ability to secure some permanent provision for the maintenance and education of the child; and in view of these requirements, even should they be fulfilled, the Court would probably transfer the proceeding to the Chancery Division to which belongs the wardship of infants in general.

Conditions

(384.) It will be observed that those equitable and beneficial grounds on which the interposition of the Lord Chancellor on behalf of infants were called into action, arose only in regard to such as had become wards of the Court of Chancery. When the Lord Chancellor was acting under his Common Law jurisdiction as on an application to him for a

(*a*) *In re* Goldsworthy, L. R. 2 Q. B. D. 75.

Custody and Education of Infants.

writ of *Habeas Corpus*, his arm was as short, and his discretion as limited as those of any other Judge at the Common Law.

But to exercise this jurisdiction of interference with the legal rights of guardians as to the custody and education of their wards to any good purpose, the court should have some guarantee of a competent maintenance or provision being made for the infant ward, and failing this has refused to change its custody,(*a*) not from want of jurisdiction, but a want of means to exercise it, for the court could not take upon itself the maintenance and education of all the children in the kingdom.(*b*)

In some cases the court has acted on an undertaking to support the children.(*c*) In other cases it has required a suitable sum to be lodged in court to maintain the children in a manner suitable to their condition. This provision might come from strangers, as in the case of Alicia Race.(*d*) But *In re* Fynn,(*e*) the court refused to act on the covenant of the children's grandmother to provide for them.

In Shelley's case a sum of £2,000 was transferred by the grandfather to trustees for the support of the children.

(*a*) *In re* Fynn, 2 De Gex & Sma. 457.

(*b*) Wellesley *v.* Duke of Beaufort, 2 Russ. 1, *per* Lord Eldon.

(*c*) Warde *v.* Warde, 2 Ph. 786; Regina *v.* Alicia Race, *ubi supra*; O'Malleys, Minors, 8 Ir. Chan. Rep. 291.

(*d*) Not reported on this point, but see *In re* Meades, Minors, Ir. Rep. 5 Eq., at p. 99, where V. C. Kindersley's order was produced in court.

(*e*) *In re* Fynns, infants, 2 De Gex & Smale. 457.

CHAPTER XLII.

General Prevalence of Equity.

Section 28. *Subsection* (11).

385. General Prevalence of Rules in Equity, 324.
386. Accident, 325.
387. Actio Personalis, 326.
388. Administration of Assets, Legal and Equitable, 327.
389. After-acquired Property, 327.
390. Attachment of Equitable Debts, 327.
391. Choses in Action, 328.
392. Contribution, 328.
393. Discovery, 329.
394. Equity to a Settlement, 330.
395. Fraud in Deeds, 330.
396. Interest, Rate of, 330.
397. Jus Accrescendi, 331.
398. Lien, 331.
399. Mistake in Written Instruments, 332.
400. Mistake of Law, 333.
401. Partnership, 334.
402. Part Performance, 335.
403. Retainer and Preference, 335.
404. Separate Estate, 335.
405. Taxation of Costs, 336.

General prevalence of rules of equity.

(385.) Section 28, subsection (11) (*a*) is as follows:—

"Generally, in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of Equity and the rules of the Common Law *with reference to the same matter*, the rules of Equity shall prevail."

Some eminent authorities, and amongst them Lord Cairns, are said to have expressed themselves that it was a fallacy to suppose that the rules of Law and Equity did or could conflict, seeing that they related to different classes of cases, and that these enactments have been introduced in deference to the apprehension of certain judges—notably Lord Chief Justice Cockburn and the late Lord Romilly—who entertained notions that the rules of Law and Equity,

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(*a*) J. A., 1877, s. 28, subs. (11).

General Prevalence of Equity.

were sometimes different on the same facts and questions, or "with reference to the same matter," as the subsection expresses it.(*a*) Without pretending to offer anything like a complete or exhaustive catalogue of instances in which the rules of Law and Equity did conflict or were supposed to conflict, it may not be without use to enumerate in alphabetical order some few instances which have occurred to us by way of illustration merely, on a matter which has become of interest if not of importance.

Accident.

(386.) The rules or principles of Law and Equity as regards the relief which "accident" entitles a party to, as a plaintiff or as a defendant, were somewhat different. At law inevitable accident was a defence to an action for damages occasioned by acts done. It was defined, such as arises from act of God or *vis major*, an earthquake, a storm or flood of rain causing, for example, an artificial pond to overflow, there being no negligence in the construction or maintenance of the work.(*b*) In equity, "accident" meant something more, and included such unforeseen events, misfortunes, losses, acts, and omissions as are not the result of any negligence or misconduct of the party.(*c*) Equity, treated it as inequitable that loss should fall upon a party from circumstances beyond his own control, or from his acts done in entire good faith and in the performance of a supposed duty.(*d*) Thus it afforded relief in respect of lost deeds and bonds requiring an affidavit of the loss accompanying the claim, to prevent wanton change of the forum, which probably may now become unnecessary.

So as regards lost bills of exchange or other

(*a*) See Finlason's New Judicial System, p. 125, and *vide ante* (5) p. 9.

(*b*) See Nichols *v.* Marsland, L. R. 10 Exch. 255; Ryland Kearney *v.* London and Brighton Railway Company, L. R. 5 Q. B. 411.

(*c*) Story, Eq. Jur. § 78. (*d*) *Ib.* § 89.

General Prevalence of Equity.

negotiable instruments until lately(*a*) a Court of Law could give no relief, because it could not settle a proper indemnity against future claims. As to negotiable instruments not merely lost by accident but destroyed, there seems to be some doubt whether there was a variance between the rule of law as laid down by C. J. Tindal, in Hansard *v.* Robinson,(*b*) and in Equity,(*c*) but the doubt now has no further value. There was a further doubt whether a Court of Law could settle an indemnity where the action was not on the bill directly, but upon the consideration for it, *ex. gr.*, goods sold and delivered, or where the defence was that a bill of exchange had been given on account of the cause of action.(*d*) This doubt is no longer material. The application for the indemnity should be made before plea pleaded.(*e*) Accidental loss or misapplication of assets, *bonâ fide*, and without negligence by a personal representative of a deceased person was ground for relief in Equity, although it was not available at Law under a plea of *plene administravit*.(*f*)

Actio personalis.

(387.) The rule *actio personalis moritur cum persona* which prevailed at Law was recognised and adopted in Equity in its administration of assets, *ex. gr.*, where compensation in the nature of damages was sought on the ground of fraud, or misrepresentation on the part of a deceased person whose assets were being administered unless it were proved that the assets had received benefit from the deceit.(*g*)

(*a*) See Com. Law Pro. Act, 1856, s. 90; and see M'Donnell *v.* Murray, 9 Ir. Com. Law Rep., 495 Ex.

(*b*) Hansard *v.* Robinson, 7 B. & C. 95.

(*c*) See Wright *v.* Lord Maidstone, 1 Kay & J. 708.

(*d*) Naish *v.* Macken, Ir. Rep. 5 C. L., 51 Ex.

(*e*) See Clarke *v.* Bowman, 7 Ir. Com. Law Rep., 49 Ex.

(*f*) See 2 Williams on Executors, pp. 1807-8, 7th Edition. Crosse *v.* Smith, 7 East, 205.

(*g*) Peek *v.* Gurney, L. R., 6 H. L. C. 377.

General Prevalence of Equity.

(388.) As to the distinction between legal and equitable assets and the mode of their administration there can scarcely be said to have been a variance with reference to the same matter—an executor dealt with legal assets according to certain established priorities and the Court of Chancery with equitable assets—generally without regard to priorities amongst creditors of all grades, *pari passu*. But legal assets were disposed of in the like way in Equity as at Law. The statute 32 & 33 Vic., c. 46, had, as regards estates of persons dying on or after 1st January, 1870, levelled the priority of specialty debts over simple contract debts in the administration of legal assets, saving any specific lien or charge. Under this it has been held that rent secured by covenant has now no priority over simple contract debts;(*a*) and subsection (1) of this section 28 of the J. A. has further taken away some advantage of secured creditors on deficient estates.

Administration of assets, legal and equitable.

After an executor has paid away the assets under the orders of the Chancery Division of the Court, it would seem almost of course for any other Division to stay an action by a creditor in respect of the same assets.(*b*)

After-acquired property.

(389.) As to the validity of the transfer of "after-acquired property" included in a bill of sale or deed of settlement which was regarded void at Law but valid in Equity, the conflicting rule of Equity must now prevail and be effectuated.(*c*)

Attachment of equitable debts.

(390.) The distinction between legal and equitable debts has been so far modified that a trust debt can not only be the subject of claim by way of action and specially indorsed on the writ as such, but further it may now be attached under a garnishee order.(*d*)

(*a*) Shirreff *v.* Hastings, 25 W. R. 342, V. C. M.

(*b*) See Stevens *v.* Phillips, L. R. 10 Chan. 423, *per* Mellish, L. J.

(*c*) See Anon, W. N., 1876, 64, Archibald, J.; Anon, W. N., 1875, 203; Holroyd *v.* Marshall, 10 H. L. C. 191.

(*d*) Wilson *v.* Dundas, W. N., 1875, 232; 20 Sol. Jour. 99, Quain, J.

General Prevalence of Equity.

Choses in action.

Contribution.

(391.) The different rules of Law and Equity as to assignment of choses in action as have been for the most part reconciled, as we have seen in a previous chapter xxxvi, p. 258.

(392.) As regards the right to contribution between co-debtors, co-sureties, and co-contractors, incurring a common liability in respect of one and the same debt or transaction, the rules of Law and Equity did conflict, although as between tortfeasers, the rules, both of Law and Equity, so far agreed that there should be no contribution. However costs paid by one defendant under a decree against two, were treated as of the nature of debt, and not damages.(*a*)

At law the right to contribution was supposed to arise out of contract: in equity, it was founded on the natural duty expressed in the maxim, *Qui sentit commodum sentire debet et onus*, so that it might arise between strangers; but, of course, contract may modify or alter the right. The maritime law of general average and contribution was founded on the same principle.(*b*) The Common Law doctrine being based on a supposed contract, did not consider that it involved more than a restoration of a rateable share of the sum actually paid, and that, without interest, whereas equity regarding it as an obligation of complete indemnity, it covered the interest as well as the principal money.(*c*) Again, in case of the death or insolvency of some of the parties bound to contribute, the plaintiff could only recover from the solvent or surviving parties, their aliquot shares, according to the original number of

(*a*) Staples *v.* Smith, 6 Ir. Eq. Rep. 211, Ex.; Archbishop of Dublin *v.* Trimbleston, 13 Ir. Eq. Rep. 98; and see Furlong *v.* Scanlan, Ir. Rep., 9 Eq., V. C. 202.

(*b*) See Mavro *v.* Olean, Marine Ins. As., L. R., 10 C. P. 414, *per* Blackburn, J.

(*c*) See *In re* Swan's Estate. Ir. Rep. 4 Eq. 211, Ch. Ap. Ct. overruling Onge *v.* Truelock, 2 Mol. 42; Salkeld *v.* Abbott, Hay. and Jo. 110.

General Prevalence of Equity.

the contributories liable; whereas, in equity, the obligation of complete indemnity involved that the solvent and surviving parties should contribute towards making up the shares of the insolvent or deceased contributories.(*a*)

The right of a co-surety who is obliged to pay the entire debt to sue at law the executors of his deceased co-surety, had been questioned.(*b*)

Discovery.

(393.) As regards the extent of discovery which a party litigant was entitled to get from his adversary upon interrogatories, or by way of inspection, there seemed to be some slight variance between the rules of law and equity. In equity a class of interrogatories were demurrable as tending to criminate the party required to answer, which might be administered at law, viz., in an action of libel interrogatories, asking defendant whether he had not been instrumental in publishing a libel, the subject of the action.(*c*) On the other hand, equity was in the habit of enforcing inspection in certain cases in which it was denied at law, for example, letters between a defendant and his agent.(*d*) So as to the practice of the Court of Chancery to order the production of a document which was not sufficiently protected by the affidavit of the party who has the custody of it, and that the Judge has no discretion in the matter, but is bound to order the production, unless there be grounds for permitting a further affidavit to be made.(*e*)

(*a*) Lefroy *v.* Gore, 1 Jo. and Lat. 570, 7 Ir. Eq. Rep. 220. *In re* M'Donaghs, Minors, Ir. Rep. 10 Eq. at p. 271, L. C. Ball.

(*b*) Story, § 497. Contra, Bataod *v.* Hawes, 2 El. and Bl., at p. 297, *per* Lord Campbell. C. L. Ashby *v.* Ashby, 7 B & C. 444, Bayley, J. See *infra*, (397).

(*c*) Bartlett *v.* Lewis, 12 C. B. N. S., 249, Osborn *v.* London Dock Cr. 10 Ex. 698, Hill *v.* Campbell, R. L. 10 C. P. 222.

(*d*) See English *v.* Tottie, L. R., 1 Q. B. D. 141, 24 W. R. 393.

(*e*) See Bustros *v.* White, L. R. 1 Q. B. D. 423, 24 W.R., 721, 20 Sol. Jour. 585, A. C., a decision of eight judges.

General Prevalence of Equity.

Equity to a settlement of wife.

(394.) As regards a wife's equity to a settlement out of moneys recovered in a Court of Equity, it was asked by Lord Chief Justice Cockburn, whether this rule of equity should apply to cases in which the husband may recover in a Common Law Division of the High Court personal property in right of his wife, since every division of the Court is a Court of Equity.(*a*) The obvious answer to such a question would seem to be, that it must prevail in all cases in which the High Court is asked to exercise its jurisdiction as a Court of Equity to realize the fund, in which case the Court, is bound to exercise the jurisdiction as nearly as may be, in the same manner as the same might have been exercised in the Court of Chancery;(*b*) and the rule was never applied by a Court of Equity to the recovery of property by the husband on a purely legal title; but in pursuance of the principle expressed in the maxim, that he who seeks equity must do equity.(*c*)

Fraud in deeds.

(395.) Fraud in the shape of misrepresentation or concealment of material facts was a good defence to an action on a covenant in a deed at law as well as in Equity.(*d*) It may now be relied on by a plaintiff in reply to a deed relied on by a defendant.(*e*) But that class of fraud which consisted of obtaining the execution of deeds or other instruments by reason of undue influence, or taking advantage of the mental incapacity of the grantor, was not generally cognizable at law.

Interest, rate of.

(396.) In an action at law, in the absence of contract, the rate of interest was usually in the discretion of a jury. In a Court of Equity it was in the discretion of the Court, regulated, however, in

(*a*) Finlason, p. 120. (*b*) J. A., 1877, s. 26.

(*c*) See Fox *v.* Bulkley, L. R., 3 Chan. D. 508, 25 W. R., 170, A. C.

(*d*) See Evans *v.* Edmonds, 13 C. B. 777; Hogan *v.* Healy, Ir. Rep. 10 C. S. 6 C. P.

(*e*) *Vide ante* (263).

General Prevalence of Equity.

ordinary cases by a general order as to a certain fixed rate called the Court rate. But even in a Court of Equity where the demand was a legal demand, it might give such interest as a jury in its discretion might have given, and at the rate in use when interest first became payable.(*a*)

Jus accrescendi.

(397.) There was a variance between the rules in law and Equity, where two or more persons were entitled to a common right or subject to a common liability and one or other of the parties happened to die before the right or liability was ascertained or adjudicated upon. Thus where several persons make a joint purchase for the purpose of a joint undertaking or partnership, either in trade or in any other dealing, although they were joint tenants at law, and as to the legal estate, yet in equity they were considered as tenants in common as to the beneficial interest, and the survivors were deemed to be trustees for those who happened to die.(*b*) So similarly liabilities which at law were only joint, were treated as joint and several in Equity, and the assets of the deceased party might be resorted to. Thus for a bond the consideration of which was a partnership debt.(*c*)

It would seem that since the Judicature Act it is competent, where one of two joint debtors dies, to sue the surviving debtor and the executors of the deceased.(*d*)

Lien, equitable and legal.

(398.) The High Court, even in the Chancery Division, will not apply equitable rules to legal estates, so as to work recoupment by way of equitable lien, out of the estate of a trustee guilty of a

(*a*) *In re* Day's Estate, Ir. Rep. 10 Eq. 201, L. E. Ct.

(*b*) Lake *v.* Gibson, 1 Eq. Cases, *ab.* 294, 3 Peere. Wms. 158; 1 White & Tudor, 168.

(*c*) Beresford *v.* Browning, L. R. 20 Eq. 564, M. R.

(*d*) See Williams *v.* Andrews, 20 Sol. Jour. 100.

General Prevalence of Equity.

breach of trust, or a tenant for life concurring in it, in misappropriation of the property of the *cesqui que* trust or remainder-men, where the estate is a legal estate acquired by direct devise, and not through the action of the Court.(*a*)

Mistake in written agreements.

(399.) The rules of law did not admit parol evidence to vary the terms of an agreement in writing, even by way of defence, to an action on the contract, although they did allow of parol evidence in aid of a defence to show that there was no definitive agreement at all, *ex. gr.*, that when the defendant signed the agreement it was agreed collaterally that the writing should be no agreement until approved of by a third person,(*b*) or that an agreement after being reduced into writing had been waived, or dissolved, or annulled, by a fresh agreement.(*c*) But in no case could a plaintiff bring forward a document on which he founded his right, and be allowed to say that the instrument, by accident or mistake, did not express the real agreement.(*d*)

By the rules of Equity when a written instrument evidencing a contract was sought to be enforced specifically, it was competent to the defendant to show by parol evidence that the contract was entered into by mistake or upon the faith of a state of things which did not exist,(*e*) as plaintiff he might seek to have it cancelled(*f*) or rectified, and after it

(*a*) Fox *v.* Buckley, L. R. 3 Chan. D. 508, 25 W. R. 170 A. C. But see New Mostyn *v.* West Mostyn Coal Company, 24 W. R. 401.

(*b*) See Pym *v.* Campbell, at p. 370, *per* Erle, C. J.

(*c*) Goss *v.* Lord Nugent, 5 B. & Ad. 65, *per* Lord Denman, C. J.; Scott *v.* Midland Great Western Railway Company, 3 Ir. Com. Law Rep. 64, *per* Monahan, C. J.

(*d*) Druiff *v.* Parker, L. R. 5 Eq. at p. 137, *per* Wood, V. C.; Wake *v.* Harrop, 6 Hurl. & Norm. 768.

(*e*) Emmerson's case, L. R., 1 Chan., 433; Cochrane *v.* Willis, L. R., 1 Ch. 58.

(*f*) Cooper *v.* Phibbs, L. R., 1 H. L. 168; Torrance *v.* Bolton, L. R., 8 Ch. 118.

General Prevalence of Equity.

was rectified, and not before, he might enforce it at law, or have specific performance of it.(*a*)

A remarkable instance of the exercise of this jurisdiction to rectify an instrument in order to make it available at law arose before Sir William Page Wood, V. C.,(*b*) where a bill of exchange was intended to be indorsed to the plaintiff as a renewal of a former bill drawn by the defendant, but the plaintiff's name was inserted by mistake above the place where the drawer's name was afterwards inserted. The plaintiff having sued as indorsee at law, the defendant, the real drawer, relied on the fact of the plaintiff's name being appearing on the bill as drawer, to which the plaintiff demurred; but feeling his success at law to be doubtful, filed his bill in Equity to rectify the mistake. In a similar case, it is presumed that the rules of Equity would prevail as to the admission of parol evidence to correct the mistake.

Mistake in law.

(400.) Mistake in matter of law was not a ground in a Court of Equity any more than in a Court of Law for relief from agreements deliberately entered into. In both jurisdictions the maxim *ignorantia legis haud excusat* prevailed, and everybody who enters into an agreement is bound to know what the law is and what the legal consequences of his acts are.(*c*) Equity introduced the qualification that the mistake of law should not be brought about by misrepresentation or misplaced confidence, undue influence or mental incapacity overreached.(*d*) Apart from these special circumstances, which were mostly if not entirely cog-

(*a*) See Woollam *v.* Hearn, 2 White & Tudor, 403, 3rd Ed.; Leaver *v.* Fielder, 32 Beav. 1.

(*b*) Druiff *v.* Lord Parker, J. R., 5 Eq. 131, V. C. Wood.

(*c*) Pullen *v.* Ready, 2 Atk., 591; Powell *v.* Smith, L. R., 14 Eq. 85, M. R.

(*d*) Story, § 118.

General Prevalence of Equity.

nisable in Equity, ignorance or mistake of law, with full knowledge of the facts, furnished no ground to rescind agreements or to set aside solemn acts of the parties.(*a*)

The maxim, however, applies only to the general or ordinary and well-known law of the land, and not to private rights such as ownership of land,(*b*) or other property, which is matter of fact as well as of law. Mistake in respect of this might be ground for relief in Equity,(*c*) or still more so, where the mistake was mutual, and a man took a lease of his own property,(*d*) or where it arises on the construction of the meaning of an obscurely worded document.(*e*)

Partnership actions.

(401.) In matters of partnership a plaintiff could not at law maintain an action against a firm of which he himself happened to be a partner. This deprived a partner of all remedy at Common Law for money lent, or goods supplied to or work done by him for his firm while a member of it. If the same individual happened to be a member of two firms, no action could be brought by either firm against the other in respect of contracts entered into between them.(*f*) In a Court of Equity no such difficulty stood in the way of justice.

It is presumed that this variance is at an end. Co-partners may be sued in the name of their firm, and the action cannot be defeated by any mis-

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(*a*) Story,§ 137; Stewart *v.* Stewart, 6 Cl. & F., at p. 965, *per* Lord Cottenham; Kelly *v.* Solari, 9 M. & W., at p. 58, *per* Lord Abinger, C. B.

(*b*) See Leonard *v.* Leonard, 2 Ball & B. at p. 182; and see Thompson *v.* Eastwood, L. R., 2 H. L., at p. 234.

(*c*) Broughton *v.* Hutt, 3 De Gex & Jo., 501.

(*d*) Cooper *v.* Phibbs, L. R., 2 H. L. at p. 170, overruling S. S., 17 Ir. Chan. Rep., 73.

(*e*) Earl Beauchamp *v.* Winn, L. R., 6 H. L. 223.

(*f*) See Addison on Contracts, p. 988, 7th Edition.

joinder of a common partner, even if it be now a misjoinder. *General Prevalence of Equity.*

(402.) Part performance on an agreement was in equity considered to take the case out of the Statute of Frauds; and it appears the rule was the same at law, on the ground that the contract was then no longer executory, but executed.(*a*) Part performance.

(403.) As regards the right of an executor or administrator to retainer of the assets to satisfy his own debt, equity followed the law as to legal debts and legal assets,(*b*) and extended it further to equitable debts,(*c*) and where an executor was a trustee for others, it compelled the executor to take satisfaction by way of retainer out of legal assets, when otherwise he would have trenched upon equitable assets to the prejudice of his *cestui que* trusts.(*d*) So, as regards an executor's right of preference of one creditor over another of equal degree, equity followed the law, and upheld an equitable assignment by an executor of the debts of his testator to secure the demand of a particular creditor.(*e*) Retainer and preference.

(404.) The variance which existed between the rules of the Common Law by which a married woman could hold no property apart from her husband, and the rules of equity by which she was deemed capable of possessing property to her separate use, independent of her husband, with all its privileges and incidents, including the *jus disponendi,* controlled only by conditions expressly restraining alienation by way of anticipation of reversionary property in personalty(*f*) has been already terminated to some Separate estate.

(*a*) Knowlman *v.* Bluett, L. R. 9 Exch. 307.
(*b*) Hanley *v.* M'Dermott, Ir. Rep., Eq., 35, V. C.
(*c*) *In re* Morris' Estate, L. R., 10 Chan., p. 72, Sir Geo Mellish, L. J.
(*d*) Sanders *v.* Heathfield, L. R., 19 Eq. 21, V. L. M.
(*e*) Earl Vane *v.* Rigden, L. R., 5 Chan. 669.
(*f*) Tullett *v.* Armstrong, 4 M. & C.; Purden *v.* Jackson, 1 Russ. 1.

General Prevalence of Equity.

extent by statute. The Act 33 & 34 Vic., c. 93, the Married Women's Property Act, 1870, enables a married woman to acquire a legal title to certain classes of property and to protect them by proceedings in a court of law independently of her husband. Thus her wages and earnings in any employment or trade carried on separately from her husband, and any money acquired by her labours or artistic or scientific skill, have become her separate property as if settled to her separate use, and deposits in savings banks in her own name, or moneys in the public stocks or funds over £20 standing in her name, or in joint-stock companies, or in policies of insurance effected by herself, and for all these, so far as they lie in action, she may maintain an action or have the same remedies, civil or criminal, against all persons as if they belonged to her as an unmarried woman.(*a*) Thus she may sue for an injunction in the Chancery Division to prevent a sheriff or creditors of her husband selling her separate property purchased out of her earnings.(*b*) The savings out of her earnings are distributed after her death as equitable assets.(*c*)

Taxation of costs.

(405.) As a small item of variance between the rules of law and equity may be noticed that Courts of Equity allowed the costs of a witness qualifying himself for examination, whereas Courts of Law did not. Since the Judicature Act, the Common Law Divisions in England all follow the rule of equity.(*d*)

(*a*) See Summers *v.* City Bank, L. R. 9 C. P. 580. Ramsden *v.* Brearley, L. R., 10 Q. B. 147. But as to her right of disposal of her property as if unmarried, see Howard *v.* Bank of England, W. N., 1875, 211, M.R.

(*b*) See Marston *v.* Smith, W. N., 1877, 169 V. C. H.

(*c*) Thompson *v.* Bennett, L. R. 6 Ch. D. 739.

(*d*) Mackley *v.* Chillingworth, L. R., 2 C. P. D. 273, 25 W. P. 650.

PART VI.

THE NEW PROCEDURE.

Chapter XLIII.—The New Procedure.

" XLIV.—Pending Causes.

" XLV.—Actions.

" XLVI.—Writ of Summons.

" XLVII.—Service of Writ.

" XLVIII.—Appearance.

" XLIX.—Summary Orders before Pleading.

" L.—Parties to Actions.

" LI.—Pleadings.

" LII.—New Rules of Pleading.

" LIII.—Incidental Matters between Pleading and Trial.

" LIV.—Trial and Evidence.

" LV.—Judgment and Execution.

" LVI.—Costs.

" LVII.—Appeals.

" LVIII.—Final Appeal to House of Lords.

" LIX.—Interpleader.

" LX.—Remitter of Actions to Civil Bill Court.

CHAPTER XLIII.

The New Procedure.

406. The New Procedure, 338.
407. Pre-existing Procedure, 338.
408. Scope of the Rules as to procedure, 339.
409. Exceptions from, 340.
410. Proceedings other than Actions, 340.
411. Act and Rules how far retrospective, 341.

The new procedure.

(406.) The procedure and practice which, with certain exceptions mentioned hereafter, are henceforth to govern the proceedings in the High Court of Justice and in the Court of Appeal, are to be found partly in the Judicature Act in the Rules of Court contained in the first schedule to the Act, and in the Orders made subsequently thereto, and partly in the pre-existing practice of the Courts whose jurisdiction has been transferred to the High Court, and which remains in force where no other provision is made by the Act or Rules.(*a*)

Pre-existing procedure, how far preserved.

(407.) Thus it is enacted that "the jurisdiction transferred to the High Court of Justice and the Court of Appeal respectively, shall be exercised (so far as regards procedure and practice) in the manner provided by the Act and the Rules and Orders of Court contained in, or made pursuant to the Act, with reference thereto."(*b*)

But where, and so far as, the Judicature Act or the Rules of Court contained in it or made under it, contains no special provision the jurisdiction is to 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 the

(*a*) See Creen *v.* Wright, L. R., 2 C. P. D. 254 A. C.
(*b*) J. A., 1877, s. 26; J. A., 1873, s. 23.

The New Procedure.

Courts,(*c*) and save as is otherwise provided by the Act or Rules, "all forms and methods of procedure which at the commencement of the Act were in force in any of the Courts whose jurisdiction is transferred to the High Court and to the Court of Appeal respectively, under or by virtue of any law, custom, general orders, or rules whatsoever, and not inconsistent with the Act or with the rules of Court may continue to be used and practised in the High Court of Justice and the Court of Appeal respectively, in such and like cases, and for such and the like purposes as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred if the Act had not been passed."(*d*)

Thus as regards a party, being an infant, consenting by his guardian to have the evidence taken by affidavit, the former practice is to be considered as though it were embodied in the new order enabling infants defendants to defend by guardian,(*e*) there being nothing in the statute or in the rules inconsistent therewith.

In fact, neither the Act nor the Rules profess to furnish anything like a complete code of procedure, they form in reality but a general outline which may be filled hereafter, but must at present be filled in by the pre-existing and unrepealed rules as to procedure and practice.

Scope of the Rules.

(408.) The scope of the procedure as governed by the rules in the statute and in the New Orders extends to all proceedings in actions whether at Common Law or Equity, and formerly commenced by summons and plaint or by bill or information in

(*c*) J. A., 1877, s. 26.

(*d*) J. A., 1877, s. 67; J. A., 1875, s. 21.

(*e*) Fryer *v.* Wiseman, 24 W. R. 205, 20 Sol. Jour., 211; Knatchbull *v.* Fowler, L. R., 1 Chan. D. 604, 24 W. R., 629, M. R.

The New Procedure.

Chancery. In some respects they apply to proceedings by petition or summons in the Chancery Division, as for example the rules as to pleadings which are defined to include petitions and summonses(*f*) and the rules as to discovery of documents have been held to apply to proceedings under the Companies' Act, 1862.(*g*)

Exceptions from Rules.

(409.) Among the exceptions from the general application of the New Procedure, it is provided "that the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice and in the Court of Appeal respectively, including the practice and procedure with respect to Crown cases reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of the Act."

The Schedule Rules and New Orders, except Order L., Rules 1 & 2, and Order LVIII., have no application to business within the exclusive cognizance of the Court of Probate or the Court for Matrimonial Causes—nor to proceedings before the Land Judges heretofore within the exclusive jurisdiction of the Landed Estates Court. Neither do they apply to criminal proceedings or proceedings on the Crown side of the Queen's Bench Division, or on the Revenue side of the Exchequer Division.(*h*)

Proceedings other than actions.

(410.) All other proceedings (than actions) and applications to the High Court may, subject to any rules to the contrary, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if the Judicature Act had not been passed.(*i*)

(*f*) J. A., 1877, s. 3.

(*g*) *In re* National Funds Assurance Association, W. R. 774, A. C.

(*h*) Sch. R. 38, Ord. lxiv. *infra*. (*i*) Schedule R. 1.

The New Procedure.

Judicature Act, how far retrospective.

(411.) As regards the question how far the provisions of the Judicature Act have a retrospective operation, it is to be observed that while as regards alterations in rights and liabilities and matters of principle new enactments will be construed as intended to govern future rights and not rights already acquired, unless clear and express words are used, manifestly sufficient to make the enactment retrospective; yet, so far as an enactment deals with questions of procedure only or the means of establishing rights, ordinary words are sufficient to make them retrospective,(*a*) for suitors have no vested interest in defective procedure.(*b*)

Acting on this distinction, the Court has sanctioned the application of the new procedure to enable a defendant to have the benefit of a counterclaim or set-off, so that he might have judgment for the balance if found to be in excess, considering that this effected no alteration of legal rights but an alteration of procedure merely, and giving a defendant a better remedy for enforcing the same right,(*c*) and some of the judges have considered that sec. 22 of the Judicature Act, 1873, enabled them to permit judgment to be marked in a summary way, on a writ issued before the Act came into operation; it being indorsed in manner similar to that required by the new procedure.(*d*)

New Rules, when retrospective.

The procedure introduced by the new Rules in England has been held, in certain cases, to apply to past transactions, *e.g.*, the additional rules 30, 31 and 32 as to costs; in a case where a

(*a*) *In re* Joseph Suche & Co., 24 W. R. 134.

(*b*) Republic of Rica *v.* Erlanger, L. R., 3 Ch. D. 62, 24 W. R. 955.

(*c*) Anon. W. N., 1875, 229; 20 Sol. Jour. 201, Quain, J.

(*d*) Anon. 20 Sol. Jour. 162, Huddlestone, B.; Anon. 20 Sol. Jour. 219. Lindley, J.; *sed contra*; Anon. 20 Sol. Jour. 101, Quain, J.

The New Procedure.

taxation had been already had and an appeal sought to be taken without the preliminary objection being made before the taxing officer, as required by the rules.(*c*)

Thus where a pending cause was ordered to be continued according to the old procedure, the new Rules were applied as regards amendment of pleadings at any stage of the proceedings where desirable.(*d*) In one case,(*e*) after issued joined before the Act, the bill was amended at the hearing under the new Rules by alleging a specific act of wilful default against a trustee.(*f*)

In a pending cause in the Chancery Division, in which an injunction had been granted against proceeding in an action at law, the injunction could be continued no longer, but the suit might be transferred to the Court and Division in which the action was pending.(*g*)

So, where a rule *nisi* for a new trial on the ground of admission of improper evidence had been granted before the Order 39 (English) came into operation, the Court discharged it afterwards on the ground that although the evidence was inadmissible the verdict of the jury could not have been in any way influenced by it.(*h*)

(*c*) Anon. W. R. 1875, p. 219, Lush, J.

(*d*) Budding *v.* Murdock, L. R., 1 Ch. D. 42; 24 W. R. 23.

(*e*) King *v.* Corke, L. R. 1 Ch. D. 57; 24 W. R. 23, V. C. B.

(*f*) See also Roe *v.* Davis, L. R. 2 Ch. D. 729; 24 W. R. 606, V. C. B.

(*g*) Edwards *v.* Noble, 24 W. R., 390; W. R., 1876, p. 81, V. C. B.

(*h*) Earp *v.* Faulkner, W. N., 1876, p. 181; 24 W. R. 774, A. C.

CHAPTER XLIV.

Pending Causes.

Procedure.

412. Pending business transferred, 343.
413. Causes fully heard, judgment not perfected, 343.
414. Judgment perfected, but not executed, 344.
415. Error and Appeals, 344.
416. Other proceedings in High Court, 344.
417. Jurisdiction to deal with old causes, 345.
418. Form and manner of procedure, as to, 345.
419. Mode of continuance in law division, 345.
420. Special orders for, 346.
421. To let in a counter-claim, 347.
422. To introduce new parties, 348.
423. For other purposes, 348.
424. To change nature of action, 349.
425. Appeals when under new procedure, 349.
426. Special orders in Chancery Division, 349.
427. Before notice of motion for decree or replication, 350.
428. Setting down causes for hearing and evidence, 350.
429. After notice of motion for decree or replication served, 351.
430. Other matters than causes, 351.
431. Special orders, 352.

Pending business in old suits and actions transferred.

(412.) Since the former Courts of Justice have ceased to exist and their jurisdiction has been transferred to the High Court of Justice and the Court of Appeal, it became necessary to make provision for the transaction and disposal of pending business in suits and actions commenced before the Judicature Act came into operation, and this is done by J. A. 1877, sec. 25, which has in effect transferred all business pending in the old tribunals to the new.

Causes fully heard, but judgment not perfected.

(413.) In the first place, as regards causes, matters and proceedings which have been fully heard, but in which judgment has not been actually given, or if given (or pronounced), it has not been signed, drawn up, passed, entered, or otherwise perfected at the commencement of the Act, such judgment, decree, rule, or order may be given, made, signed, drawn up, passed, entered, or perfected after the commencement of the Act in the name of the same

Pending Causes.

(defunct) court, and by the same judges and officers and generally in the same manner in all respects as if the Judicature Act had not passed. And the judgment, decree, rule, or order will take effect to all intents and purposes as if it had been perfected before the commencement of the Act.(*a*)

Judgments perfected, but not executed.

(414.) Where the judgment, decree, or order is duly perfected before the commencement of the Act, it may be executed and enforced, and, if necessary, amended or discharged, by the High Court or the Court of Appeal in the same manner as if it had been a judgment, decree, or order of its own. (*b*) Thus, where an order for taxation of a solicitor's bill had been made, and the balance found due by him was ordered to be paid within twenty-one days from the date of the certificate of taxation, and the solicitor failed to pay the balance, it was held that an attachment to enforce this order should issue under the new procedure, and therefore notice should be given of the application.(*c*)

Error and appeals in Appeal Court.

(415.) Proceedings in error, or by way of appeal, and proceedings before the Court of Appeal in Chancery, or in the Court for land cases reserved at Dublin, in causes or matters, whether civil or criminal, and which have not been fully heard before the transfer, are to be continued and concluded in and before the new Court of Appeal.(*d*)

Thus, in an appeal from an order made before the Act, the Appeal Court might direct security to be given for costs under special circumstances, under Ord. 58, R. 11, *infra*; Ord. 58, R. 15, E.(*e*)

Other proceedings in High Court.

(416.) All other proceedings (than by way of

(*a*) J. A., 1877, s. 25, § 2; J. A., 1873, s. 22.
(*b*) J. A., 1877, s. 25, § 3; J. A., 1873, s. 22.
(*c*) *In re* a Solicitor, W. N., 1875, 243; M. R.
(*d*) J. A., 1877, s. 25, § 4; J. A., 1873.
(*e*) Wilson *v.* Smith, L. R. 2 Ch. D. 67; 24 W. R., 421.

Pending Causes.

error or appeal), and not fully heard at the time of transfer, are to be continued and concluded in and before the High Court of Justice.(*a*)

Jurisdiction to deal with old causes transferred.

(417.) For the disposal of pending business, the High Court of Justice and the Court of Appeal are invested with the same jurisdiction in all causes, matters, and proceedings thus transferred to them, as if the same had been commenced in the High Court of Justice or the Appeal Court itself, and had been continued in it down to the point at which the transfer has taken place.(*b*)

Form and manner of procedure as to old causes.

(418.) As to the form and manner of procedure in old causes and matters transferred to the High Court and the Appeal Court, they may be continued and concluded either in the same or the like manner as they would have been continued or concluded in the Courts from which they have been transferred, or according to the ordinary course of the new Courts, so far as the same may be applicable thereto, as the latter Courts may think fit to direct.(*c*)

Mode of continuance.

(419.) The statute contemplates that the several divisions of the new Court shall direct which of the two alternative modes of procedure—the old or the new—shall govern pending causes transferred to the High Court. In the English Common Law Divisions, in order to save expense and inconvenience of separate applications, and subject to any special order made to the contrary, the judges directed that where the actions had been commenced, and the writ served, but no declaration delivered, the action should be continued according to the ordinary course of the High Court of Justice, as if it had been commenced in that Court.(*d*)

(*a*) J. A., 1877, s. 25, § 4; J A., 1873, s. 22.

(*b*) J. A., 1877, s. 25, § 5; J. A., 1873, s. 22.

(*c*) J. A. 1877, s. 25, § 6.

(*d*) Ord. 2 Nov., 1875, and see a case illustrating this where printing was required; Anon. W. N., 1875, 198, 20 Sol. Jour. 31, Lush, J.

Pending Causes.

In all other cases where declaration had been delivered, the action was to be continued to the close of the pleadings according to the old practice of the Court in which it was brought, and afterwards, *i.e.*, after issue joined, then according to the provisions of the Judicature Act.(*a*)

Under the English rules, without a special order it was not competent for either party to avail himself of the benefit of the new procedure where the action at the time of transfer had reached the stage of the delivery of the declaration, equivalent as nearly as possible to the service of our Summons and Plaint.

Thus, a defendant could not deliver an equitable defence without leave,(*b*) nor plaintiff deliver interrogatories without an order as heretofore.(*c*)

Special orders for new procedure.

(420.) The judges in England at the first starting of the Judicature Act used to exercise their power very liberally to order proceedings to be continued under the new system, in order to bring into use as early as possible the benefits of the new procedure. Thus, a declaration delivered has been ordered to stand as a statement of claim, the title being altered to the High Court of Justice; and it has been customary to combine in one order a direction that the action be continued according to the course of the High Court of Justice, with an order to allow interrogatories to be exhibited,(*d*) and where an action had been commenced under the Bills of Exchange Act, defendant got leave to appear and continue under the new Procedure.(*e*) But where the defendant was served abroad, and

(*a*) Eng. Ord., 2 Nov., 1875.
(*b*) Anon. W. N., 1876, 52.
(*c*) Anon. 20 Sol. Jour., 32 and 82, Lush, J.
(*d*) Ramsden *v.* Brearley, 20 Sol. Jour. 36, Lush, J.
(*e*) Norris *v.* Beazley, L. R., 2 C. P. D. 80; 25 W. R. 320.

Pending Causes.

was living there, and the declaration was not delivered until after the Judicature Act came into force, the Court refused to make an order ex parte for liberty to mark judgment under the new procedure as for default of appearance.(*a*)

To raise counter-claim.

(421.) So where a defendant desired to plead a counter-claim or set-off to the declaration which had been delivered, and there appeared to be a *bona fide* ground for a cross action, it had been almost as, of course, to direct the proceedings to be continued under the new procedure in order to enable two actions to be tried simultaneously, or practically to be converted into one.(*aa*) So, to enable defendant to have the benefit of a set-off under the new system, and recover the balance should it be in excess of the plaintiff's claim.(*b*) This has been allowed in a petition of right to enable the Crown to set up a counter-claim,(*c*) and, at the instance of one of several defendants, to enable him to claim a set-off against plaintiff and contribution from the defendants.(*d*) But, on these occasions the Court usually required from the defendant an affidavit showing a good cause of action on his part.(*e*)

Where there seemed no substance in the counter-claim or set-off, the Court left the defendant to his remedy under the old law.(*f*)

The opportunity to plead a counter-claim under such circumstances was generally afforded on terms,

(*a*) Fowler *v.* Zewry, W. N., 1875, 232, Quain, J.

(*aa*) Norton Cannock, Coal Co. *v.* Merriman, W. N., 1875, 219, Lush, J.

(*b*) Anon. W. N., 1875, 230, Quain, J.

(*c*) Thomas *v.* The Queen, W. N., 1875, 218, 20 Sol. Jour. 79, Lush, J.

(*d*) Harrison *v.* Markins, W. N., 1875, 200, 20 Sol. Jour. 161, Huddlestone, B.

(*e*) Anon. W. N., 1875, 21, Lush, J.; Lowther *v.* Bellairs, W. N., 1875, 220, Lush, J.

(*f*) Tennant *v.* Walton, W. N., 1875, 219; 20 Sol. Jour. 79, Lush, J.

Pending Causes.

such as defendant bringing into court the amount claimed by the plaintiff, and in most cases giving plaintiff time to elect whether to go on with his action or abandon it as on a defence arising after action brought, getting in the latter case his costs up to the date of order,(*a*) more especially where the counter-claim was unconnected with the original claim.(*b*) Where there was much delay, *ex. gr.*, exceeding a month, after issue joined liberty to file a counter-claim has been refused to a defendant.(*c*)

To introduce new parties.

(422.) Another ground of seeking the application of the new procedure has been to enable the defendant to have contribution (or rather to lay grounds for having it) (*d*) against a co-defendant or to bring the real plaintiff before the court with a view of getting discovery from him which the ostensible plaintiff is unable to give.(*e*)

After an action coming on for trial and adjournment the court thought it too late at that stage to allow a third person to be joined as a defendant who could not have been made so before the Judicature Act, viz.: the executor of a deceased person jointly liable.(*f*)

Other purposes.

(423.) The new procedure has been rendered applicable to pending actions for various other purposes, *e.g.*, to enable a defendant to have a reference under the English Judicature Act, 1873, sec. 57, Ord. 36.(*g*)

(*a*) Anon. W. N., 1875, 229; 20 Sol. Jour. 201; Quain, J.; Trevena *v.* Watts, W. N. 1875, 250; 20 Sol. Jour. 140, Quain, J.

(*b*) Capellaus *v.* Brown, W. N., 1875, 231; 20 Sol. Jour. 98, Quain, J.; see Fowler *v.* Lee, W. N., 1876, 86.

(*c*) Ware *v.* Gwynne, W. N. 1875, 240. (*d*) See ante (253).

(*e*) Clarkson *v.* British and Foreign Marine Insurance Company, W. N., 1876, 9; 20 Sol. Jour. 177, Quain, J.

(*f*) Williams *v.* Andrews, W. N., 1875, 237; 20 Sol. Jour. 100, Quain, J.

(*g*) See Anon. 20 Sol. Jour. 80, Lush, J. See Cruikshank *v.* The Floating Swimming Baths Company, W. N., 1876, 154; 20 Sol. Jour. 121, C. P. D.

Pending Causes.

To change nature of action.

(424.) But where it was sought to change the entire character of the action from an action at law to a suit in equity it was refused, *ex. gr.*, an action against a female for goods sold and delivered, pleas of coverture, never indebted, replication, the defendant in her proper person had undertaken to pay, and thereby charged her separate estate and that she was living apart from her husband, and therefore her separate estate was liable. This replication had been set aside on the ground that it did not allege that defendant had any separate estate and was therefore embarrassing. The plaintiff having amended his replication by stating that the defendant was possessed of separate estate, asked leave to proceed under the Judicature Act in order to avail himself of this replication which might be a good answer in equity to a plea of coverture, and thus to convert the suit from an action against her personally to one for relief against her separate estate. The court refused to allow this unless plaintiff paid all costs from the writ downwards converting the declaration into a statement of claim.(*a*)

Appeal when under new procedure.

(425.) Where a party wishes to appeal from a decree or judgment and no petition of appeal has been presented when the Judicature Act comes into operation the case is not within the meaning of section 22 of Judicature Act, 1873, as a matter or proceeding pending and the appeal should be brought according to the new procedure without special directions.(*b*)

Chancery Division special orders in.

(426.) In the Chancery Division in England the Master of the Rolls and the Vice-Chancellors gave general directions as to the course of procedure to be adopted, subject, however, to any special order which might

(*a*) Hancock *v.* De Niceville, W. N. 1875, 204 & 230; 20 Sol. Jour. 98, Lush, J.

(*b*) Barthain *v.* Yates, L. R. 1 Ch. D. 13; 24 W. R. 19, A.C.

Pending Causes.

be made in any particular cause, matter, or proceeding pending in their respective courts on the day of transfer.(*a*)

Causes before notice of motion for decree or replication.

(427.) Pending causes in which, when the Judicature Act came into operation, notice of motion for a decree had not been served, nor replication filed, were to be continued in the same manner as they would have been continued in the High Court of Chancery up to the time at which such notice of motion would have been served or replication filed under the old system.(*b*) In a case in which a defendant was in default for not answering interrogatories before the Judicature Act came into force, it was considered that the plaintiff was entitled to issue an attachment for want of an answer, under the old practice in England, *i.e.*, *ex parte*.(*c*)

Setting down hearing and evidence.

(428.) From and after the stage at which notice of motion for decree could have been served or replication filed the cause was to proceed according to the ordinary course of the High Court of Justice —that is to say, the cause should be set down to be heard on motion for judgment, and the hearing, and all proceedings relating thereto, should be under the new procedure: for example, issue should be joined, and the evidence taken under the Judicature Act and Rules,(*d*) unless by consent or special order, and evidence by way of affidavits, could not be used in England as heretofore, nor could the plaintiff use by way of evidence in chief affidavits filed for an interlocutory motion for an injunction, and a special order to that effect *ex*

(*a*) Notice, 3 Nov., 1875; 20 Sol. Jour., 33.

(*b*) Garling *v.* Royds, L. R. 1 Ch. D. 81, V. C. H.

(*c*) Royal Marine Life Assurance Company, 20 Sol. Jour. 25 M. R.; Attorney Gen. *v.* Wiltshire, L. R., 1 Ch. D. 89, V. C. H.

(*d*) Perkins *v.* Slater, L. R. 1 Ch. D. 83; 24 W. R. 39, V. C. H.; Attorney-General *v.* Wiltshire, L. R. 1 Ch. D. 89, V. C. H.; 20 Sol. Jour. 47, V. C. H.

parte was refused.(*a*) Even where the affidavits had been already prepared the Court refused to use them, there being no sufficient reason offered for not following the prescribed practice.(*b*) An order was made for liberty to proceed under the old system, to take the bill *pro confesso* against a very aged defendant, when it was not desirable to proceed by way of attachment for not answering interrogatories.(*c*)

Pending Causes.

In one case, on a consent in that behalf, the Court allowed the cause to be set down on a motion for judgment instead of motion for decree, as a short cause; although the defendant's time for delivery of a defence had not expired, and there was no default.(*d*)

(429.) Where the Judicature Act came into operation, after notice of motion for decree served, or replication filed, proceedings were to be continued and concluded in the same manner as they would have been in the Court of Chancery. They were heard in the same manner and on the like evidence as heretofore. When they became abated they were to be revived under the old procedure.(*e*)

After notice of motion for decree or replication.

(430.) All matters and proceedings (other than causes) were to be continued and concluded in the same manner as they would have been in the High Court of Chancery. Where a sole petitioner to a petition died after an order made thereon, the Court ordered that the proceedings be continued and carried on by the executors of the late petitioner.(*f*)

Other matters than causes.

(*a*) Perkins *v.* Slater, *ubi supra*; and see as to using affidavits on the hearing where no consent is given; Royal Marine Life Assurance Company; 20 Sol. Jour. 25, M. R.; Attorney-General *v.* Wiltshire, *ubi supra*.

(*b*) Pattison *v.* Dooler, W. N. 1875, 255, V. C. M.

(*c*) Culling *v.* Buttifant, L. R. 1 Ch. D. 84; 24 W. R. 55, V. C. H.

(*d*) Palin *v.* Brookes, W. N., 1875, 188, V. C. B.

(*e*) See Crane *v.* Loftus, 24 W. R. 93, V. C. H., Roffey *v.* Miller, W. N. 1875, 225, M. R.

(*f*) In Atkins, Estate, L. R., 1 Ch. D. 82 V. C. H.

Pending Causes.

Special orders.

(431.) But any party to a pending cause was permitted to apply by summons at chambers that for special reasons a direction might be given for continuing the cause according to the ordinary course of the High Court of Justice.(*a*) Thus an order has been made after answer filed, to treat it as a statement of defence and counter-claim, and so prevent the necessity of a cross action, plaintiff to be at liberty to amend his bill if so advised.(*b*) So, where a bill has been served on several defendants and interrogatories on one who did not appear or answer, to enable plaintiff to proceed to enter judgment for want of an appearance or defence under the new procedure, the cause was ordered to proceed under it, and that the bill be headed as a statement of claim.(*c*) A like application was refused where interrogatories had been served after an appearance by the defendant, but before he was in default in not pleading, plaintiff being required to proceed by attachment to have his bill taken *pro confesso*, though the actual execution of the attachment was dispensed with.(*d*)

(*a*) See Anon., 20 Sol. Jour. 80, Lush, J.

(*b*) Credit Foncier As. *v.* Adair, W. N., 1876, 16, M. R.

(*c*) Provident Permanent Buildings As. *v.* Greenhill, L. R., 1 Ch. D. 624, M. R.; Gardiner *v.* Hardy, W. N., 1876, 185, V. C. B.

(*d*) Culling *v.* Buttivant, L. R., 1 Ch. D. 84; 24 W. R. 55.

CHAPTER XLV.

New Actions.

431. All Suits called Actions, 353.
432. What is an Action, 353.
433. Other proceedings, 354.

All actions and suits to be called actions.

(431.) All actions which have hitherto been commenced by Writ of Summons and Plaint in the Superior Courts of Common Law in Ireland, and all suits which have been hitherto commenced by Bill or Information in the High Court of Chancery, are to be henceforth instituted in the High Court of Justice by a proceeding called "an action."(*a*)

Actions, what are.

(432.) The word action is defined by section 3(*b*) to mean "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, and shall not include a criminal proceeding, by or in the name of the Crown." The term action is to be used in future instead of the term "suit" in equity proceedings; but a suit commenced by Bill before the Judicature Act, is not an action within its meaning, and it must be revived in the way used heretofore.(*c*)

It does not seem to include (as the term does in the English Rules) a suit commenced by citation in the Court of Probate, nor does it include a proceeding in the Chancery Division before the Land Judges in respect of matters formerly in the exclusive jurisdiction of the Landed Estates Court. Neither can it include a cause *in rem* or *in personam* in the High Court of Admiralty as the term does under the English Rules.(*d*)

(*a*) Sch. R. 1, part of Ord. 1, R. 1, E.
(*b*) J. A., 1877, s. 3.
(*c*) Darcy *v.* Whittaker, 24 W. R. 244; W. N. 1876, 17, V. C. B.
(*d*) See Ord. 1, R. 1, English.

New Actions.

Among the Chancery actions there will still be open one for discovery in aid of an action in contemplation,(*b*) or in aid of proceedings by way of arbitration,(*c*) and for declaration of rights,(*d*) and to quiet title in the nature of a Bill of Peace, to preserve testimony in support of some future assertion of title,(*e*) to enforce a decree,(*f*) or to set aside a decree or judgment for fraud.(*g*)

Of course Chancery proceedings by way of Petition or Summons are not included in the category of actions.

Other proceedings.

(433.) All other proceeding in and applications to the High Court, may be taken and made in the same manner as they would have been taken and made in any court in which any proceedings or application of the like kind could have been taken or made, if the Judicature Act had not passed.(*h*) This includes other proceedings of a civil nature than by way of action which used to be taken in the Court of Chancery or Courts of Common Law, and they are to proceed as heretofore, *ex. gr.*, proceeding to enforce or set aside awards.(*i*)

(*b*) Orr *v.* Draper, L. R. 4 Ch. D. 92; 25 W. R. 23, V. C. H.

(*c*) See Ainsworth *v.* Starkie, W. N. 1876, p. 8; 20 Sol. Jour. 162, Quain, J.

(*d*) See Cox *v.* Barker, W. N. 1876, p. 210, V. C. B. *Ib.*, 231; A. C.

(*e*) See Vane *v.* Vane, 24 W. R. 565, Ch. D.

(*f*) See Commissioners of Sewers *v.* Gellatby, W. N. 1876, p. 201; 24 W. R. 1059, M. R.

(*g*) See Flower *v.* Lloyd, L. R. 6 Chan. D. 297, 25 W. R. 793, A. C.

(*h*) Sch. R. 1, part of Ord. 1, R. 3, E.

(*i*) Robert Phillips and Brooke Gill, *in re* arbitration, L. R. 1, Q. B. D. 78; 24 W. R. 158; 20 Sol. Jour. 132.

CHAPTER XLVI.

The Writ of Summons.

434. All Actions commenced by, 355.
435. Preparation of the Writ, 355.
436. Form of Writs, 356.
437. Title of Court and Division, 356.
438. Title of Cause, 356.
439. Date and Teste, 356.
440. Indorsement of Claim, 357.
441. Nature of ground of Complaint, 357.
442. Sealing and issue, 358.
443. Copy filed and numbered, 358.
444. Amendment of Writ, 359.

All actions commenced by writ of summons.

(434.) Every action in the High Court must be commenced by writ of summons, (*a*) whether it be a Chancery action or a common law action, for debt, damages, ejectment, replevin, and instead of filing a bill first, and serving an endorsed copy of it, or issuing a writ of summons and plaint, a new form of writ (to be had at any law stationer's) is to be filled up and endorsed, and then brought to the Record and Writ office, if it be a Chancery action, and to the Writ and Seal Office if assigned to either the Queen's Bench, Common Pleas, or Exchequer Division, together with a copy to be stamped. This writ of summons is the only way of commencing an action, whether against a peer, member of Parliament, corporation, or solicitor. Forms of writs of summons are given in the Appendix A, part 1, Nos. 1 and 2, according as the writ is to be served within the jurisdiction, or outside the jurisdiction.

Preparation of writ by solicitor.

(435.) The writ of summons is to be prepared by the plaintiff or his solicitor,(*b*) and then produced to the proper officer to be sealed, after which it is deemed to be issued.

(*a*) Sched., Rule 2, Ord. 2, R. 1, E.
(*b*) Sch. R. 7, Ord. 5, R. 5, E.

Writ of Summons.

Form of writs.

(436.) Every writ of summons, and the endorsement thereon, may be in one of the forms given in Appendix A; and any costs incurred by the use of any more prolix, or other forms of writ, or of endorsements thereon, must be borne by the party issuing the same, unless the Court shall otherwise prescribe.(*a*)

Title of court or division.

(437.) The writ should be entitled in the High Court of Justice, and must specify the division of the High Court to which it is intended that the action should be assigned.(*b*)

The solicitor, by leaving a copy of the proposed writ with the officer, specifying the division, sufficiently gives notice of the division to which the action is to be attached, under the Judicature Act, 1877, sec. 37.

Title of cause.

(438.) The writ should contain the correct title of the cause, by giving the names of all the plaintiffs and defendants in full.

In actions for the administration of assets of a deceased person, the title should be prefaced, "In the matter of the estate of A. B., deceased," (*c*) and probably it should state it is on behalf of the plaintiff, and all other creditors.(*d*)

After the writ is entered in the Cause Book, the action receives a distinguishing date, letter, and number.

Date and teste.

(439.) Every writ of summons and every other writ must bear date on the day which it is issued and be tested in the name of the Lord Chancellor,

(*a*) Sch. R. 3, Ord. 2, R. 2 & 3, E.

(*b*) Sch. R. 3, Ord. 2, R. 1, E.

(*c*) See Eyre *v.* Cox, 24 W. R. 317; 20 Sol. Jour. 311, M. R.

(*d*) Worraker *v.* Pryer, 24 W. R. 269; W. N., 1876, p. 44, M. R.; Fryer *v.* Boyle, W. N., 1876, p. 139; Adcock *v.* Peters, W. N., 1876, p. 139. Contra—See Cooper *v.* Blissett, L. R. 1 Ch. D. 691; 24 W. R. 235; W. N., 1876, p. 17, V. C. H; Frye *v.* Wiseman, 20 Sol. Jour. 292, V. C. H.

Writ of Summons.

or if the office of Lord Chancellor be vacant, in the name of the Lord Chief Justice of Ireland.(*a*)

Indorsement of claim.

(440.) The writ of summons is to be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action,(*b*) and this indorsement is to be made on the writ before it is issued.(*c*) A variety of concise forms of indorsement applicable to different kinds of claims, both equitable and legal, are given in the Appendix A., part 2, sections 1 & 2, which may be followed in effect so far as they may be applicable to the case. But if none of the forms referred to be applicable to the plaintiff's case, such other similar and concise forms may be used as the nature of the case may require.(*d*) Where the demand is on foot of an account, *ex. gr.*, for goods sold, consisting of a great number of items, it will be sufficient to say—for balance of account.(*e*)

As to indorsement of liquidated demands with a view to final judgment in case of non-appearance, or notwithstanding appearance, see Order II., R. 2 and 3, *infra*,(*f*) or for account see Rule 5.(*g*)

The indorsement should not be altered after the writ is sealed.(*h*)

Precise ground of complaint not essential.

(441.) In the indorsement of the claim it is not essential to set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled, and the plaintiff may, by leave of the Court or a judge, amend the

(*a*) Sch. R. 4, Ord. 2, R. 8, E.

(*b*) Sch. R. 2.

(*c*) Sch. R. 5, Ord. 3, R. 1.

(*d*) Sch. R. 6, part of Ord. 3, R. 2, E.

(*e*) Anon. 20. Sol. Jour. 81, Lush, J. S. C.; called Parson *v.* Smith, 20 Sol. Jour. 93, A. C.

(*f*) Ord. 11, R. 2 & 3, *infra*.

(*g*) Ord. 11, R. 5; Ord. 3, R. 6, 7 & 8, E.

(*h*) Anon., 20 Sol. Jour. 31, Lush, J.

Writ of Summons.

indorsement so as to extend it to any other cause of action or any additional remedy or relief.(*a*)

It would seem therefore that the plaintiff is not required at the initiatory step of the action to determine the precise legal character of his complaint, while perhaps his solicitor has not yet fully ascertained the facts. And doubtless he may obtain an injunction or mandamus or receiver if it appears to be just or convenient that he should have it although he has not mentioned it in the indorsement.(*b*) But where the substantial object of the action is to have an injunction or receiver, the writ should be endorsed accordingly.(*c*) And generally speaking the relief should be in harmony with the nature of the claim indicated by the indorsement, and where it was on a guarantee for price of goods sold and delivered, signed by a female defendant sued with her husband, making no reference to separate estate, this would scarcely enable the Court to give judgment charging the debt on her separate estate.(*d*)

Sealing and issuing.

(442.) Every writ of summons is to be sealed by the proper officer, *i.e.*, the Clerk of Records and Writs, and when sealed is deemed to be issued.(*e*)

Copy filed and action distinguished by a number.

(443.) The plaintiff or his solicitor, on or within two days from after the issuing the writ of summons, is to leave with the Clerk of the Records and Writs in Chancery actions, and in other actions with the Pleadings Assistant of the Division, a correct copy of it with all its indorsements signed by, or for the solicitor leaving the same, or by the plaintiff himself

(*a*) Sch. R. 6, part of, Ord., 3, R. 2, E.

(*b*) See J. A., 1877, s. 28, sub. 8, and p. 281, chapter xxxviii.

(*c*) See Colbourne *v.* Colbourne, L. R., 1 Ch. D. 690, V. C. H.

(*d*) See Butterworth *v.* Tee & Wife, W. N., 1876, 9; 20 Sol. Jour. 178, Quain, J.

(*e*) Sch. R. 7, Ord. 5, R. 6, E.

Writ of Summons.

where he sues in person.(*a*) The officer thereupon files the copy and makes an entry of it in a book called the Cause Book,(*b*) and attaches the date of the year, and a letter and number by which the action is thenceforth distinguished, similar to that used in Chancery causes under 273 G. O., 1867.

Amendment of writ.

(444.) The Court of a judge may at any stage of the proceedings allow the plaintiff to amend the writ of summons on such terms as may seem just.(*bb*) Where the writ is amended in the name of any of the parties and affidavits have been filed in that case, a little difficulty arises, and it would seem the affidavits must be re-sworn unless the parties consent to use them as they are.(*c*)

A writ and statement of claim have been amended and altered into an information and action, having first obtained the sanction of the Attorney-General.(*d*)

As regards the indorsement, generally speaking, after statement of claim delivered, amendment of the indorsement becomes unnecessary.(*e*)

A writ issued before the Judicature Act has been amended by inserting in the indorsement dates to enable the plaintiff to sign final judgment in default of appearance, on a liquidated demand, notwithstanding an appearance.(*f*)

(*a*) Ord. iv. R. 2, *infra*, but see Sch. R. 8, Ord. 5, R. 7, E.

(*b*) Sch. R. 9, Ord. 5, R. 8, E.

(*bb*) Ord. xxvi. R. 10, *infra;* Ord. 27, R. 11, Feb., 1876, E.

(*c*) See Mouell's Estate, 20 Sol. Jour., 451.

(*d*) See Caldwell *v.* Pagham Harbour Cr., L. R., 2 Ch. D. 221; 24 W. R. 790, V. C. H.

(*e*) Large *v.* Large, W. N., 1877, 198, M. R.

(*f*) Denison *v.* Franklyn, 20 Sol. Jour. 198, Lindley, J.; Anon. W. N., 1876, 53, Archibold, J.

CHAPTER XLVII.

Service of Writ.

445. Service of Writ. p. 360.
446. Substitution of Service, 361.
447. Service out of the Jurisdiction, 362.
448. Disputed Service, 362.

Service of writ.

(445.) The writ of summons is to be served in the same manner as process from the court whose jurisdiction is transferred to the High Court might have been served if the Judicature Act had not passed,(*a*) *i.e.*, writs marked for the Chancery Division are to be served in the same manner as a copy of the bill which was in the nature of process might have been served, and writs marked for any one of the Common Law Divisions may be served in the manner in which writs of summons and plaint might hitherto have been served.

Service of the writ in Common Law actions will still be governed by the Common Law Procedure Act, 1853, s. 32. When defendant is within the jurisdiction it should be served personally, if practicable, with due and reasonable diligence, or failing that by leaving the copy at the defendant's house or place of business with a member of his family or servant or clerk aged sixteen—leaving a copy and showing the original writ or a concurrent writ.(*b*)

Bodies corporate and aggregate are to be served as directed by sec. 33 of same statute. A defendant may be served in a prison when undergoing penal servitude without any order of the court.(*c*)

Personal service is absolutely necessary to take advantage of the Bills of Exchange Act, and service on a partner will not suffice.(*d*)

(*a*) Sch. R. 10, part of.

(*b*) See French *v.* Mulligan, Ir. Rep. 5 Com. Law, 50, Ex.

(*c*) Cosby *v.* Robinson, 5 Ir. Jur. N. S. 37, Keogh, J.; see White *v.* Barry, Ver. & Scri. 287, Ex.

(*d*) Pollock *v.* Campbell, L. R. 1 Ex. D. 50; 24 W. R. 248.

Service of Writ.

In England, without an order, nothing less than personal service will be sufficient,(*a*) but as this was not absolutely necessary before in Ireland, it does not seem to be necessary now.

In actions for possession of land under the Landlord and Tenant Act, 1860, ss. 55 and 74, when for non-payment of rent, or for overholding, service must be made on all persons in actual possession of the land as tenants or under-tenants, and in actions on the title it is also necessary to serve all persons in receipt of the rents and profits, or claiming to be entitled thereto—C. L. Pro. Act, 1853, s. 197.

In Chancery actions, service of copy of the writ is effected personally, or by leaving the copy with a servant or some member of the family aged sixteen years and upwards, at his dwelling-house or usual place of abode.(*b*)

Substitution of service.

(446.) The High Court has the same power of directing substitution of service, or that any service already made shall be deemed good service, or that notice shall be substituted for service (*i.e.* probably in respect of writs for service out of the jurisdiction) as might have been exercised by the Courts whose jurisdiction is transferred to the High Court if the Judicature Act had not passed.(*c*)

Substitution of service as to Common Law writs was and still is regulated by the C. L. Pro. Act, 1853, s. 34, which requires that it shall be made appear to the satisfaction of the Court or Judge, that a defendant in an action, the cause of which has arisen within the jurisdiction, has not been served and has not appeared, and that due and proper means have been used to serve him, on which the Court or Judge may, on application after the time for ap-

(*a*) Anon. W.N. 1875, 202, Lush, J.

(*b*) See 25 G. O., Oct. 31, 1867.

(*c*) Sch. R. 10, part of.

Service of Writ.

pearing has expired and while the writ is in force, authorize such substitution of service through the post office, or in such manner and with such extension of time for service and appearance as may seem fit.

Substitution of service in Chancery suits in Ireland was had by special order and usually by service upon some agent in Ireland managing the affairs of the defendant, if abroad and in communication with him,(*a*) or by service on the defendant himself in person, if living abroad. Without an order of a Judge, nothing short of personal service is sufficient in England.(*b*)

Service out of jurisdiction.

(447.) Service of a writ of summons out of the jurisdiction can only be made by leave of the Court or Judge, and only in certain classes of cases in which the whole or some part of the subject-matter of the action is land or stock or other property within the jurisdiction, or in respect of a contract made within the jurisdiction or broken within it.(*c*)

Disputed service.

448. Where defendant swears he has not been served and has had no knowledge of the writ, it has been usual to set aside judgment by default without an affidavit of merits.(*d*) If defendant admits the debt he may be required to lodge it and the costs, the latter to abide result of prosecution for perjury against process-server.(*e*) If the service be admitted, but alleged to be irregular, *ex. gr.*, out of jurisdiction, defendant by appearing, without moving to discharge the order for service waives the objection.(*f*)

(*a*) See Hobhouse *v.* Courtney, 12 Sim. 140.

(*b*) Anon. W. N. 1875, 203, Lush, J.

(*c*) *Vide* Ord. X., *infra*.

(*d*) Martin *v.* Williams, Ir. Rep. 3 Com. Law, 5 Q. B. overruling S. C.; Ir. Rep. 2 Com. Law, 84; and see Tisdall *v.* Humphreys, Ir Rep. 1 Com. Law, 1 C. P.; Moseley *v.* Blake, 28 L. J. 35 Ex. Ch.

(*e*) O'Ferrall *v.* Burke, Ir. Rep. 2 Com. Law, 82 Ex.

(*f*) Edwards *v.* Warden, L. R. 9 Chan. 495.

CHAPTER XLVIII.

APPEARANCE.

448. Defendant bound to appear, p. 363.
449. Appearance without Defence, 363.
450. Time for Appearance, 363.
451. Mode of Appearance, 364.
452. Address for Service, 365.
453. Entry of Appearance, 365.
454. Liberty to Appear and Defend, 365.
455. Same as Landlord, 365.
456. Default of Appearance, 365.

Defendant bound to appear.

(448.) A defendant served with a writ of summons is bound to appear to the writ at such time and in such manner as is directed by the rules of court.(*a*)

The writ of summons requires the defendant to cause an appearance to be entered for him in the assigned division of the High Court and contains a memorandum at foot apprizing him that he may appear to it by entering an appearance either personally or by solicitor, at the proper office (naming it). See Appendix A., Part I., No. 6.

Appearance without defence.

(449.) It is not necessary for a defendant when entering an appearance to the writ of summons to file any defence or answer thereto.(*b*)

Time for appearance.

(450.) The ordinary time for appearance, where the service is within the jurisdiction, is within eight days after the service of the writ upon the defendant, inclusive of the day of service.

Where the writ of summons or notice of its issue is to be served out of the jurisdiction the number of days allowed for appearance is fixed by the judge, and counts from the service, but inclusive of the day of service.

Where substituted service is ordered, the time to appear is reckoned from the date of the taking effect of the order for the substituted service.(*c*) Even

(*a*) Sch., R. 9. (*b*) Sch., R. 14, part of.
(*c*) Johnson *v.* Moffatt, W. R., 1875, p. 248; 20 Sol. Jour. 130

Appearance. after the allotted time for appearance a defendant may appear at any time before judgment.(*c*)

Mode of appearance.

(451.) The mode of a defendant entering an appearance to a writ of summons is by delivering to the proper officer (that is, the Clerk of Records and Writs in actions assigned to the Chancery Division, and in other divisions the Pleadings Assistant), a memorandum in writing, dated on the day of delivering the same, and containing the name of his solicitor or stating that he defends in person.(*d*) The names of several defendants appearing by the same solicitor may be included in one memorandum.(*e*)

It should state that the defendant requires or does not require a statement of complaint to be filed and delivered.

Where husband and wife are sued together the husband should, under ordinary circumstances, appear by attorney for both.(*f*) If the husband appeared alone without leave, the appearance might be set aside. So an appearance entered for the wife alone would be set aside at law.(*g*)

It was otherwise in equity.(*h*) A married woman, if sued alone must appear in person and not by solicitor.(*i*) Afterwards by leave of the court or a judge she may defend without her husband, and without a next friend on giving security if required.(*k*)

Quain, J. See Crane *v.* Jullion, L. R., 2 Ch. D., 220; 24 W. R., 691, V. C. H.

(*c*) See Ord. XI., R. 7, *infra*; Ord. 12 R. 15, E.

(*d*) Sch., R. 14; Ord. 12, R. 6, E.

(*e*) See *infra*, Ord. XI., R. 2.

(*f*) White *v.* Seaver, 6 Ir. C. L. R., 465, Q. B. Copinger *v.* Quirk, 4 Ir. C. L. R. 442; 7 Ir. Jur. 330, C. P.

(*g*) 2 Ferg. Prac. 726. (*h*) 1 Daniel, Ch. Pr. 495, 4th Edn.

(*i*) Bergin *v.* Burke, 4 Ir. C. L. R. 90; 7 Ir. Jur. 27, C. P., Kennedy *v.* Grace, 7 Ir. Jur. 28, C. P.

(*k*) Ord. XV., R. 8, *infra*.

Appearance.

Address for service.

(452.) Where defendant appears by solicitor the appearance should state in the memorandum his registered residence. If the defendant appears in person he should state in the memorandum his address and a place to be called his address for service which must be in Ireland.(*f*)

Entry of appearance.

(453.) The officer, on receipt of the memorandum of appearance is bound forthwith to enter the appearance in the Cause Book.(*g*)

Liberty to appear and defend in ejectment.

(454.) Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the court or judge appear and defend on filing an affidavit showing that he is in possession of the land either by himself or his tenant.(*h*)

Same by landlord.

(455.) 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.(*i*)

Default of appearance.

(456.) The entering by the plaintiff of an appearance for a defendant who is in default in not entering an appearance for himself is discontinued and instead thereof the plaintiff is generally entitled upon an affidavit of service to sign judgment interlocutory or final according as the nature of the demand is liquidated or otherwise, and in Chancery actions to proceed as if an appearance had been entered by defendant.(*k*)

Where defendant is an infant or person of unsound mind, the plaintiff must first apply to appoint a guardian to defend.(*l*)

(*f*) Sch., R. 14, part of.

(*g*) Sch., R. 16, Ord. 12, R. 11, E.

(*h*) Sch., R. 17, Ord. 12, R. 18, E.

(*i*) Sch., R. 18; Ord. 12, R. 19, E. See Com. Law Pro. Act, 1853, s. 200.

(*k*) See Ord. XII. R. 11, *infra*. (*l*) Ord. XII., R. 1, *infra*.

CHAPTER XLIX.

Summary Orders for Relief before Pleading.

458. Judgment for default of Appearance, p. 366.
459. After appearance on specially endorsed Writ, 366.
460. For an Account, 366.

Judgment for want of appearance.

(458.) Where any defendant, or any one of several defendants, does not in due time enter an appearance to the action, the plaintiff is entitled, upon filing an affidavit of service of the writ or of the notice in lieu of service, if the claim be for a debt or liquidated demand, specially indorsed on the writ, he may then sign final judgment for any sum not exceeding that indorsed, with interest, if any, to date of judgment and a sum for costs.(*a*) If the claim be for an unliquidated demand he may sign interlocutory judgment and proceed to assess his damages.

Summary order for judgment after appearance.

(459.) After appearance to a writ specially endorsed with a claim for a liquidated demand and costs, the plaintiff, on a proper affidavit, verifying his cause of action, and of his belief that there is no defence, may call on the defendant to show cause why he, the plaintiff, should not sign judgment for the amount with interest and costs, and the Court, unless defendant can satisfy it that he has a good defence to the action on the merits, may allow judgment to be signed.(*b*)

Summary order for an account.

(460.) So, either in default of appearance or after it, where the writ is indorsed for an account, the Court may order one to be taken.(*c*)

(*a*) See Ord. xii., R. 3 *infra*; Ord. R. xiii., 3, E.
(*b*) See Ord. xii., R. 6 *infra*; Ord. xiv., R. 1, E.
(*c*) See Ord. xiv. *infra*; Ord. xv. E.

CHAPTER L.

Parties to Action.

461. Misjoinder not to defeat action, p. 367.
462. Misjoinder of Plaintiff, 367.
463. Joinder of new Plaintiff, 368.
464. Parties may be added, 369.
465. Adding Plaintiff, 369.
466. Consent of Plaintiff, 370.
467. Joinder of Defendants, 371.
468. Service with notice, 373.
469. Parties struck out, 373.
470. Representative of numerous parties, 374.

No action to be defeated by misjoinder of parties.

461. No action can be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.(*a*)

Since the Judicature Act, eight persons, trustees of a charity, being libelled in one and the same letter, were deemed entitled to bring a joint action of libel against the defendant for the libel, as a separate wrong to each man who complained of it, but the damages ought to be assessed separately (except in cases of partnership).(*b*)

Misjoinder of plaintiffs.

462. The misjoinder of plaintiffs, *i.e.*, the adding of a plaintiff who had no interest in the suit, or whose interest was in conflict with the interests of his co-plaintiffs, or as to whom there was a complete defence, was fatal both at law and in equity, and precluded the other plaintiffs from having any relief whatever. This inconvenient rule was mitigated in Common Law actions by requiring the defect to be pointed out by notice and enabling the Court to remove the defect by amending the record. Com. Law Pro. Act (Ire.) 1853, sec. 84.

In Equity the Court was latterly enabled, instead of dismissing the bill, whenever it appeared that

(*a*) Sch., R. 19, part of ; Ord. 16 R. 13, E.

(*b*) Booth *v.* Briscoe, L. R. 2 Q. B. D. 496; 25 W. R. 838, A. C.

Parties to Action.

notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of them, or the existence of some ground of defence affecting some one or more of them, the plaintiffs or some of them are or is entitled to relief, to give such relief and modify its decree according to the special circumstances of the case, and for that purpose direct such amendments as might be necessary, and to treat any one or more of the plaintiffs as if he were a defendant. Where the plaintiff, having an interest died, leaving a plaintiff on the record without any interest, the Court might, at the hearing of the cause, order it to stand revived, and if it saw fit proceed to a decision.(*a*)

Joinder of plaintiffs.

(463.) All parties 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 entitled to relief, for such relief as he or they may be entitled to without amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.(*b*)

In a recent case two adjoining owners of property joined as co-plaintiffs, complaining of a common nuisance, and the case of one failed while that of the other succeeded, the bill was dismissed as to the first, with costs to be paid to the defendant so far as they had been occasioned by reason of his being made a plaintiff, and deducted from the costs which the defendant was ordered to pay.(*c*)

(*a*) See 15 & 16 Vic. c. 86, sec. 49, English and Chan. (Ire.) Act, 1867, sec. 154.

(*b*) See Ord. xv. R. 1, *infra*; Ord. 16, R. 1 E.

(*c*) Umfreville *v.* Johnson, L. R. 10 Chan. 580.

Parties to Action.

Parties may be added.

(464.) It was stated to be the clear intention of the Act, that all persons interested, and every question that can arise should be brought before the Court, so as to dispose once for all of the whole matter, and this although some of the parties may not be interested in the entire matter.(*a*)

The Court or Judge may either upon or without application, order the name or names of any party or parties, whether plaintiffs or defendants, who ought to be joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle the questions involved in the action be added.(*b*)

Adding name of plaintiff.

(465.) The non-joinder of a person who ought to have been a co-plaintiff was a fatal objection at Common Law when the action was on a contract, but in tort an objection should be taken by plea in abatement. The Com. Law Pro. (Ire.) Act, 1853, s. 84, required the objection to be taken by notice, and allowed it to be cured by amendment. Now it would seem that any objection of this nature must be made by application to add the plaintiff under the statutory rule.

Even under the old procedure a new plaintiff has been added on the eve of a trial where the Statute of Limitations would have barred a fresh action.(*c*)

Since the Judicature Act, 1873, where a nominal plaintiff sueing for the benefit of an absent party, the defendant was baffled in his effort to obtain discovery of papers from the real plaintiff, a foreigner, not therefore amenable to the Court, the Court

(*a*) Cox *v.* Barker, L. R. 3 Chan. D., 359. V. C. B.; affirmed W. N. 1876, 231, A. C. A case of a defendant added.

(*b*) Sch., R. 19, part of; Ord. 16 R. 13, E.

(*c*) Brown *v.* Fullarton, 13 M. & W. 556; Carne *v.* Meilins, 6 Exch. 803.

Parties to Action.

ordered that he should be made a co-plaintiff, or that the action be stayed.(*a*) It was refused where the object was merely to have further security for costs of an action, or the benefit of a counter-claim.(*b*) A new plaintiff will be added at the instance of the original plaintiff, only where there has been a *bonâ fide* mistake made; and where a party institute a suit on speculation or expectancy, and when met by a demurrer for his want of title, sought to cure the defect by joining the right person as plaintiff, it was refused.(*c*) But where there was a mistake, either of fact or law, as to the title to sue, and the right happened to be in one of the defendants, the plaintiff was allowed to amend by making that defendant a co-plaintiff, reserving defendant's right to costs.(*d*) The Court refused to strike out the name of a plaintiff trustee, and substitute the infant *cestui que* trusts, on an *ex parte* application.(*e*)

Plaintiff or next friend not added without his consent.

(466.) No person can 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 thereto.(*f*) Thus a plaintiff was not permitted to add as co-plaintiff, without his consent, a third person alleged to be interested in the action as a part owner, and in order that he should become partly liable to a counter-claim set up by the defendant.(*g*)

(*a*) Clarkson *v.* British and Foreign Marine Insurance Company, W. N. 1876, 9; 20 Sol. Jour. 177, Quain J.

(*b*) Peek *v.* Dear, W. N. 1876, 40; 20 Sol. Jour. 26, Lindley, J.

(*c*) Clowes *v.* Hillard, L. R. 2 Ch. D., 413, M. R.; and see New Westminster Brewery *v.* Hannah, W. N. 1876, 15; 24 W. R., 899. V. C. H. affirmed W. N. 1877, 35; 21 Sol. Jour. 278 A. C.; Smith *v.* Haseltine, W. N. 1875, 250.

(*d*) Duckett *v.* Gover, L. R. 6 Chan. D. 82; 25 W. R. 455, M. R.

(*e*) Tildesley *v.* Harper, L. R. 3 Ch. D. 277, V. C. H.

(*f*) Sch., R. 19, part of.

(*g*) Cormack *v.* Grofrian, W. N. 1876, 22; 20 Sol. Jour. 240, Lindley, J.

Parties to Action.

Where a person was named plaintiff without his consent, it was as, of course, to strike the name out of the record on his application, though offered an indemnity,(*c*) but if he were a trustee for the other plaintiff in ejectment, it might be otherwise.(*d*) Even one tenant in common had no right to use the name of his co-tenant.(*e*)

As to what was evidence of consent, see Perry *v.* Moore.(*f*) As to filing consent of a person as next friend to any infant or married woman, see Chan. (Ire.) Act, 1867, s. 62; Com. Law. Pro. Act, 1853, s. 50. The application to strike out the name of a plaintiff introduced on the record without his consent, can only be made by the party whose name has been used.(*g*)

Addition of defendant.

(467.) The addition of a defendant has been allowed at the instance of the plaintiff, where he was ignorant of the party primarily responsible, when he brought his action, *ex. gr.*, in libel,(*h*) and in an action for non-performance of a contract brought against a principal, but made by a third party as agent acting on his authority, where the defendant denied the authority of the agent, the plaintiff was allowed to make the latter person a defendant, and seek alternative relief against each, *i.e.*, against one on the contract, and against the other for breach of warranty, that he had authority from his alleged principal.(*i*) So, where the original claim was for an injunction to restrain trespassers

(*c*) Bourke *v.* Murray, 10 Ir. Com. Law R. 11, Q. B.

(*d*) Montgomery *v.* Montgomery, 6 Ir. Com. Law R. 522, Q. B.; Sullivan *v.* Sullivan, 6 Ir. Com. Law Rep. 523.

(*e*) Stubber *v.* Roe, 15 Ir. Com. Law R. 506, C. P.

(*f*) Perry *v.* Moore, Ir. Rep. 7 C. L. 99, C. P.

(*g*) Duckett *v.* Gover, L. R. 6 Chan. D. 82; 25 W. R. 554.

(*h*) Edwards *v.* Lowther, 24 W. R. 424; 20 Sol. Jour. 351, C. P. D.

(*i*) Honduras Oceanic Railway Company *v.* LeFevre, L. R. 2 Ex. D. 301; 25 W. R. 310.

Parties to Action.

on the plaintiff's land, and defendant relied on a right of way acquired from a third person, the former owner of the lands, and under whom plaintiff derived, the plaintiff was permitted to make him a defendant, and pray, as alternative relief, compensation from him.

It was held by the Court of Appeal that this was proper, although the alternative reliefs prayed were inconsistant, and that both questions should be tried by the same jury, for if plaintiff be right, he was entitled to succeed against one or other of the defendants and the rule was intended to avoid the risk of plaintiff failing in two separate actions from the juries taking different views of the same evidence.(*a*)

The joinder of a new defendant at the instance of the plaintiff was refused after the cause had been in the list for trial.(*b*)

Where the plaintiff is in doubt as to the person from whom he is entitled to redress he may join two or more defendants,(*c*) subject of course to the penalty of costs,(*d*) and one or more of several persons jointly, or jointly and severally, liable on a contract.(*e*)

As to adding new defendants *at the instance of a defendant,* where a married woman was sued alone, she was allowed to claim to have her husband or her trustees made parties defendants.(*f*)

But where a defendant desired to have a third person, who claimed title adverse to the plaintiff,

(*a*) Child *v.* Stenning, L. R., 5 Ch. D. 304, V. C. H. *s. c.*; reversed L. R., 5 Ch. D. 695; 25 W. R. 519; 21 Sol. Jour. 297, A. C.

(*b*) Williams *v.* Andrews, W. N., 1875, 237; 20 Sol, Jour. 100, Quain, J.

(*c*) See Ord. xv., R. 6 *infra*; Ord. xvi., R. 6, E.

(*d*) Marsh *v.* Dunlop, 21 Sol. Jour. 75.

( ) Ord. xv., R. 5 *infra*; Ord. xvi., R. 5, E

(*f*) Ochse *v.* Redfern, 20 Sol. Jour. 560, Q. B. D.

made a party defendant, it was refused,(*g*) or where the object was to compel a plaintiff to sue a defendant whose liability he does not assert, and so to shift the liability from the party he has made defendant,(*h*) and where a third party—a company for whom the defendant alleged he was acting as a trustee, in the matter of the action—sought to be made a defendant in order that it, the company, might raise a counter-claim against the plaintiff for fraudulent representations, it was refused on the ground that it was not intended to admit on the record a defendant against whom the plaintiff does not choose to prosecute a claim, but whom the actual defendant wishes to add for his own convenience.(*i*) *Parties to Action.*

(468.) All parties whose names are so added shall be served with a summons or notice in the manner prescribed by rules or by any special order, and the proceedings as against them will be deemed to have begun only on the service of such summons or notice.(*k*) Service with notice.

(469.) The Court or a Judge may at any stage of the proceedings either upon or without the application of either party in the manner prescribed by the rules and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants improperly joined shall be struck out.(*l*) In this way the Court has power now, to do Parties may be struck out.

(*g*) Harvy or Harvey *v.* Davey, L. R., 2 Ch. D. 721, 24 W. R. 576, V. C. B.

(*h*) See Lereculey *v.* Harrison, W. N., 1876, 39, 20 Sol. Jour. 259, Lindley, J. See Lovell *v.* Holland, W. N., 1876, 53 20 Sol. Jour. 279, Archibald, J. Anon. W. N., 1875, 200, Lush, J.

(*i*) Norris *v.* Beazley, L. R. 2 C. P. D. 80, 25 W. R. 320.

(*k*) Sch., R. 19, part of, see Ord. xv., R. 16 *infra;* Ord. xvi., R. 13, Ex.

(*l*) Sch., R. 19, part of; Ord. 16, R. 13, Ex.

Parties to Action.

before the hearing or trial, what formerly it could only do at the hearing—to strike the name of a defendant out of the record on his own application, whom the Court might think not a proper party to it, and where the plaintiff has delivered a statement of claim to him, but had in another suit, entered into a consent order virtually abandoning his claim against the same defendant, the name was struck out with costs from the date of the consent order.(*a*)

Such an application ought to be made as early as possible after it appears that it is needless or improper that the defendant should be a party.(*b*)

Numerous parties.

(470.) Where there are numerous parties having the same interest in one action one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action on behalf or for the benefit of all parties so interested.(*c*)

In a creditor's action for administration of real and personal estate, or either, it would rather seem that the writ of summons should expressly state that he sues on behalf of himself and all other the creditors for the inquiry must go for all debts generally.(*d*)

Where(*e*) one person sued on behalf of a number joint-owners of a ship against a charterer, it was sought that the others should be made co-plaintiffs merely to give the defendant better security for his costs, it was refused as an attempt to return to the

(*a*) Vallance *v.* Birmingham and Midland Land Company, L. R. 2 Ch. D. 369, 24 W. R. 454, V. C. M.

(*b*) *Ibid.*

(*c*) Sch., R. 20; Ord. 16, R. 9, Ex.

(*d*) Cooper *v.* Blissett, L. R. 1 Ch. D. 691, 24 W. R. 235, V. C. H. Eyre *v.* Cox, 24 W. R. 317, 20 Sol. Jour. 311, M. R. Worraker *v.* Pryer, L. R. 2 Ch. D. 109, 24 W. R. 269. Adcock *v.* Peters, W. N., 1876, 139, V. C. M. Fryer *v.* Royle, L. R., 5 Ch. D. 540, 25 W. R. 528, 21 Sol. Jour. 499, V. C. B.

(*e*) De Fait *v.* Stevenson, L. R. 1 Q. B. D. 313, 24 W. R. 367, 20 Sol. Jour. 332.

old system of pleading in abatement, although had the plaintiff been a man of straw put up by others to fight their battle it would be ground for an application for security for costs. *Parties to Action.*

CHAPTER LI.

PLEADINGS.

471. Statement of Claim when required, p. 375.
472. Default of, 375.
473. Statement of Defence, 376.
474. Default of, 376.
475. Set-off and counter-claim, 376.
476. Time to reply, 377
477. Reply to set-off, 377.
478. Default of, 377.
479. No pleading after reply without leave, 377.
480. Close of Pleadings, 377.
481. Application to settle issues, 377.
482. Demurrer, when to be filed, 377.
483. Special cases, 378.
484. Forms of Pleadings, 378.
485. Printing Pleading, 378.
486. Signature of Counsel, 378.

(471.) After an appearance, unless the defendant in the action at the time of his appearance states that he does not require a statement of complaint, the plaintiff is bound to deliver one, and a statement of the relief or remedy to which he claims to be entitled.(*a*) Statement of claim, when necessary.

The plaintiff may if he pleases, at any time after issue of the writ of summons, deliver a statement of claim at the risk of being ordered to abide the costs of it if deemed unnecessary.(*b*)

The statement of claim after an appearance, should be delivered within six weeks from the appearance.(*b*)

(472.) If the plaintiff being bound to deliver a Default of statement.

(*a*) Sch. R. 21, part of; Ord. 19 R. 2, E.

(*b*) Ord. xx., R. 1, *infra*; Ord. 21, R. 1, E.

Pleadings.

statement of claim does not do so within the time allowed, defendant may apply to dismiss his action with costs for want of prosecution.(*c*)

Statement of defence.

(473.) No statement of defence is required where there has been no statement of claim or notice equivalent.(*d*) But where a statement of claim has been delivered the defendant is bound, unless he intends to let judgment go by default, to deliver a defence within fourteen days in actions assigned to the Chancery Division, and eight days in actions assigned to a Common Law Division, from the delivery of the claim or from the time for appearance whichever be last.(*e*) A defendant, however, may deliver a defence, although no claim has been filed and though he has dispensed with it, and this within eight days after appearance.(*f*) He is not bound to do so, nor can judgment be entered as by default if he does not.

Default of defence.

(474.) If defendant being under obligation to deliver a defence fails to do so within the prescribed time, plaintiff may sign judgment as by default where the action is assigned to a Common Law Division,(*g*) and when for a claim assigned by the Statute to the Chancery Division he may set down the action on motion for judgment.(*h*)

Defence, set-off, and counter-claim.

(475.) The defendant may within the time for delivering a defence, deliver a statement of his defence by way of set-off or counter-claim against the claim of the plaintiff, whether such set-off or counter-claim sound in damages or not,(*i*) and to

(*c*) Ord. xxviii., R. 1, *infra;* Ord. 29, R. 1, E.

(*d*) Hooper *v.* Giles, W. N. 1876, 10; 20 Sol. Jour. 217.

(*e*) Ord. xxi., R. 1, *infra;* Ord. 22, R. 1.,

(*f*) Ord. xxi., R. 2, *infra.*

(*g*) Ord. xxviii., R. 2 to R. 8, *infra;* Ord. 29, R. 2 to R. 9, E.

(*h*) *Ib.* R. 10, *infra;* and R. 10, E.

(*i*) Sch., R. 22, & Ord. xviii., R. 4; & Ord. xxi., R. 5, *infra;* Ord. 19 R. 3, E.; see chap. xxiii., *ante*, p. 190.

this the plaintiff may in like manner deliver a statement in reply.(*a*) *Pleadings.*

(476.) The plaintiff should deliver his reply, if any, to a defence, set-off, or counter-claim, within three weeks after the defence or the last of the defences set-off, or counter-claim, has been delivered, unless the time is extended by the Court or Judge.(*b*) Time for reply.

(477.) If the plaintiff do not deliver a reply or demurrer to the defence within the time allowed for the purpose, he will be deemed to have admitted the statement of facts in the defence, and the pleadings will be deemed to be closed.(*c*) Default of reply.

(478.) No pleading subsequent to the reply (other than a joinder of issue) can be pleaded without leave of the court.(*d*) No pleading after reply.

(479.) As soon as either party has joined issue upon any pleading of the opposite party simply, without adding any further pleading thereto, the pleadings as between such parties shall be deemed to be closed.(*e*) Close of pleadings.

(480.) Every pleading in the Chancery Division exceeding ten folios of seventy-two words, each figure being counted as a word, must be printed; when under ten folios it may either be printed or written partly or wholly. In the other divisions it is optional to use printing or writing.(*f*) Printing pleadings.

(481.) The signature of counsel is not necessary now to any pleading.(*g*) Signature of counsel.

(482.) The practice as to serving and settling issues under the Common Law Procedure Act, 1853, s. 102, is abolished. But if any party considers it expedient from the state of the pleadings to have Application to judge to settle issues.

(*a*) Sch., R. 21, post.
(*b*) See Ord. xxiii., R. 1, *infra*; Ord 24 R. 1, E.
(*c*) Ord. xxviii., R. 12, *infra*; Ord. 29 R. 12, E.
(*d*) Ord. xxiii., R. 2, *infra*; Ord. 24, R. 2, E.
(*e*) Ord. xxiv., *infra*; Ord. 25 E. (*f*) Ord. xviii., R. 2, *infra*.
(*g*) Sch., R. 23, part of; Ord. 19 R. 4, E.

Pleadings.

issues settled he may apply to a judge in chamber for the purpose.(*q*)

Demurrer, when to be delivered.

(483.) A demurrer should be delivered in the same manner and within the same time as any other pleading in the action, *i.e.*, within eight days after statement of claim, three weeks after defence, and four days after reply on subsequent pleading.(*r*)

Special cases.

(484.) The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the court.(*s*)

Forms of pleadings.

(485.) The forms of pleadings referred to in the statutory rules, are the forms prescribed by the Supreme Court of Judicature Act, 1875.(*t*)

These forms are reproduced it is presumed for the sake of convenience in the schedules attached to our Orders of 18th December, 1877, and are copied for the most part with literal accuracy,(*u*) and omitting such only as relate to admiralty or probate procedure.

The forms given in the appendix are not made obligatory, nor even are they authenticated by any formal declaration, but doubtless are to be considered as recommended for use, by the fact of their being referred to by the Judicature Act, 1877, and being annexed as they are to our Orders. Some of them have been challenged as being erroneous, but with no great success so far.(*v*)

(*q*) Ord. xxv., *infra*, see Ord. 26 E.

(*r*) Ord. xxvii., R. 3, *infra*, Ord. 28, R. 3, E.

(*s*) Sch., R. 31, and Ord. xxxiv., *infra* Ord. 34, R. 1, E.

(*t*) Sch., R. 37.

(*u*) See Appendix C., Form No. 2, par. 2, line 3, word "into" omitted in both Schedules.

(*v*) See Earp *v.* Henderson, *supra.*, and Hall *v.* Eve, L. R., 4 Ch. D. 321; 25 W. R. 177.

CHAPTER LII.

New Rules of Pleading.

486. New Rules substituted for Old, p. 379.
487. Material Facts and not Evidence, 381.
488. Statement of Claim should not anticipate Defence, 384.
489. Pleading Admissions, 385.
490. Inferences of Law, 386.
491. Pleadings to be Brief, 386.
492. Paragraphs Numbered, 387.
493. Statement of Claim to State Relief, 387.
494. General Denial not Permitted, 388.
495. Payment into Court Pleaded, 388.
496. Settling Issues, 388.
497. Amendment of Pleading, 389.

New rules of pleading substituted for former rules.

(486.) The rules included in order xxviii. *infra* in addition to those contained in the schedule to the statute have been substituted for those hitherto used in the High Court of Chancery and in the three Common Law Courts in Ireland.(*a*)

It would therefore seem that all rules of pleading heretofore used in Courts of Equity, or in Courts of Common Law, on the same subject, are swept away, and in their stead are given a few elementary rules leaving the ground practically clear for the pleader of the future to create a new system of pleading.

The object of pleadings under the new system (as expressed by Sir George Jessel, M.R.) (*b*) is to bring the parties to an issue, and the meaning of the rules in Order xix. (English), (*c*) is that the issue be not enlarged so as to prevent either party from knowing what the real point to be decided is, and by narrowing the issue, to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing. As sketched by the statutory rules, it would seem to be something in-

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(*a*) See Ord. xviii., R. 1, Ord. 19, R. 1, E.

(*b*) Thorp *v.* Holdsworth, L. R. 3 Chan. D., at p. 639.

(*c*) Order 19, English, corresponding to Order xviii., *infra*.

New Rules of Pleading.

termediate between the full particularity of equity pleading, and the vague generality of Common Law pleading. To require each party respectively to set forth all material facts on which he has occasion to rely and to state these facts clearly and concisely would seem to be the aim of the Judicature Act.

Thus a statement of claim should give the defendant sufficient information of the real nature of the complaint and be something more specific than the usual form of a common law pleading.

For example, a claim for damages against an agent employed by the plaintiff to dispose of certain shares must tell something more than that defendant had given a false account of the shares, and had so fraudulently conducted himself towards the plaintiff that the shares became of no value to him. Here, fraud being the ground of relief and being a complex thing, it would hardly be fair to call upon the defendant to answer the charge without more specific information.(*d*)

Nevertheless old forms of pleading, although no longer obligatory or universally applicable may still in certain cases be allowable and useful as models, especially those of the simple type, of money had and received by the defendant to the use of the plaintiff, and such a statement may be sufficient where the only material facts are that defendant did receive the money and that he received it for plaintiff's use, and it would be unnecessary and improper to set out the circumstances under which the defendant did receive the money, or when, where, and under what circumstances a particular account was stated between the plaintiff and defendant.(*e*)

(*d*) Barron *v.* Cooke, W. N. 1875; 220, Lush, J.

(*e*) See Bartlett *v.* Roche, W. N. 1876, 54 Archibald, J., and as to pleas, see Barnicott *v.* Hann, W. N. 1876, 24; 20 Sol. Jour. 242.

New Rules of Pleading.

Material facts and not evidence.

(487.) Every pleading (in which term is included every statement in writing of the claim or demand of the plaintiff and of the defence of any defendant thereto and of the reply of the plaintiff to any counterclaim of the defendant, as also every petition or summons)(*f*) is required to contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are proved.(*g*) This varies but slightly from the direction as to bills of complaint in Chancery, and only so far that the latter required a "narrative" instead of a "statement" and the subject of the narrative included besides the material facts also "matters and circumstances" upon which the plaintiff relies.(*h*) In Chancery pleading every fact which it was intended to prove should be stated in the pleading, and as to the evidence by which the party intended to establish the fact it was not necessary to state it except for the purpose of procuring admissions.(*i*) The Common Law Procedure Act required a plaintiff to set out such material facts as grounded or supported the cause of action or defence as distinguished from details of circumstances which precede, surround, or follow it, and which were mostly immaterial in statement however useful in evidence.(*k*)

It was an ancient rule of common law pleading that evidence of material facts should not be pleaded but only the matter of fact itself.(*l*) And under the Judicature Act in England, paragraphs in

(*f*) J. A. 1877, s. 3.

(*g*) Sch. R. 22, part of Ord. xix., R. 4, E.

(*h*) Chan. (Ire.) Act, 1867, s. 61.

(*i*) See Mansell *v.* Feeny, 2 John & H. at p. 313, Sir W. Page Wood, V.C.

(*k*) See in libel C. L. Pro. Act, 1853, s. 65.

(*l*) Dowman's case, 9 Rep. 9 b. Stephen on Pleading 388, and see Segrave *v.* Barber, 5 Ir. Com. Law Rep. 67.

New Rules of Pleading.

pleadings infringing this rule have been struck out.(*m*)

Thus in an action for malicious prosecution a statement of claim was ordered to be amended, because, instead of stating as a matter of fact that there was reasonable or probable cause, it set forth a narrative of the *res gestæ* affording evidence of an absence of reasonable cause.(*n*)

Although the rules of pleading are to be the same in all divisions of the High Court, yet it is manifest that their application must be somewhat different when dealing on the one hand with the more complex questions which usually form the occasion for Chancery actions, and on the other hand the more plain and simple controversies which common law actions generally raise. No one inflexible rule or style of pleading can be adapted to every action and to every defence. Some Chancery actions may be as plain and simple as an action of debt on a bond and require a statement as simple, and some Common Law actions and defences may require treatment as full as an equity pleading. The circumstances of each individual case must more or less determine and justify the character of the statement. Thus an action for an account may be founded on particular circumstances and arise out of a long series of dealings and transactions with various parties, and the statement of claim may properly set forth a series of letters or other documents in detail which the Court may be unwilling to strike out.(*o*) So a defence in a Common Law action on equitable grounds may arise out of a number of circumstances which taken together may be sufficient to avoid the contract sued upon,

(*m*) Anon. 20 Sol. Jour. 102, Quain, J.

(*n*) Aderis *v.* Thrigley, W. N. 1876; 56, 20 Sol. Jour. 282, Archibald, J.

(*o*) Davy Bros. *v.* Garrett, 26 W. R. 110, W. N. 1877, 262, V. C. H.

although one or more of them taken singly would not have that effect and this may require the pleader to set forth in more or less of detail the facts on which he relies according to the practice of the Court of Chancery, and it would be both unfair and unreasonable to require the defence simply to allege that the contract sued on was obtained by the duress and undue influence of the plaintiff. On a case of this nature coming before a Common Law Division, Mr. J. Field stated, that the intention of the Legislature in introducing this new practice and procedure was to follow as guides the practice and procedure previously existing in the Court of Chancery, and that this is a matter not to be forgotten in construing the Judicature Act; and a reference to the forms given, Appendix C, shows that it was intended to supersede the forms of pleading existing at common law, and that an equitable defence may be pleaded as an answer to a bill in Chancery used to be. It may be somewhat prolix and not quite so convenient at a trial with a jury, but it is useful, and even with a jury would not prejudice the fair trial of the action.(*p*)

In one case V. C. Malins is reported to have carried this idea somewhat further, and to say generally that where allegations of fact are such as would not have been improper in an old pleading in Chancery, the Court, *i.e.*, the Chancery Division, would now decline to treat them as improper on motion,(*q*) but in the Court of Appeal the Lords Justices (Mellish and Baggally) both dissented from this view, especially from the proposition that the charging part of a bill which gave merely the statement of the pleader's views of the equities of the case, or of matters of evidence would be now

(*p*) Heap *v.* Marris L. R. 2, Q. B. D. 630.

(*q*) Watson *v.* Rodwell, W. N. 1876, *Vid.* V. C. M.

New Rules of Pleading.

admissible. Facts and not evidence are to be pleaded, and charges which amount merely to a statement of the pleader's views of the equity of the case are to be omitted; on the other hand, pleadings ought to give a clear statement of facts on which the party relies, in contradistinction to the old system of pleading.(*r*)

Statements of claim should not anticipate the defence or reply.

(488.) Again, it is no part of the statement of claim to anticipate the defence or to state what plaintiff may have to say in reply to it. In one case, where a statement in reply denied the truth of the statement made in the defence, and then pleaded that even if true the plaintiff was entitled to relief on various equitable grounds which might have appeared in the statement of claim, Vice-Chancellor Bacon ordered the statement in reply to be set aside with liberty to amend the original claim,(*s*) but the Court of Appeal reversed this decision, holding that instead of anticipating defences and answering them beforehand, as a bill in Chancery might have done, the proper course was for plaintiff to state his own case, and if he wished to confess and avoid the defence, to reply specially in forms like those given in Appendix C to the Orders.

As Mr. Justice Twisden said of old, a party should not leap before he comes to the stile. Those who framed the rules intended the pleadings to go as far as the replication, and it was a mischievous practice to anticipate the defence because the plaintiff could not tell what defence will be raised, and so he would be bound to anticipate all the possible defences that could be raised which must lead to great length of pleadings.(*t*)

(*r*) Watson *v.* Rodwell, 24 W. R. 1,009; 20 Sol. Jour. 782 A. C.

(*s*) Hall *v.* Eve, W. N. 1876, 282 V. C. B.

(*t*) S. C. L. R., 4 Chan. 345; 25 W. R. 177; 21 Sol. Jour. 148; Bramwell, J. A., A. C.

New Rules of Pleading.

Pleading admissions.

(489.) To set forth statements of what the opposite party told the party pleading or admitted to him, or to his solicitor, has been deemed open to the objection of pleading evidence.(*u*) Even letters written by parties were not properly pleaded at law and might be proved and used in equity as evidence of facts, such as notice of fraudulent purpose without being directly put in issue in pleadings.

But when intended to be used as admissions or confessions of facts, the rule in equity used to require them to be put in issue by the pleading to enable the opposite party to explain them.(*v*)

The rule was latterly less strictly stated by Lord Cottenham,(*w*) to extend only so far, that if the other side be taken by surprise by the letters not being stated in pleading, it might afford ground for giving them further opportunity to explain.(*x*)

The opportunities now open for oral examination would seem in most cases to remove all reason for diversity of practice in regard to pleading admissions.

There are certain cases in which facts and evidence are so mixed up that they are almost undistinguishable, as for example, where defendant pleaded that a guarantee was given to the plaintiff in consideration of his undertaking, to make certain advances which he had failed to do, in such a case it would not be a violation of the rule as to not pleading evidence to set forth whether the undertaking was verbal or in writing, when made and

(*u*) Jones *v.* Turner, W. N. 1875, 239; 20 Sol Jour. 121; Askew *v.* North Eastern Railway Company, W. N. 1875, 238; 20 Sol. Jour. 120.

(*v*) Austen *v.* Chambers, 6 Cl. & Fin. 33.

(*w*) M'Mahon *v.* Burchell, 2 Ph. 127.

(*x*) See Crosbie v. Thompson, 11 Ir. Eq. Rep. 406, L. C.

New Rules of Pleading.

between what parties;(*y*) and in a recent case a series of letters being set forth as containing a contract to take a house, the Judge refused to strike them out.(*z*)

Inferences of law.

(490.) Though a pleading should contain all such allegations as are necessary to establish the legal rights of the party, it need not state specifically what form those legal rights assume; that is an inference of law to be drawn by the Court from the facts averred on either side. For example, where plaintiff claims certain sums of money by way of rent he is not required in his pleading to disclose in what precise form of action he wishes to recover the amount whether as for use and occupation or under a covenant.(*a*)

So, if on the statement of a claim, a cause of action appears, it is not essential that it should be stated in any particular legal form, *ex. gr.*, where it relies on the liability of a vendor remaining in possession after the day fixed for completion of the contract to make compensation, it need not set it forth as for use and occupation of the premises.(*b*)

As to inferences of fact, under the Com. Law Pro. Act, 1853 s. 63, a plaintiff might set forth the words actually spoken or written, and state as a matter of fact they were used in a defamatory sense, without any prefatory averment (or inducement) to show how they were used.

Pleadings to be brief. Costs of prolixity.

(491.) All statements of claim, defence, &c., shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action is

(*y*) Smith *v.* West, W. N. 1876, 55; 20 Sol. Jour., 28 Archibald, J.; and see Hope *v.* Banks, W. N. 1876, 38 Lindley, J.

(*z*) *Ibid.*

(*a*) Lord Hanmer *v.* Flight, 24 W. R. 346, W. N. 1876, 54; 20 Sol. Jour. 280, C. P. D.

(*b*) Metropolitan Railway Company *v.* Defries, L. R., 2 Q. B. D. 387; 25 W. R. 271 A. C.

bound to inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with same.(*d*) *New Rules of Pleading.*

Conciseness, it has been said, is the very soul of the new rules of pleading, and that all that is required in most cases is to notify simply the ground of the complaint or defence,(*e*) and where a pleading sets forth matters with unnecessary prolixity the offending paragraphs may be struck out with leave to substitute a more condensed statement.(*f*)

(492.) Every statement, whether of claim, counterclaim, defence or reply, should be divided into paragraphs numbered consecutively, and each paragraph should contain as near as may be a separate allegation. Dates, sums, and numbers are to be expressed in figures and not in words.(*g*) Paragraphs to be numbered.

The 34 Gen. Ord. of 1854 at Common Law as to each cause of action and further plea and the Chan. (Ire.) Act, 1867, s. 61, contained similar provisions.(*h*)

(493.) Every statement of claim should state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. The same rule applies to a counterclaim made or relief claimed by a defendant in his defence.(*i*) Statement of claim to state relief.

If the plaintiff's claim is for discovery only the statement of claim should show it.(*k*)

(*d*) Sch. R. 21, part of, Ord. 19, R. 1. E.; see Chan. (Ire.) Act, 1867, s. 70, 147, G. O., 1867 (Chan.)

(*e*) Askew *v.* North Eastern Railway Company, W. N., 1875, 238; 20 Sol. Jour. 120, *per* Quain, J.

(*f*) See Marsh *v.* Mayor of Pontefract, W. N., 1876, 7; 20 Sol. Jour. 161, Huddleston, B.

(*g*) Sch. R. 23, part of Ord. 19, R. 4, E.

(*h*) See Redmond *v.* Butler, 4 Ir. Com. Law Rep. 287; 7 Ir. Jur. 391; M'Anulty *v.* Nanties. 13 Ir. Com. Law Rep., 391 App. 40 Ex.

(*i*) Sch. R. 24, Ord. 19, R. 8 E. (*k*) *Ib.*

New Rules of Pleading.

General denial not permitted.

(494.) It will not be sufficient for a defendant [unless in some cases otherwise specially provided for] in his defence to deny generally the facts alleged by the statement of claim or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counterclaim, but each party, must deal specifically with each allegation of fact of which he does not admit the truth.(*c*)

The object of this rule is to oblige a defendant to discover his points of defence and put an end to the general traverse, called the general issue. However, the privileged defence of not guilty by statute is still preserved in England,(*d*) and has been restored in Ireland.(*e*)

Payment into court pleaded.

(495.) Payment of money into Court should be pleaded in the defence and the claim or cause of action in respect of which such payment shall be made should be specified therein.(*f*)

A plea of payment cannot be accompanied by a denial of the cause of action in respect of which the payment is made.

Settlement of issues.

(496.) The Judicature Act seems to contemplate that the issues of fact or law for trial by a judge or jury or by the Court will in general be evolved from the pleadings themselves, but where this does not happen to take place a procedure something like that of our Common Law Procedure Act, 1853, itself (borrowed from that of the Scotch Courts) must be resorted to, and, for this purpose it is provided that where, in any action, it appears to a judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties he may direct the

(*c*) Sch. R. 25, Ord. 19, R. 20, E.

(*d*) See Ord. 19, R 16, E.

(*e*) Ord. xviii., R 9 *infra*.

(*f*) Sch. R. 30, part of Ord. 31, R. 1. E.

parties to prepare issues; and such issues shall, if the parties differ, be settled by the Judge.(*g*) Our Order xxv. further declares that the practice heretofore in use under the Common Law Procedure Act, 1853, as to serving and settling of issues is abolished. But if any party considers it expedient from the state of the pleadings to have issues settled he may apply to a Judge in Chamber for the purpose. *New Rules of Pleading.*

(497.) The Court or Judge may at any stage of the proceedings allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties; and all parties shall have also such further powers of amendment as shall be prescribed by the rules.(*h*) Amendment of pleadings.

CHAPTER LIII.

Incidental Proceedings between Pleadings and Trial.

499. Discontinuance of Action, p. 389.
500. Withdrawing Defence, 390.
501. Payment of Money into Court, 390.
502. Discovery and Evidence, 390.

(499.) Plaintiff may before defence or before taking any step after it (save an interlocutory application), discontinue the action by serving notice to that effect or he may withdraw any part of his complaint and thereupon he must pay Discontinuance of action.

(*g*) Sch R. 27, Ord. 26 E.; see Com. Law (Ire.) Pro. Act, 1853, s. 102.

(*h*) Sch. R. 28, Ord. 27 E.

Incidental Proceedings between Pleadings and Trial.

defendant's costs of the action, or the costs occasioned by the part withdrawn.(*a*) But otherwise the plaintiff cannot withdraw a record (except on consent of both parties), or discontinue the action without leave.(*b*) The defendant may sign judgment for his costs on a notice of discontinuance of part or the entire action.(*c*)

Withdrawing defence.

(500.) A defendant may be allowed by order to withdraw the whole or any part of his defence or counter-claim but he cannot do so without leave.(*d*)

Payment of money into Court.

(501.) Where any action is brought to recover a debt or damages any defendant may at any time after service of the writ and before or at the time of delivering his defence or by leave of the Court or Judge, at any later time, pay into Court a sum of money by way of satisfaction or amends.(*e*)

As we have seen this plea cannot be joined with a denial of the right of action.(*f*)

Discovery and evidence.

(502.) Very ample powers are given to the parties respectively to obtain discovery of facts and inspection of documents, at periods fixed by the Rules,(*g*) and to call for admission of documents.(*h*)

But otherwise the rules of evidence or mode of giving evidence by oral examination of witnesses in trials by jury are not affected or altered by the Judicature Act or Rules, save the power of the Court for special reasons to allow depositions or affidavits to be read.(*i*)

(*a*) See Order xxii. R. 1, *infra* Ord. 23, R. 1 E.
(*b*) *Ib.*
(*c*) Ord. xxii. R. 3, Ord., June, 1876, E.
(*d*) Ord. xxii. R. 1. *infra.*
(*e*) Sch. R. 30, part of, Ord. 31, R. 1. E
(*f*) See *ante* (495), p. 388.
(*g*) See Ord. xxxi. R. 1 & 5, *infra* Ord. 31, E.
(*h*) See Ord. xxxii. *infra* Ord. 32, E.
(*i*) J. A. 1877, sec 66; J. A. 1875, s. 20.

CHAPTER LIV.

Trials and Evidence.

504. County and place of Trial. p. 391.
505. Different modes of Trial, 392.
506. Trial by Jury, Right to, 392.
507. Notice of Trial by Jury, 392.
508. Judge may order different modes and times of trial, 392.
509. Assessors may be called in aid, 392.
510. Provision as to Arbitration, 393.
511. Notice of Trial without Jury, 393.
512. Dismiss for want of proceeding by Notice, 393.
513. Notice of Trial by Defendant, 394.
514. No countermand, except by consent or leave, 394.
515. General Lists for Dublin, 394.
516. Entry for Trial by opposite side, 394.
517. Two copies of Pleadings to be lodged, 394.
518. Trial, 394.
519. Shorthand Writer's Notes, 394.
520. Non-appearance at Trial, 395.
521. Right to proper Directions, 395.
522. Right enforced by exceptions, 396.
523. Exception to a direction, 396.
524. Order for Judgment, 396.
525. Evidence on Trial by Jury, 396.
526. Affidavits as to particular facts, 296.
527. Evidence on other Trials, 397.
528. Evidence on Affidavits, 397.
529. New Trial, application for, 397.
530. Admission or rejection of Evidence, 398.
531. New Trial as to part, 398.
532. Without interfering with the rest, 398.

County or place of trial to be named.

(504.) The plaintiff is required in the document by which each cause is commenced to name the county or place in which he proposes that the cause shall be tried or proceeding shall take place, but the Court or Judge may in their or his discretion direct the same to be tried in any other county or place, and so far as shall be reasonably consistent and speedy discharge of the business, every issue and question of fact submitted to a Jury shall be tried in the county or place where the cause of action has arisen.(*a*)

Any order of a Judge as to the place of trial may be discharged or varied by a Divisional Court.(*b*)

(*a*) J. A. 1877, s. 33, part of. (*b*) *Ib.*

Trials and Evidence.

Unless where the trial is to be by jury it is unnecessary in the writ to specify any county or place.(*b*)

Trial—different modes of.

(505.) Actions may be tried in three different ways, first, before a Judge or Judges; second, before a Judge sitting with assessors; third, before Judge and Jury with or without assessors.(*c*)

Trial by jury—right.

(506.) It is expressly provided, by the Judicature Act, that nothing contained in it or in any rule made under its provisions shall take away or prejudice the right of any party to any action to have questions of fact tried by a jury in such cases as he might heretofore of right have required it.(*d*)

Notice of trial.

(507.) Accordingly the curial rule(*e*) on the subject declares, that in cases where heretofore any party to the action might of right have required any question of fact to be tried by a Jury, the plaintiff may, with his replication, or after the close of the pleadings, give notice of trial by Judge and Jury and have the action so tried. If the plaintiff fails to do so within six weeks of the close of the pleadings, defendant may give notice of trial before a Judge and Jury; and if no place be named in the writ defendant may name the county in which he proposes the trial should be held.

Judge may order different modes and times of trial.

(508.) Subject to the right to a trial by jury the Court or Judge may order different questions of fact to be tried by different modes of trial and appoint the place and order in which the issues of fact shall be tried.(*f*)

Assessors may be called in aid.

(509.) Subject to any right that may exist to have particular cases submitted to the verdict of a jury,

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(*b*) Ord. 1, R. 1, *infra*.
(*c*) Ord. xxxv. R. 1, *infra*; Ord. 36, R. 2 E.
(*d*) J. A. 1877, s. 48, § 2.
(*e*) See Ord. xxxv. R. 2, *infra*.
(*f*) Ord. xxxv. R. 5, *infra*; Ord. 36, R. 6 E.

the High Court, or the Court of Appeal, may, in any civil cause or matter 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 the cause or matter wholly or partially with the assistance of the assessors. The remuneration, if any, to be paid the assessors, will be determined by the Court.(*g*)

Provision as to arbitration.

(510.) The provisions (sections 6 to 20, both inclusive) of the Common Law Procedure Act (Ireland) 1856, in reference to arbitrations, are made applicable to the High Court of Justice and the several Divisions of it and the Judges of same, in the same manner as formerly to the Superior Courts of Common Law and the Judges of same respectively.(*h*)

Notice of trial by other means.

(511.) Where the action is not of right triable by Judge and Jury, the plaintiff may in like manner and time give notice of an application to a Judge to direct the mode and if necessary the place of the trial of the action. In default the defendant may give such notice, upon this application, the Judge may direct the action to be tried in such mode, and if before Judge and Jury, in such county, and also give such directions as to the evidence upon the trial as he may think fit.(*i*)

Dismiss for want of prosecution.

(512.) In default of the plaintiff giving notice of trial by jury, or of an application, as in the case last mentioned, to have the mode of trial directed by a Judge, the defendant instead of giving notice of trial, or giving notice of application to direct the mode of trial (as in last section), may apply to dismiss the action for want of prosecution, on which the action may be dismissed or such other order be made as may seem just.(*k*)

(*g*) J. A. 1877, s. 59.
(*h*) J. A. 1877, s. 60.
(*i*) Ord. xxxv. R. 3, *infra*.
(*k*) Ord. xxxv., R. 4, *infra*.

Trials and Evidence.

Notice of trial by defendant.

(513.) If the plaintiff in an action triable of right by jury do not, within six weeks after the close of the pleadings, give notice of trial by jury, the defendant may give such a notice, and name a county for trial if none be mentioned in the writ.(*l*)

Countermand only by consent or leave.

(514.) Notice of trial cannot be countermanded except by consent or by leave of the court.(*m*)

General Dublin lists.

(515.) In Dublin for county and city the lists for trial are to be prepared and allotted for trial without reference to the division to which the action may be attached.(*n*)

Entry by opposite party.

(516.) When the action is for trial in Dublin, if the party giving notice omits to enter the action for trial on the day or day after giving the notice, the opposite party may do so within four days.(*o*) Where the notice is for trial elsewhere than in Dublin, either party may enter it.(*p*)

Two copies of pleadings to be lodged.

(517.) There is no such thing as a Record of Nisi Prius, instead thereof the party who enters the action for trial is to deliver to the officer two copies of the whole of the pleadings, one of which is for the use of the judge,(*a*) and the other presumably for the use of his Registrar.

Trial.

(518.) It is probable the Registrar will provide himself with a book in which may be entered the judge's directions as to judgments and exceptions to his charge if any, for the purpose of supplying something in the nature of a permanent official record of these proceedings at the trial.

Shorthand writer's report of evidence.

(519.) The J. A., 1877, s. 61, § 2, enables the proper authorities to make rules of court "for the reporting by a competent shorthand writer of the evidence in all cases of trials by jury, whenever it may be expedient or desirable to do so." The Gene-

(*l*) Ord. xxxv. R. 3, *infra*.
(*m*) Ord. xxxv., R. 14, *infra*.
(*n*) *Ib.* R. 17, *infra*.
(*o*) Ord. xxxv., R. 15, *infra*.
(*p*) *Ib.* R. 16, *infra*.
(*a*) Ord. xxxv., R. 18, *infra*.

ral Order LXI. accordingly provides that when any party wishes to have the evidence at a trial by jury reported by a shorthand writer, he may apply to the judge in whose list the case may be entered for trial within four days after service of notice of trial or such further term as may be allowed, for an order that the evidence shall be reported. The judge, if he thinks it right, may make an order accordingly, and appoint a shorthand writer, and direct a sum of money to be deposited for his payment. He may also direct copies of the report to be furnished to himself and to the parties. The expenses of the shorthand writer are to be borne by the party asking for the order, unless the judge immediately after the trial certifies that in his opinion it was expedient the evidence should be reported. On such a certificate the costs become costs in the cause. The scale of fees to be paid to the shorthand writer is fixed by Rules of Court.

Non appearance at trial.

(520.) If, when the action is called on for trial, the plaintiff appears, but defendant does not appear, the plaintiff must prove his case so far as the burthen of proof lies on him,(*q*) but if the defendant appears while the plaintiff does not, the defendant is entitled to have judgment dismissing the action; if he has a counter claim he should prove it so far as the burthen of proof lies on him.(*r*)

Right to have issues left to jury with proper directions.

(521.) Nothing in the Judicature Act or Rules shall take away or prejudice the right of any party upon any trial before a jury to have the issues for trial by jury submitted and left by the judge to the jury before whom the same may come for trial with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues.(*s*)

(*q*) *Ib.* R. 19, *infra.* (*r*) *Ib.* R. 20, *infra.*

(*s*) J. A. 1877, s. 48, § 2, part of.

Trials and Evidence.

Right enforced by motion on an exception.

(522.) The party's right to have his case properly submitted to the jury may be enforced by motion to the High Court, or by motion in the Court of Appeal grounded upon an exception entered upon or annexed to the record.(*t*)

Exceptions to directions.

(523.) Formal bills of exceptions are abolished by Order lviii., R. 1, and there is now really no record upon or to which the exception can be entered or attached unless it be the Registrar's Book.(*u*) It is presumed the proper course will be to hand in a memorandum or dominical of the objection raised or exception taken which the judge may attach to his note of the evidence or to the pleadings, or probably direct the Registrar to make an entry of it on his book.

Upon this exception the party has the option to move the Divisional Court, or move the Court of Appeal by way of appeal from the judge's direction or ruling.(*v*)

Order for judgment.

(524.) The judge may at or after the trial direct judgment to be entered for either party or adjourn the case for further consideration or leave the party to move for judgment.(*w*)

But no judgment can be entered after a trial without an order of a court or judge.(*x*)

Evidence—witnesses examined *viva voce*, or trial by jury.

(525.) In the absence of agreement between the parties all witnesses on a trial of an action before a judge and jury or at any assessment of damages are to be examined *vivâ voce* in open court.(*y*)

Affidavits as to particular facts.

(526.) However the court or judge may for sufficient reason, at any time order any particular fact to be proved by affidavit or that an affidavit be read at the hearing or trial, or that any witness

(*t*) J. A. 1877, s. 48, § 3.
(*u*) See Cheese *v.* Lovejoy, 25 W. R. 453, A. C.
(*v*) *Ib.*
(*w*) Ord. xxxv. R. 23, *infra.*
(*x*) *Ib.*
(*y*) See Ord. xxxvi. R. 1, *infra.*

whose attendance in court ought for some sufficient cause be dispensed with, be examined by interrogatories before a commissioner or examiner.(*z*) Where the evidence at the hearing is taken by affidavit the witnesses may be required to attend for cross-examination.(*a*)

On other trials—evidence as to.

(526.) In trials before a judge alone, or before a judge with or without assessors, evidence is to be taken as the court shall direct.(*b*)

So that, as it seems, a direction as to evidence must be had from the judge in every case except where the trial is before a jury and presumably at the close of the pleadings.

Evidence on affidavit

(527.) If the judge directs the evidence at the hearing to be taken by affidavit, the affidavits are to be filed in a series of three, to be filed and printed as on motion for decree in the Court of Chancery. There is this difference that the time fixed for filing each set can be varied by agreement between the parties.(*c*) In this case either party wishing to cross-examine a deponent who has made an affidavit on behalf of the opposite side has an absolute right within a prescribed time to call for his production.

The party who seeks to use his affidavit must produce the deponent, at the peril of its being rejected, unless by special leave, and this without the party calling for the production of the witness, tendering his expenses in the first instance.(*d*)

New trials—application for.

(528.) Application for a new trial of any cause tried in a Common Law Division, before a jury or by a judge without a jury may be made to Divisional Court, by motion for an order to show cause at the expiration of eight days from the date of the order or so soon after as the case can be heard, why a new trial

(*z*) Ord. xxxvi., R. 1, *infra*. (*a*) Ord. xxxvii, R. 4, *infra*.
(*b*) Ord. xxxvi, R. 4, *infra*. (*c*) Ord. xxxvii. RR. 1, 2, 3, *infra*.
(*d*) Ord. xxxvii, R. 4, *infra*.

Trials and Evidence.

should not be directed. The motion is to be made within four days after the trial, if the Divisional Court be sitting, or four days after the following sittings commence.(*e*)

Unless such an application is made to a Divisional Court, no appeal will lie to the judgment entered after a verdict unless in case of an exception taken to the directions of a judge and entered of record in which case the party may move either a Divisional Court or the Appeal Court.(*f*)

New trial for admission or rejection of evidence—not unless substantial miscarriage.

(529.) No new trial can be granted on the ground of misdirection or of the improper admission or rejection of evidence unless in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.(*g*)

New trial as to part without disturbing the rest.

(530.) If it appear to the Court that the wrong or miscarriage (however substantial) affects part only of the matter in controversy, it is competent for the Court to give final judgment as to the other part thereof only and direct a new trial(*h*)

New trial on any question without interfering with the rest.

(531.) A new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question.(*i*)

(*e*) Ord. xxxviii, R. 1.

(*f*) Cheese *v.* Lovejoy, 25 W. R. 453; 21 Sol. Jour. 457.

(*g*) Sch., R. 32, part of; Ord. 39, R. 3, E.

(*h*) Sch., R. 32, part of.

(*i*) *Ib.*

CHAPTER LV.

Judgment and Execution.

532. Motion for Judgment, p. 399.
533. Motion to set aside Judgment, 400.
534. Judgment, how enforced, 400.
535. Execution, right to immediate, 401.
536. Attachment of the person, 401.
537. Orders, how enforced, 401.

Motion for judgment.

(532.) Unless when some special direction is given as to obtaining judgment, the party considering himself entitled to it must apply to the Court by motion for judgment.(*a*)

Judgment may be entered without such an application in certain cases, as for default of appearance or for default of defence or replication.

But after a trial by a Judge, or Judge and Jury, no judgment can be entered without an order for the purpose.(*b*) This application may be to the Judge himself at the trial who is constituted a Court of the High Court(*c*) for this purpose, and has all the powers of the Court to deal with the action—so he may apply the law to the facts found and pronounce the proper judgment and direct it to be entered.(*d*)

If he does so direct, the party in whose favour it is given may obtain a certificate from the Judge's Registrar to that effect, and upon production to the proper officer in Dublin the latter will enter the judgment,(*e*) or where there are several issues or questions ordered to be tried in different ways, in that case judgment will be obtained by motion for judgment.(*f*)

In the Chancery Division in England motions

(*a*) Ord. xxxix., R. 1, *infra*; Ord. 40, R. 1, E.
(*b*) Ord. xxxv., R. 23, *infra*.
(*c*) *Vide ante* (195) p. 156,
(*d*) Ord. xxxv., R. 23, *infra*.
(*e*) Ord. xxxv., R. 25, *infra*.
(*f*) Ord. xxxix., R. 5, *infra*.

Judgment and Execution.

for judgment are set down in the cause book and brought on as causes and not as ordinary motions.

But the Judge may, in directing judgment to be entered, also reserve leave to any party to move to set aside or vary the judgment or to enter some other judgment, and in that case the party to whom leave is reserved should set down the action on motion for judgment (not on motion to show cause) and give notice thereof to the other side, stating the grounds thereof, within the time limited by the Judge, or, if no time is limited then, within ten days after the trial.(*a*)

If the judge at the trial gives no direction as to entry of the judgment, the plaintiff should set down the action on motion for judgment and give notice, and failing to do so within ten days after the trial, the defendant may set it down.(*b*)

Motion to set-aside the judgment.

(533.) Where the judge at the trial directs a judgment to be entered the opposite party may, without any leave reserved apply by motion to the Divisional Court that the judgment as entered be set aside and to enter some other judgment on the ground that the judge has caused the finding of the jury to be entered wrongly,(*c*) or has entered a wrong judgment upon the finding.(*d*)

Judgments —how enforced.

(534.) Every judgment of the High Court for the recovery or payment of money, whether in the Chancery or the Common Law Divisions, may be enforced by one and the same process. Common Law judgments may be enforced by sequestration and by attachment of the person in cases in which attachment is authorized by law (by the Debtors' Act), and Chancery Judgments may be enforced or

(*a*) Ord. xxxix., R. 2, *infra* ; Ord 40, R. 2, E.
(*b*) Ord. xxxix., R. 3, *infra* ; Ord 40, R. 3, E.
(*c*) Ord. xxxix. R. 4, *infra*. (*d*) *Ib.* R. 5.

Judgment and Execution.

realized by attachment of debts.(*c*) Judgments for the recovery or delivery of the possession of land may be enforced by writ of possession,(*d*) and for recovery or delivery of other property by writ of delivery, attachment, or sequestration.(*e*)

Execution —right to immediate.

(535.) The right to have execution of the judgment for a sum of money or for costs whether it follow upon the verdict of a jury or not is immediate unless there be some order made to the contrary.(*f*)

By attachment.

(536.) Every judgment of the High Court requiring any person to do any act other than the payment of money or to abstain from doing any act, may be enforced by writ of attachment or by committal.(*g*)

But no writ of attachment can be issued without special leave of the court or judge to be applied for on notice to the party to be attached.(*h*)

Order enforced as judgment.

(537.) Every order of the High Court or a judge in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.(*i*)

(*c*) See Ord. xli., R. 1 & 2, *infra*. (*d*) *Ib.* R. 3.
(*e*) *Ib.*, R. 4. (*f*) Ord. xli., R. 15, *infra*.
(*g*) Ord. xli., R. 5, *infra*. (*h*) Ord. xliii., R. 2, *infra*.
(*i*) Ord. xli., R. 21, *infra*.

CHAPTER LVI.

COSTS.

538. Costs generally in discretion of Court, p. 402.
539. Costs of Actions tried by Jury, 402.
540. Statutory Limitations as to Costs, 403.
541. Trustees and Mortgagees, 403.
542. Party and party Costs, 403.

Costs generally in discretion of Court.

(538.) Subject to certain exceptions provided by the Judicature Act and of any Rules of Court, the costs of and incident to every proceeding in the High Court of Justice and in the Court of Appeal are placed in the discretion of the Court.(*a*)

Costs of action tried by jury.

(539.) Subject to all existing enactments limiting regulating or affecting the costs payable in any action by reference to the amount recovered, the costs of every action, question, and issue tried by a Jury follow the event, unless the Judge at the trial or the Court, shall for special cause shown and mentioned in the order otherwise direct. However, any order of a Judge as to such costs may be discharged or varied by a Divisional Court.(*b*) This jurisdiction cannot be exercised by the Judge who tried the case at Chambers.(*c*) In England, as in Ireland the statutes relating to costs in actions of libel, slander, &c., and under County Courts Acts are still in force, although it was at one time considered they were repealed by operation of Order 55, English.(*d*) Where the amount of plaintiff's claim is reduced by the counter-claim the amount must be decided with

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(*a*) J. A. 1877, s. 53, § 2; Ord. 53, E.

(*b*) *Ib.*; see Ord. 55, E.; see Wood *v.* Browne, 20 Sol. Jour., 782, Probate Ct.

(*c*) Baker *v.* Oakes, L. R., 2 Q. B. D. 171; 25 W. R. 220 A.

(*d*) Garnett *v.* Bradley, L. R., 2 Exch. 349; 25 W. R., 653 A. C.; overruling Parsons *v.* Tinling, L. R., 2 C. P. D. 119; 25 W. R. 255.

reference to the balance.(*a*) The Court may make an order as to costs notwithstanding that no application was made at the trial.(*b*) *Costs.*

(540.) All existing enactments limiting, regulating, or affecting costs payable in any action by reference to the amount recovered therein, are undisturbed by the Judicature Act, and more particularly in all actions for libel where the jury give damages under forty shillings, the plaintiff will not be entitled to more costs than damages.(*c*) Statutes limiting costs.

(541.) The Judicature Act does not alter the rule of equity by which a trustee, mortgagee, or other person, was considered entitled to costs out of a particular estate or fund to which he would have been entitled, according to the rules hitherto acted on in Courts of Equity.(*d*) Costs of trustees, mortgagees, &c.

(542.) Where in any proceeding in the High Court of Justice or Court of Appeal, other than for the recovery of a penalty, the costs of any party to the proceeding are ordered to be paid or borne by another party to the proceeding, or by a fund or estate, these costs shall, if the Court so directs, include in addition to the costs which at the time of the passing of the Judicature Act would be allowed as between party and party, all or any other costs, charges, and expenses, reasonably incurred for the purposes of the proceeding.(*e*) Party and party costs may include solicitor and client's costs.

(*a*) Staples *v.* Young, L. R., 2 Ex. D., 324; 25 W. R. 304.

(*b*) General Steam Navigation Company *v.* London Shipping Company, W. N. 1877, 156; 25 W. R. 694, Ex. D.

(*c*) J. A. 1877, s. 53, § 3. (*d*) *Ib.* § 1, Ord. 55 E.

(*e*) *Ib.* § 4.

CHAPTER LVII.

APPEALS.

543. What Orders may be appealed from, p. 404.
544. Decrees of Chancery Division, 405.
545. Criminal matters, 405.
546. Consent Orders, 406.
547. Costs and discretion, 406.
548. Orders at Chambers, 407.
549. Appeal from part of Decree or Order, 408.
550. Limit of time for appealing, 408.
551. *Ex parte* applications, 409.
552. Periods, how computed, 409.
553. Extension of time, 410.
554. Appeal to be by way of notice, 411.
555. Service of notice, 411.
556. Respondent not put to Cross Appeal, 412.
557. Setting down and listing, 413.
558. Deposit and security for costs, 413.
559. Appeal by way of rehearing, 415.
560 Evidence, how brought before Court, 416.
561. Further evidence, 418.
562. Further evidence without leave, 420.
563. Power of Court to amend, 420.
564. Proper judgment to be given, 420.
565. Power as to costs, 421.
566. Printing evidence, 421.
567. Interlocutory Orders not to prejudice Appeal from final Orders, 422.
568. Stay of proceedings, 422.
569. Application to Court below, 424.

What orders appealed from.

(543.) Every order of the High Court whether interlocutory or not (with some few exceptions) may be appealed from.(*a*)

Thus orders on interpleader(*b*) or a decision of the C. P. Division in an action referred to them by an inferior Court,(*c*) and possibly from an order for a prerogative writ of mandamus.(*d*) On exceptions to a direction of a judge it is optional to proceed by motion in the Court of Appeal or by motion in the High Court, *i.e.*, a Divisional Court thereof.(*e*) From

(*a*) J. A., 1877, s. 24.

(*b*) Witt *v.* Parker, 25 W. R. 518, A. C.

(*c*) Maclean *v.* Vaughan, 20 Sol. Jour. 723, A. C.

(*d*) See Reg. *v.* Upper Mersey Dock Trustees, 20 Sol. Jour. 150, Q. B. D.

(*e*) J. A., 1877, s. 48 § 3; see Cheese *v.* Lovejoy, L. R. 4 Ch. D. 421, 25 W. R. 453; 21 Sol. Jour. 457, A. C.

a judgment or a decree of a single Judge without a jury on a question of fact an appeal lies without applying for a new trial.(*f*) *Appeals.*

(544.) Decrees of the Chancery Division may be appealed from whether enrolled or not. Enrolment only affected the action of the Court of Chancery itself as to rehearing, but not that of a Court of Appeal proper, distinct from itself.(*g*) Decrees of Chancery Division and Court of Chancery.

A decree of the former Court of Chancery if enrolled cannot be appealed from to the new Court of Appeal unless the enrolment be first vacated.(*h*) This can only be done by order of the Lord Chancellor. Such decrees probably must still be enrolled in order to an Appeal to the House of Lords and application made to the tribunals representing the Judge and the Chancery Appeal Court as under the General Orders, 31 Oct., 1867 (Chancery.)(*i*)

Decrees and orders of the Court of Chancery passed and entered, but not enrolled, may be appealed from, and are to be prosecuted under the new rules.(*j*)

If not passed and entered they may still be reconsidered and minutes varied without rehearing.(*k*)

(545.) No appeal lies from judgments or orders of the Queen's Bench Division (nor from the former Court of Queen's Bench) in any criminal cause or matter, save for error apparent on the record, and not reserved under the 11 & 12 Vic. ch. 78.(*l*) Thus In criminal matters.

(*f*) Sugden *v.* St. Leonards, Lord, L. R. 1 Pro. D. 154, 24 W. R. 479; Foster *v.* Roberts, W. N., 1877, 11 A. C.

(*g*) Hastie *v.* Hastie, L. R., 2 Ch. D. 304; 20 Sol. Jour. 391, 411.

(*h*) Allan *v.* United Kingdom Electric Telegraph Company, 24 W. R. 898; 20 Sol. Jour. 703, A. C.

(*i*) See Cope *v.* De la Warr, L. R., 5 Chan. D. 666; 21 Sol. Jour. 360, A. C.

(*j*) See chap. xliv. *ante* Bartlam *v.* Yates, L. R. 1 Ch. D. 13, 24 W. R. 19, A. C.

(*k*) Griffin *v.* Hamilton, Ir. Rep. 7 Eq. 141, V. C.

(*l*) J. A., 1877, s. 50, § 2.

Appeals. no appeal lies from an order discharging a rule for a writ of certiorari to bring up a summary conviction(*m*) or from an order on a special case from an inferior Court, on a conviction for keeping a gaming house.(*n*)

Consent orders. (546.) No appeal lies from an order made on consent of parties.(*o*) No order can be so treated unless it be expressed to be so made, but in one case where this was omitted the Court of Appeal appears to have given leave to apply to the Court below to alter the form of the order,(*p*) and the Judge below amended it by expressing that it had been made by consent, whereupon the Court of Appeal ordered the appeal to be struck out.(*q*)

It seems where the order is purely by consent no appeal can be reserved by the parties themselves (*r*)

A special case directed by an arbitrator partakes of this character of consent.(*s*)

Orders as to costs and matters of discretion. (547) No appeal lies from an order as to costs only, which by law are left to the discretion of the Court, unless by leave of the Court or Judge making the same.(*t*)

Where an order in its terms deals merely with costs, but in reality involves a question of law and principle though for costs an appeal will lie,(*u*) or where the Judge awarded costs against a plaintiff on a declaration that no breach of an injunction

(*m*) The Queen *v.* Fletcher, L. R, 2 Q. B. D. 48, 25 W. R. 149; see The Queen *v.* Steel, L. R. 2 Q. B. D. 37.

(*n*) Metropolitan Ry. Coy. *v.* Defries, L. R. 2 Q. B. D. 387, A. C.

(*o*) J. A., 1877, s. 52.

(*p*) See Plant *v.* Bristowe, 20 Sol. Jour. 584 A. C.

(*q*) S. C. 20 Sol Jour. 603, A. C.

(*r*) The Republic of Bolivia *v.* National Bolivian Navigation Company, 20 Sol. Jour. 311, M. R.

(*s*) Jones *v.* Victoria Graving Dock, L. R. 2 Q. B. D. 314.

(*t*) J. A., 1877, s. 52, § 1.

(*u*) *In re* Rio Grande do Sul Ship Cy., L. R. 5 Ch. D. 282; 21 Sol. Jour. 54, A. C.

had been committed,(*v*) or where the Judge had exercised no discretion in the matter of costs, as he ought to do, but awarded them on a principle that is wrong.(*a*) Where trustees were ordered to pay costs personally of a petition under T. R. Act, it was held they could appeal from this.(*b*) *Appeals.*

Matters left to the discretion of a Judge cannot generally be made subject of appeal, as where a Judge at Nisi Prius strikes out a case out of his list(*c*) or refuses to amend a pleading,(*d*) or to dismiss a bill for want of prosecution,(*e*) or to act on an admission in pleading as a ground for immediate judgment,(*f*) or to issue a commission to examine a witness abroad.(*ff*)

By leave of the Court or Judge making the order an appeal may be taken, and this leave may be applied for at the time of making the order or subsequently.(*g*)

(548.) No appeal lies from any order made at Chambers, unless a motion to set it aside or vary it has been made, *i.e.*, to a Divisional Court, or unless the Judge making the order or the Court of Appeal specially gives leave to appeal.(*h*) To obtain this leave from the Court of Appeal it is required in Orders made at chambers.

(*v*) Witt *v.* Corcoran, L. R. 2 Ch. D. 69, 24 W. R. 501; 20 Sol. 411, A. C.

(*a*) Sturla *v.* Freccia, W N., 1877, 188; 21 Sol. Jour. 73, A. C.

(*b*) Hoskin's Trusts, L. R. 6 Chan. D. 280, 25 W. R. 779, A. C.; Taylor *v.* Dowla, L. R. 4 Ch. 697; but see Etherington *v.* Wilson, 24 W. R. 303, A. C.

(*c*) Cave *v.* Mackenzie, W. N., 1876, 237; 20 Sol. Jour. 744, A. C.

(*d*) Golding *v.* Wharton, L. R. 1 Q. B. D. 374; 24 W. R. 423, A. C.; Watson *v.* Rodwell, 24 W. R. 1009: 20 Sol. Jour. 782, A. C.

(*e*) Cooper *v.* Castle, 21 Sol. Jour. 457, A. C.

(*f*) Mellor *v.* Sidebottom, L. R. 5 Chan. D. 342, 25 W. R. 401; 21 Sol. Jour. 379, A. C.

(*ff*) *In re* Imperial Land Co. of Marseilles, W. N. 1877; 244 A. C.

(*g*) Walsh *v.* Bishop of Lincoln, 20 Sol. Jour. 73, M. R.

(*h*) J. A., 1877, s. 54.

Appeals.

England as regards Chancery orders that the Chief Clerk or the Judge should certify, or that it should appear on the order itself, that the matter has been fully argued before the Judge.(*i*)

Appeal from whole or part of judgment.

(549.) An appeal may be brought from the whole or any part of a judgment or order, but the notice of appeal must state whether the whole or part only of the judgment or order is complained of, and in case part must specify the part.(*j*) At Common Law a judgment was an entire thing and could not be reversed in part and affirmed in part, but now it is otherwise and the appeal may be made accordingly.

So an appeal may be taken to a judgment by one or more of several plaintiffs or defendants although others may refuse to join.(*k*)

Time for appealing.

(550.) An appeal from an interlocutory order must be brought within twenty-one days and from any other order not after the expiration of one year except by special leave of the Court of Appeal.(*l*)

Appeals from the Probate Division are included in this Rule.(*m*) But as regards appeals from orders or decisions made under the Companies Acts,(*n*) and from orders made in the Court of Bankruptcy(*o*) or in any other matter not being an action, they are to be governed by the limit mentioned above as to interlocutory orders, *i. e.* within twenty-one days.(*p*)

Thus an appeal from an order made under the Trustee Relief Acts must be brought within twenty-one days.(*q*)

(*i*) Murr *v.* Cooke, 24 W. R. 756, W. N., 1876, 193 V. C. H.; Thomas *v.* Elsom, L. R. 6 Chan. D. 346, A. C.

(*j*) Sch. R. 33, part of.

(*k*) See Greene *v.* LeClerk, 17 Ir. Com. Law Rep. 357, Ex.

(*l*) Ord. lviii., R. 11, *infra*. (*m*) See Order lxiv., R. 1.

(*n*) Order lviii, R. 5, *infra*. (*o*) *Ib*. (*p*) *Ib*.

(*q*) *In re* Baillie's Trust, 25 W. R. 310, W. N. 1877, 42; 21 Sol. Jour. 231.

Appeals.

It is stated that an order made on petition, in an old suit, directing payment to the person entitled on the death of tenant for life, of the capital of a fund, was considered by the Court of Appeal as a final order and appealable within twelve months.(*r*)

Time—*ex parte* application.

(551.) In case an *ex parte* application is made to the Court below and refused, a similar application may be made to the Court of Appeal within four days from the date of such refusal or such enlarged time as a judge of the Court below or of the Court of Appeal may allow.(*s*) The four days mean days during which the Court of Appeal is sitting.(*t*)

Periods—how computed.

(552.) The periods of twenty-one days and of one year for appealing are to be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected.(*u*) But in case of a refusal of an application from the date of such refusal.(*v*)

This latter clause has been strictly acted on; and though the Registrars office was closed on the twenty-first day where notice was not served on that day the appeal was held too late.(*w*)

Where an interlocutory motion was made to vary a chief clerk's certificate and refused, and then a final order was made on further consideration and an appeal brought from both orders after the twenty-one days, it was held to be too late as regards the former order, and that it was not intended that anything in the nature of a finding or verdict,

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(*r*) Harris *v.* Newton. 21 Sol. Jour. 630, A. C., and see Baring *v.* Stanton, 20 Sol. Jour. 561, A. C., as to quorum of three judges.

(*s*) Ord. lviii, R. 6, *infra*.

(*t*) Marcus *v.* General Steam Navigation Co., 20 Sol. Jour. 211, A. C.

(*u*) Ord. lviii, R. 11, part of, *infra*. See *in re* Lewer *ex parte* Gerrard, L. R. 5 Chan. D. 61; 25 W. R. 364 A. C., and see formerly *ex parte* Hinton, L. R. 19, Eq. 266.

(*v*) Ord. same as above.

(*w*) *In re* Lambert, L. R. 5 Chan. D. 365; 25 W. R. 572.

Appeals.

although it might really determine the suit, should be open on an appeal from the final order, but becomes conclusive if the time limited for appealing from it has expired.(*x*)

So where the order appealed from was made on a summons containing several applications and some are granted and some refused, it was held that the appeal as to the latter should be brought within twenty-one days from the refusal,(*y*) so where some items are admitted and others not included.(*z*)

This distinction as to appeals from orders granting or refusing an application was made purposely, because when an application is granted, the exact terms of the order may be material with regard to the appeal, and in that case the time to appeal does not run till the order is perfected and appellant has the opportunity of knowing its exact terms, but when refused nothing can turn on the the terms of the order.(*a*)

Extending time.

(553.) An extension of the time for appealing can now only be given by the Court of Appeal. The court has refused to extend time to appeal for a mere inadvertence or misapprehension of the party or his solicitor, although it was the first case under the new rule,(*b*) but otherwise when the party was misled by the officer of the court.(*c*)

Time has been extended after a year in favour of

(*x*) White *v.* Witt, L. R. 5 Chan. D. 589, 25 W. R. 435, 21 Sol. Jour. 379, A. C., Cummins *v.* Herron, 25 W. R. 325, 21 Sol. Jour. 219, A. C.

(*y*) Berdan *v.* Birmingham Small Arms Co., 26 W. R. 89, A. C.

(*z*) Trail *v.* Jackson, L. R. 4. Chan. D. 7, 21 Sol. Jour. 28, A. C.

(*a*) Swindell *v.* Birmingham Syndicate, L. R. 3 Chan. D. 127. 24 W. R. 911, 21 Sol. Jour. 720, A. C.

(*b*) National Funds Assurance Co., L. R., 4 Chan. D. 305; 25 W. R. 126 A. C., Swindell *v.* Birmingham Syndicate, L. R., 3 Chan. D. 127, 24 W. R. 911, 21 Sol. Jour. 720, A. C.

(*c*) The Phosphate Sewage Co. *v.* Hartmount, 21 Sol. Jour. 457, A. C.

parties not served with notice of decree but who lately had obtained leave to attend proceedings.(*d*) *Appeals.*

Extension of time to appeal after the time limited has expired, must be given by "special leave of the Court" of Appeal, and the Court in England has held it cannot do so on an *ex parte* application,(*e*) and that it should be granted only in cases like where the enrolment of a decree would have been vacated by reason of the applicant being misled by the conduct of his opponent, or some mistake of an officer or some inevitable accident.(*f*)

Time is sometimes enlarged on the terms of bringing into court any money or costs ordered to be paid.(*g*)

(554.) All appeals to the Court of Appeal are to be brought on by notice of motion in a summary way and no petition, case, or other formal proceeding other than such notice is necessary.(*h*) Appeals by way of notice.

The notice of appeal may be amended at any time, as to the Court of Appeal may seem fit.(*i*)

Fourteen days notice of motion by way of appeal must be given from a judgment whether final or interlocutory,(*j*) and from an order of an interlocutory character four days notice of motion.(*k*)

(555.) The notice of motion by way of appeal should be served on all parties directly affected by the appeal, but it is not necessary to serve parties not so affected.(*l*) Service of notice of motion.

However, the Court of Appeal may direct notice

(*d*) Hime *v.* Campbell, 21 Sol. Jour. 417, A. C.

(*e*) Evenett *v.* Laurence, L. R., 4 Chan. D. 139, 25 W. R. 107; 21 Sol. Jour. 109, A. C.

(*f*) International Finance Society *v.* City of Moscow Gas Co., W. N. 1877, 256, 22 Sol. Jour. 131, A. C.

(*g*) Hall *v.* Smith, 20 Sol. Jour. 31, Lush, J.

(*h*) Sch. R. 33, part of, Ord. 58, R. 2. E.

(*i*) Sch. R. 34, part of.

(*j*) Ord. lviii, R. 2, *infra*. Ord. 58, R. 2. E. (*k*) *Ib.*

(*l*) Sch. R. 34, part of, Ord. 58, R. 3, E.

Appeals.

to be served on all or any parties to the action or 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 seem just, and may give such judgment and make such order as might have been given or made if the persons served with the notice had been originally parties.(*m*)

Where a fund was claimed by three parties, A, B, and C, and the Vice-Chancellor decided in favour of C, A appealing and serving notice on C only, the court directed notice to be served on B also, and B having been served the court dismissed the appeal as between A and C, B then asked to be heard as against C, and the court allowed this under this rule postponing the case for a few days.(*n*)

Respondent not put to cross appeal.

(556.) It is not necessary for the respondent under any circumstances to give notice of motion by way of cross appeal, but if he intends upon the hearing to contend that the decision of the Court below should be varied, he must, in case of an appeal from a final order, give eight days' notice, and in case of an appeal from an interlocutory order, two days' notice of such intention to any parties who may be affected by his contention. However, the omission to give this notice does not diminish the powers of the Court, but it may in its discretion, be ground for adjournment of the appeal or for a special order as to costs.(*o*)

Where plaintiff appealed from a dismissal of his bill without costs, and the Court of Appeal affirmed the decision without hearing defendant's counsel, the latter was not permitted to argue that the bill

(*m*) Sch. R. 34, part of, Ord. 58, R. 3, E.

(*n*) Hunter *v.* Hunter, 24 W. R. 504 and 507, 20 Sol. Jour. 436, A. C.

(*o*) Sch., R. 36, Ord. lviii., R. 3.

ought to have been dismissed with costs, having given no notice of his intention to do so, and probably if he did it would not be open on appeal.(*o*) *Appeals.*

(557.) The party appealing is required to produce to the proper officer of the Court of Appeal the judgment or order, or an office copy thereof appealed from, and to leave with him a copy of the notice of appeal to be filed; and such officer shall thereupon set down the appeal by entering same in the proper list of appeals, and it will come on to be heard according to its order in the list, unless otherwise ordered.(*p*) It cannot come into the list for hearing before the day named in the notice of appeal.(*q*) Setting down and listing appeal.

The Order does not say within what time the notice of appeal is to be entered with the officer.

(558.) No deposit is necessary now in order to an appeal, but the Court of Appeal may, under special circumstances, direct such deposit or other security for the costs of the appeal, as it may think fit.(*r*) Security for costs.

Without special circumstances no deposit or security for costs can be required, even in admiralty appeals where it was the practice formerly to require it,(*s*) and applications for such security or deposit ought not to be rashly made, especially against persons engaged in trade.(*t*)

These special circumstances are generally reducible to two heads, insolvency, or residence abroad of the appellant.(*u*) Where appellant was alleged to be insolvent, and as evidence thereof that he had been imprisoned for non-payment of a small debt,

(*o*) Harris *v.* Aaron, L. R., 4 Chan., D. 749; 25 W. R. 353; 21 Sol. Jour. 60 A. C.

(*p*) Ord. lviii., R. 4, *infra*; Ord. 58, R. 8, E. (*q*) *Ib.*

(*r*) Same Ord., R. 11, part of, *infra*; Ord. 58, R. 15, E. part of.

(*s*) See Victoria, L. R., 1 Pro. D., 280; 24 W. R., 596 A. C.

(*t*) Wall *v.* Dunne, 20 Sol. Jour. 561 A. C.

(*u*) *In re* Teas Bottle Company, 20 Sol. Jour. 584 A. C.

Appeals.

and this was not satisfactorily denied, the order was made.(*v*) Where an appellant company had passed a resolution to wind up, though the assets might be more than sufficient to meet the respondent's debts, this was dealt with as a case for an order.(*w*)

So where appellant was a foreigner domiciled abroad.(*x*)

But even where an appellant was insolvent, the order has been refused when the question at issue was one that had not been previously considered in a Court of Error.(*y*)

No leave is necessary to serve notice of motion for security for costs.(*z*)

It is too late to apply after costs incident to the appeal have been actually incurred and the appeal partly heard.(*a*)

All that can be required under the Rule is to secure "the costs to be occasioned by the appeal," and it cannot be asked for to cover the sum awarded below or the costs below.

The amount of security of course depends upon the nature and magnitude of the appeal. Where a large sum of £65,000 was ordered to be paid, and several bankruptcy petitions had been presented against appellant, a sum of £200 was ordered to be secured and proceedings stayed meanwhile.(*b*) Where the evidence was very voluminous and the

(*v*) *In re* Teas Bottle Company, 20 Sol. Jour. 584 A C.; and see Clarke *v.* Roche, 25 W. R. 309; 21 Sol. Jour. 319, A. C.

(*w*) Brown *v.* Brown, 21 Sol. Jour. 48 A. C.

(*x*) Grant *v.* Banque Franco-Egyptienne, L. R., 2 C.P. D., 143 A. C.; 24 W. R. 339.

(*y*) Rourke *v.* White Moss Colliery, L. R., 1 C. P. D., 556.

(*z*) Grills *v.* Dillon, L. R., 2 Ch. D. 325, 24 W. R. 481; 20 Sol. Jour. 412.

(*a*) Grant *v.* The Banque Franco-Egyptienne, 24 W. R., 339 A. C.

(*b*) Phosphate Sewage Company *v.* Hartmont, L. R., 2 Ch. D. 811; 20 Sol. Jour. 605, A. C.; in Judd *v.* Green, 20 Sol. Jour. 500, a deposit of £150 was ordered.

appellant in humble circumstances, the order was to lodge £50 to meet the costs.(*c*) *Appeals.*

Where several respondents applied, being in the same interest, the order was for one deposit of £20.(*d*)

The Court has declined to order that in default of a deposit made, or security given within a certain time, the appeal should stand dismissed,(*e*) but after lapse of a reasonable time, if not complied with, the respondent may apply to dismiss the appeal(*f*) with costs of the motion.(*g*)

(559.) All appeals are to be by way of re-hearing,(*h*) but the Court will not re-hear a cause on the ground of fraud in obtaining the decision below which is more properly the province of the Court of first instance on a bill of review.(*i*) By way of re-hearing.

It is not open to a party, therefore, to raise on the appeal a case totally inconsistent with that which he raised below, although the evidence might have supported it.(*j*) But the Court may go into fresh facts and fresh evidence in certain cases.(*k*)

As to hearing counsel the uniform practice derived from the Court of Appeal in Chancery in England, is to hear two counsel for each side.(*l*)

(*c*) Wilson *v.* Smith, L. R., 2 Ch. D. 67; 24 W. R. 421 A. C.

(*d*) Cashin *v.* Cradock, 20 Sol. Jour. 723 A. C.; like rule in Judd *v.* Green, 20 Sol. Jour. 500 A. C.; amount £150.

(*e*) Wilson *v.* Smith, *supra.*

(*f*) Vale *v.* Oppert, L. R., 5 Ch. D. 633; 25 W. R. 610 A. C.

(*g*) Judd *v.* Green, L. R., 4 Ch. D. 789; 25 W. R. 293; 21 Sol. Jour. 257 A. C.

(*h*) Seh., R. 33, part of,

(*i*) Flower *v.* Lloyd, L. R., 6 Chan. D. 297; 25 W. R. 793 A. C.

(*j*) *In re* Walton, *exp.* Reddish, L. R., 5 Chan. D. 882; 25 W. R. 741; 21 Sol. Jour. 631 A. C.

(*k*) See Anon. 20 Sol. Jour. 81 Lush, J.; Anon. W. N. 1875, 250.

(*l*) Sneesby *v.* Lancashire & Yorkshire Ry. Cy. L. R., 1 Q. B. D. 42; See Lord Cairns' statement, 9 Nov. 1875, W. N. 1875, p. 186.

Appeals.

The practice in Ireland was similar, allowing, where the respondents had diverse interests, one counsel to address the Court for each in respect of the special case of his client. Although only two counsel on each side can address the Court, costs of a third counsel have been allowed in taxation between party and party in cases of difficulty.(*m*)

Cases will now be listed in the order in which they have been set down, and of course may be advanced when circumstances require.(*n*)

The rule fixes no limit of time for setting down or entering the appeal.

The old practice in England was, that the party moving should get the appeal set down before the day named in the notice of appeal. If the Court be not sitting on the day, then for the next day on which it sat, and in default the respondent is entitled to have the motion treated as abandoned,(*o*) and may have the costs of the day by special application.(*p*) In Ireland the setting down of the appeal was one and the same act with the lodging of the appeal.

Evidence, how brought before Court.

(560.) When any question of fact is involved in an appeal the evidence taken in the court below, bearing on the question, shall, subject to any special order to the contrary, be brought before the Court of Appeal as follows :—

(*a*). As to 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 pro-

(*m*) Robb *v.* Connor, Ir. Rep. 9, Eq., 573, M. R.

(*n*) Ord. lviii., R. 4. See Cox *v.* Barker, 20 Sol. Jour. 723 A. C.

(*o*) The National Funds Association Company, L. R. 4 Chan. D. 305; 25 W. R. 151; W. N. 1876, 287; 21 Sol. Jour. 109 A. C.

(*p*) Webb *v.* Mansel, L. R. 2 Q. B. D. 117; 25 W. R. 389 A. C.; Price *v.* Price, 21 Sol. Jour. 478 A. C.

duction of a copy of the judge's notes; where the appeal is from the Master of the Rolls or the Vice-Chancellor, the notes of the clerk in court or such other materials as the court may deem expedient.(*q*)

As to printing affidavits, where the evidence was very voluminous, the court intimated that it would not be necessary to have additional office copies of affidavits taken out for the members of the court, but would accept ordinary copies and briefs of junior counsel.(*r*) In another case where the affidavits used below were voluminous and had not been printed, the Court of Appeal accepted written copies.(*s*)

As to oral evidence—The judge's notes are conclusive and formerly the sole materials on which the Court of Appeal could proceed unless the parties agreed to use the shorthand writer's notes.(*t*)

An appeal to the judge's notes of evidence was generally found inconvenient. The judges generally refused to give them to the parties and merely handed them to the Judges of the Court of Appeal,(*u*) and the Court of Appeal in England used to decline to let copies be taken for the parties, observing that counsel were supposed to take notes of the evidence for themselves.(*v*)

Shorthand Writer's Notes.—Latterly in England the Court of Appeal has always taken the shorthand writer's notes, probably because consent became universal, so much so that a copy of the judge's notes are not entered on the order of the judge below.(*w*)

(*q*) Ord. lviii., R. 7, *infra*.

(*r*) Crawford *v.* Hornsea Steam Brick and Tile Company, 24 W. R., 422 A. C.

(*s*) Sickles *v.* Morris, 24 W. R., 102; 20 Sol. Jour. 112, A. C.

(*t*) *Ex parte* Gillebrand, L. R., 10 Chan. 52, *per* Lord Cairns, L. C.

(*u*) Woodley *v.* Metropolitan District Railway Company, 20 Sol. Jour., 450.

(*v*) Colyer *v.* Lee, 20 Sol. Jour. 451, A. C.

(*w*) Plimpton *v.* Malcomson, W. N., 1876, 89, M. R.

Appeals.

Where shorthand writer's notes were used the costs of transcribing and printing them have been allowed as part of the costs of the appeal,(*x*) but not the costs of the shorthand writer's attendance.(*y*) Our Order LXI., *infra*, has, in deference to the direction given by the J. A., 1877, s. 61, § 2, placed this matter on a more methodical basis as regards reporting evidence given on trials before juries by shorthand writers.(*z*)

May receive further evidence.

(561.) The Court of Appeal has 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.(*a*)

Where the appeal is from a judgment, after trial or hearing of any cause or matter upon the merits, further evidence (save as to matters subsequent) can he admitted only on special grounds and not without special leave of the court.(*b*)

Formerly in the Chancery Appeal Court fresh evidence, except on some interlocutory motions on matters of practice, could not be offered by either party without special leave, and that leave was seldom given except in favour of documentary evidence which could not be well manufactured or tampered with,(*c*) but evidence actually taken before the first hearing, though not used(*d*) or entered on the decree, has been received on appeals.(*e*) But

(*x*) *Ex parte* Sawyer, W. N., 1876, 18, B.

(*y*) Bigsby *v.* Dickenson, L. R., 4 Ch. D. 24; 25 W. R. 89.

(*z*) Chap. liv., p. 394, *ante*.

(*a*) Sch., R. 35, part of; Ord. 58, R. 5, E. (*b*) *Ib*.

(*c*) See Wiltshire Iron Works Company, L. R., 3 Chan. 443; Johnson *v.* Midland Great Western Railway Company, 5 Ir. Chan. Rep. 264, Ld. Chan. Brady.

(*d*) Glover *v.* Danberry, 4 De Gex, F. & J. 561; French *v.* Coppenger, 6 Ir. Chan. Rep. 577, Ch. Ap. Ct.

(*e*) Johnson *v.* Midland Great Western Railway Company, *supra*. Simpson *v.* Frew, 5 Ir. Chan. Rep. 517, L. C.

fresh parol evidence or fresh affidavits (unless to identify documents), and which the opposite party had not opportunity to meet below, were usually disallowed,(*f*) unless the opposite party consented or acquiesced by answering them in the Court of Appeal.(*g*)

Evidence of facts occurring after the original hearing was not admissible,(*h*) nor of facts discovered after decree(*i*) as it may be now.

Although it was always competent to a Court of Appeal to resort to oral examination of a witness who had not been examined below,(*j*) yet it was usual to refuse to do so,(*k*) unless the point was of such importance, that the court would, under the old practice, have directed an issue.(*l*)

In a recent case the Court of Appeal in England gave leave to subpœna a witness who had made no affidavit below to attend for examination at the hearing of the appeal, but without prejudice to the question whether his evidence should be admitted and proper explanation of his not being examined before.(*m*)

The Landed Estates Court, Bankruptcy Court, and Admiralty Court Acts, conferred on the Court of Appeal in Chancery express power to receive further evidence if it should think fit, and as regards

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(*f*) Johnson *v.* Midland Great Western Railway Company, *supra.* Simpson *v.* Frew, 5 Ir. Chan. Rep. 517. L. C.

(*g*) Bournes *v.* Bournes, Chan. Ap. Court, 25 November, 1869. See Pole *v.* Joel, 2 De Gex & J., 285.

(*h*) Lamb *v.* Orton, 33 L. J. N. S., Chan. 81.

(*i*) Barton *v.* Sampson, 10 Ir. Chan. Rep. 161, Chan. Ap. Court refused. Miller *v.* Ship "Virgo," 20 Sol. Jour. 456, A. C.

(*j*) Hope *v.* Threlfall, 33 L. J. N. S., 631 Ch.

(*k*) Farran *v.* Mercer, 6 Ir. Jur. N. S. 26, Ch. Ap. Ct.

(*l*) Ferguson *v.* Wilson, L. R., 2 Chan. 77, L. J. J. Nixon *v.* Potts, Chan. Ap. Ct. (Ire.), 6 June, 1872.

(*m*) Coal Economising Gas Company, 24 W. R., 36 A. C.

Appeals.

Chancery appeals, they being strictly re-hearings, the power of the court to do so was undoubted.

In England the Court of Appeal has held that it is not necessary that any preliminary motion should be made to obtain leave, but that the appellant should give notice to the respondent of his intention to make application at the hearing to bring further evidence before it, stating its nature sufficiently.(*n*)

Further evidence, when without leave.

(562.) Further evidence in the Court of Appeal 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.(*o*)

This would seem to cover the case of a witness on whose evidence the order below was given having been, subsequently to decree convicted of perjury.(*p*)

Powers of the Court as to amendment.

(563.) As incident to the re-hearing by way of appeal, the Court of Appeal has all the powers and duties as to amendment and otherwise of the court of first instance.(*q*) Thus the Court of Appeal when of opinion that the facts were not fully before it or that the pleadings did not raise all the material issues, may order the hearing to stand over, with liberty to amend the statement of claim.

But except as incident to the appeal, the court can exercise no first instance jurisdiction, *ex. gr.*, it cannot make an order on an original petition, except on appeal.(*r*)

Court to give proper judgment though not

(564.) The Court of Appeal has power to give any judgment and make any order which ought to have been made, and to make such further or other

(*n*) Justice *v.* Mersey Steel and Iron Company, 24 W. R. 199; 20 Sol. Jour. 151, A. C. Hastie *v.* Hastie, L. R. 1 Ch. D. 562, A. C.

(*o*) Sch. R. 35, part of. Ord. 58, R. 5 E.

(*p*) Needham *v.* Smith, 2 Vern. 463. (*q*) Sch. R. 35.

(*r*) Dunraven-Adare Coal and Iron Co., W. N. 1875, 192, 24 W. R. 37, A. C.

order as the case may require, and this power may be exercised, notwithstanding that the notice of appeal be, that part only of the decision may be reversed or varied, and it may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision.(*s*) *Appeals.* asked for, and for parties who have not appealed.

Thus the court may vary a decree in favour of the respondent as against the appellant independently of any notice by him,(*t*) but as regards his co-respondent or third parties, *ex. gr.*, creditors not before the court, it is a different matter.(*u*)

(565.) The Court of Appeal has power to make such order as to the whole or any part of the costs of the appeal as may seem just.(*v*) Power as to costs.

The modern rule as to costs in the Chancery Appeal Court was, that they almost invariably followed, and unless under very special circumstances, were awarded according to the result, as on writ of error at law, the Common Law Courts following the same rule as to appeals from rulings as to new trials.(*w*)

In England the rule is applied to appeals in admiralty cases notwithstanding the old practice of the Privy Council which refused costs to a successful appellant, where the appeal was about amount of salvage.(*x*)

(566.) Where the evidence has not been printed in the court below, the court below or a judge Printing evidence for an appeal.

(*s*) Sch. R. 35, part of.

(*t*) Kevan *v.* Crawford, 21 Sol. Jour. 668, A. C. See Watts *v.* Symes, 1 De Gex, M. and G. 240; Sherwin *v.* Shakespear, 5 De Gex, M. and G. 517.

(*u*) See *ex parte* Stirling, 6 Ir. Chan. Rep. 180, Chan. Ap. Court.

(*v*) Sch. R. 35, part of.

(*w*) Walker *v.* Bartlett, 18 C. B. 845.

(*x*) The National Steam Ship Co. *v.* Owners of "City of Berlin," L. R. 2 Prob. Div. 187, A. C.

Appeals.

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. But any party printing evidence for the purpose of an appeal without such an order will have to bear the costs of it unless the Court of Appeal or a judge thereof shall otherwise order.(*y*)

The cost of transcribing and printing short hand notes of *viva voce* evidence has been allowed, the transcript being *bona fide* taken for the use of the court and largely used.(*z*)

Interlocutory orders unappealed from not to prejudice appeal from final order.

(567.) An interlocutory order or rule from which there has been no appeal does not operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just.(*a*) Under the old procedure an appeal from a decree involved a review of all interlocutory orders which depended for their operation on the decree;(*b*) but no prior decree unless specially included in the appeal.(*c*) But where a decree founded upon issues found by a jury was appealed from it was not open to consideration whether a new trial should have been given.(*d*)

The present rule seems to be framed on the fact that interlocutory orders are not, *per se*, appealable after a limited time, and it might be contended that after that time they interposed a bar to an appeal on the merits generally.

Appeal is no stay of proceedings.

568. An appeal does not operate as a stay of

(*y*) Ord. lviii., R. 8, *infra*.

(*z*) Caerphilly *v.* Collieries Co., *ex parte* Pearson, 25 W. R. 618 A. C. See Bigsby *v.* Dickenson, L. R. 4 Ch. D. 24, 25 W. R. 89, A. C.

(*a*) Ord. lviii., R. 10, *infra*.

(*b*) Beavan *v.* Countess of Mornington, 8 H. L. C. 525, and see Corr *v.* Corr, Ir. Rep. 7 Eq. 397, M. R.

(*c*) Callaghan *v.* Callaghan, 8 Cl. and F. 474.

(*d*) Fernie *v.* Young, L. R. 1 H. L. 63.

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 so order, and no intermediate act or proceeding will be invalidated, except so far as the Court appealed from may direct.(*e*)

This was the rule of procedure both in Chancery and at Common Law. In the latter bail in error was a stay of execution on the judgment, but not a stay of proceedings otherwise, *ex. gr.*, as to a new trial.(*f*) Under this rule it is intended that notice of appeal shall not prevent the party who has obtained judgment in his favour from proceeding to execution, and the Court of Appeal will not order a stay without a substantial reason.(*g*)

The application should be made to the Judge in the Court below in the first instance,(*h*) but when afterwards made to the Court of Appeal it is not by way of appeal, but as a primary application.(*i*)

The application must be made on notice, and the Court will not grant it *ex parte*,(*j*) but may give leave to serve a short notice of motion.(*k*)

An order to stay proceedings has been made where they would render the appeal nugatory, *ex gr.*, where the order below was for an inspection by plaintiff of defendant's process of manufacture, on an allegation of infringement of plaintiff's patent, in which case if the order happened to be wrong the

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(*e*) Ord. lviii. R. 12, *infra*.

(*f*) See Callan *v.* Marum, Ir. Rep., 5 Com. Law, 115 Q. B.

(*g*) Griffiths *v.* Taylor, 20 Sol. Jour. 586, C. P. D.; Republic of Peru *v.* Weguelin, 24 W. R. 297; 20 Sol. Jour. 292.

(*h*) Cooper *v.* Cooper, L. R., 2 Ch. D. 492; 20 Sol. Jour, 469.

(*i*) Maclean *v.* Naughan, 20 Sol. Jour. 723 A. C.; Cooper *v.* Cooper, *supra*.

(*j*) Maclean *v.* Naughan, *supra*; Republic of Peru *v.* Weguelin, *supra*; see Ord. lviii. R. 14 and Ord. lii.

(*k*) Maclean *v.* Naughan, *supra*; Cooper *v.* Cooper, *supra*.

Appeals.

injury done to the appellant defendant might be irremediable.(*l*) So where the plaintiff respondent after judgment on demurrer in his favour, was proceeding to try issues in fact, and tax his costs, which would be nugatory if the judgment was wrong.(*m*)

The order when made is usually made on terms of applicant bringing money into Court,(*n*) unless the appeal is clearly frivolous.(*o*)

When application open as to Court of Appeal or Court below, to the latter first.

(569.) Whenever an application under the rules of Ord. 58, 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 should be made in the first instance to the Court or Judge below(*p*)

The second motion to the Court of Appeal is deemed an original and not an appeal motion.(*q*)

(*l*) Flower *v.* Lloyd, 20 Sol. Jour. 584 A. C.; W. N. 1877, 81 V. C. M., S. C.; Phosphate Sewage Cy., W. N. 1876, 192; 20 Sol. Jour. 603 A. C.

(*m*) Grant *v.* The Banque Franco-Egyptienne, 20 Sol. Jour. 298, W. N. 1876, 74.

(*n*) Cooper *v.* Cooper, 24 W. R. 628, W. N. 1876, 149 A. C. *sed vide* Southwell *v.* Rowditch, W. N. 1876, 38; 20 Sol. Jour. 259.

(*o*) Phosphate Sewage Cy. *v.* Hartmont, 24 W. R. 530, V. C. M., S. C., W. N. 1876, 192; 20 Sol. Jour. 603 A. C.

(*p*) Ord. lviii., R. 13. *infra.*

(*q*) See Maclean *v.* Naughan, *supra*; Cooper *v.* Cooper, *supra.*

CHAPTER LVIII.

Final Appeal to House of Lords.

570. Appeal to House of Lords from Court of Appeal, p. 425
571. No direct Appeals from subordinate Courts, 425.
572. Time to appeal, 425.
573. Stay of Execution, 426.

Appeal to House of Lords from Court of Appeal.

(570.) All decisions, judgments, decrees, and orders of the Court of Appeal are subject to appeal to the House of Lords in the cases and under the conditions in and under which the like decisions, &c., of the Court of Appeal in Chancery, or of the Court of Exchequer Chamber would have been subject.(*a*)

No direct appeal from subordinate Courts.

(571.) Except as to error from the Crown side of the Queen's Bench Division in the cases already mentioned,(*b*) neither error nor an appeal can be taken to the House of Lords in the first instance from any judgment, decree, or order made subsequent to the commencement of the J. A. (*i.e.* 1st January, 1878), by the High Court of Justice, or any Division or Judge thereof, or of the Courts of Admiralty or Bankruptcy, and appeals from Divisions must in all cases henceforth be brought only to the Court of Appeal, and not directly to the House of Lords or Queen in Council.(*c*)

Time to appeal.

(572.) Under the standing orders of the House of Lords no petition of appeal can, unless otherwise specially provided by some statute, be received unless lodged in the Parliament office for presentation to the House, within one year from the date of the last decree, order, or judgment appealed from.(*d*)

If the period expires during the recess of the House, it is extended to the third sitting day of the

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(*a*) J. A. 1877, s. 86.

(*b*) *Ante* p. 154 (190), *vide* J. A., 1877, s. 50, § 2.

(*c*) J. A., 1877, s. 86, § 2.

(*d*) See Standing Order 1, under Appellate Jurisdiction Act, 1876.

Final Appeal to House of Lords.

next ensuing meeting of the House.(*e*) In cases in which the person entitled to appeal is within the age of twenty-one years, or covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland, an appeal may be brought within one year next after the disability or absence has ceased, but in no case of absence is a longer time allowed than five years from last decree.(*f*)

Stay of execution.

(573.) If the appeal be from a judgment originally that of Common Law Division, and it is desired to stay execution, bail in error must be given under the old practice, and if the time is passed for that, the party must apply to the division to which the action is attached.(*g*)

If from the Chancery Division, whether affirmed or reversed in the Court of Appeal, it would seem the Court of Appeal has jurisdiction to stay execution.(*h*)

CHAPTER LIX.

Interpleader.

574. Interpleader continued and extended, p. 426.

Interpleader continued and extended.

(574.) The procedure and practice used before the passing of the Judicature Act, with respect to interpleader, by Courts of Common Law in Ireland, is now applicable to all the divisions of the High Court of Justice, and the application by a defendant may be made at any time after being served with a writ of summons, and before delivering a defence.(*a*)

(*e*) Standing H. L. Order vii.

(*f*) Standing Order H. L. 1.

(*g*) Justice *v.* Mersey Steel and Iron Works, L. R. 1 C. P. D. 575, 24 W. R. 955, A. C.

(*h*) Morgan *v.* Elford, L. R., 4 Chan. D. 352, 25 W. R. 136; 21 Sol. Jour., 26 A. C.

(*a*) Sch., R. 12. Ord. 1, R. 2, E.

CHAPTER LX.

REMITTER.

575. Powers conferred by C. L. Pro. Act, 1870, p. 427.
576. Ejectment for Non-payment of Rent, 427.
577. Detinue and certain Breaches of Contract, 427.

Power to remit actions to be tried in Civil Bill Courts.

(575.) The powers conferred by the 5 & 6 sections of the Common Law Procedure Act, 1870, upon the superior Courts of Common Law and the judges of same, of remitting certain actions to be tried in Civil Bill Courts, are made applicable to the High Court of Justice, the Divisions thereof, and the the judges of the divisions respectively in the same manner as formerly to the Superior Courts of Common Law and the judges of same respectively.(*b*)

Ejectment for non-payment of rent.

(576.) The power of remitting actions to be tried in the Civil Bill Courts, has been extended so as to include ejectments for non-payment of rent commenced or pending in the High Court of Justice where the same shall be within the jurisdiction of the Civil Bill Courts, and may be exercised upon such application, and in such manner as may be provided by general rules of court.(*c*)

Detinue and breaches of contract.

(577.) Under the County Officers and Courts (Ireland) Act, 1877, the provisions of the Com. Law Pro. (Ireland) Act, 1870, as to remitter of actions, are extended to actions of detinue, and for breaches of contract where the claim is for unliquidated damages, and the power of the Civil Bill Court as to the amount of damages to be awarded, is made co-extensive with that of the Superior Court.(*d*)

(*b*) J. A., 1877, s. 60, § 2. (*c*) 40 & 41 Vic., c. 56, s. 51.
(*d*) *Ib.*, sec. 52.

SUPREME COURT OF JUDICATURE ACT (IRELAND), 1877.
(40 & 41 Vict., c. 57.)

ARRANGEMENT OF CLAUSES.

Preliminary.

Section. Page

1. Short title, ... 432
2. Commencement of Act, ... 432
3. Interpretation of terms, ... 432

Part I.

Constitution and Judges of Court of Judicature.

4. Union of existing Courts into one Supreme Court of Judicature, 435
5. Division of Supreme Court into a Court of original and a Court of appellate jurisdiction, ... 435
6. Constitution of High Court of Justice in Ireland, . . 435
7. As to Judges of Landed Estates Court, . . . 436
8. As to Judges of Court of Bankruptcy, . . . 437
9. As to existing Judge of High Court of Admiralty, . . 438
10. Constitution of Court of Appeal, ... 439
11. Vacancies by resignation of Judges, and effect of vacancies generally, ... 440
12. Qualifications of Judges, ... 440
13. Tenure of office of Judges, and oaths of office, . . 441
14. Precedence of Judges, ... 441
15. Saving of rights and obligations of existing Judges, . 441
16. Provisions for extraordinary duties of Judges of the former Courts, ... 442
17. Salaries of certain existing Judges, ... 443
18. Salaries of future Judges, ... 443
19. Retiring pensions of future Judges of High Court of Justice, and ordinary Judges of Court of Appeal, . . 444
20. Salaries and pensions how to be paid, . . . 444

Part II.

Jurisdiction and Law.

21. Jurisdiction of High Court of Justice, . . . 445
22. Jurisdiction not transferred to High Court, . . 446
23. Jurisdiction transferred to Court of Appeal, . . 446
24. Appeals from High Court, ... 447
25. Transfer of pending business, ... 447
26. Rules as to exercise of jurisdiction, ... 448
27. Law and equity to be concurrently administered, . . 449
28. Rules of law upon certain points. Administration of assets of insolvent estates. Statutes of Limitation inapplicable to express trusts. Equitable waste. Merger. Suits for possession of land by mortgagors. Assignment of debts and choses in action. Stipulations not of the essence of contracts. Injunctions and receivers. Damages by collisions at sea. Infants. Cases of Conflict not enumerated, 451

Part III.

Sittings and Distribution of Business.

Section.		Page
29.	Abolition of terms,	454
30.	Vacation,	454
31.	Sittings in vacation,	455
32.	Jurisdiction of Judges of High Court on circuit,	455
33.	Sittings for trial by jury in Dublin,	456
34.	Divisions of the High Court of Justice,	456
35.	Rules of Court to provide for distribution of business,	458
36.	Assignment of certain business to particular Divisions of High Court, subject to rules,	458
37.	Provision as to option for any plaintiff (subject to rules) to choose in what Division he will sue,	460
38.	Power of transfer,	461
39.	Directions as to procedure before Land Judges.	461
40.	Application to extend receiver shall be made by summary motion to a Land Judge unless otherwise ordered by Judge,	462
41.	Sittings in Dublin and on circuits,	463
42.	Provisions of 21 & 22 Vict., c. 27, and of 25 & 26 Vict., c. 46, to apply to this Act,	463
43.	Rota of Judges for election petitions,	464
44.	Powers of one or more Judges not constituting a Divisional Court,	464
45.	Divisional Courts of the High Court of Justice.	464
46.	Divisional Courts for business of Queen's Bench, Common Pleas, and Exchequer Divisions,	465
47.	Distribution of business among the Judges of the Chancery and Probate Divisions of the High Court,	465
48.	Cases and points may be reserved for or directed to be argued before Divisional Courts or Courts of Appeal.	466
49.	Land cases reserved,	467
50.	Provision for Crown cases reserved,	467
51.	Motions for new trials to be heard by Divisional Courts,	467
52.	What orders shall not be subject to appeal,	468
53.	Costs,	468
54.	As to discharging orders made in Chambers.	468
55.	Provision for absence or vacancy in the office of a Judge,	469
56.	Power of a single Judge in Court of Appeal,	469
57.	Constitution of Court of Appeal when hearing appeals,	469
58.	Arrangements for business of Court of Appeal,	469

Part IV.

Trial and Procedure.

59.	Assessors,	470
60.	Provisions as to arbitration, &c.,	470
61.	Provision as to making of Rules of Court before or after the commencement of the Act,	470
62.	Circuits and Assizes,	472
63.	Winter Assizes,	473
64.	Rules of Courts of Probate and for Matrimonial Causes to be rules of the High Court,	473
65.	Criminal procedure, subject to future rules, to remain unaltered,	473
66.	Act not to affect rules of evidence,	473
67.	Saving of existing procedure of Courts when not inconsistent with this Act or Rules,	474

Section. Page
68. Additional power as to regulation of practice and procedure by Rules of Court, ... 474
69. Orders and Rules to be laid before Parliament, and may be annulled on address from either House, . . . 474
70. Councils of Judges to consider procedure and administration of justice, ... 474
71. Acts of Parliament relating to former Courts to be read as applying to Courts under this Act, . . . 475

PART V.

Officers and Offices.

72. Transfer of existing staff of officers to Court of Judicature, . 476
73. Appointment of future officers of Supreme Court, . . 480
74. Powers of commissioners to administer oaths, . . 483
75. Receiver-Master, ... 483
76. Salaries and pensions of officers, ... 487
77. Clerks of Assize and Nisi Prius, ... 487
78. Solicitors and attorneys, ... 487

PART VI.

Jurisdiction of Inferior Courts.

79. Rules of law to apply to inferior Courts, . . . 488

PART VII.

Miscellaneous Provisions.

80. Transfer of books and papers to Court of Judicature, . 489
81. Saving as to circuits, &c., ... 489
82. Saving as to Lord Chancellor, ... 489
83. Provisions as to Great Seal being in commission, . . 490

PART VIII.

Court Fees.

84. Fixing and collection of fees in High Court and Court of Appeal, ... 490

PART IX.

Unclaimed Dividends in Bankruptcy.

85. Amendment of the Irish Bankrupt and Insolvent Act, 1857, with respect to the unclaimed dividend account, . . 492

PART X.

Final Appeal.

86. Final appeal to the House of Lords, ... 493

SCHEDULE OF RULES, ... 494

40 & 41 Victoria, Chapter 57.

An Act for the constitution of a Supreme Court of Judicature, and for other purposes relating to the better Administration of Justice in Ireland.

[14th August, 1877.]

Preamble. Whereas it is expedient to constitute a Supreme Court of Judicature, and to make provision for the better administration of justice, in Ireland:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Section 1.

Short title.

1. This Act may be cited for all purposes as the "Supreme Court of Judicature Act (Ireland), 1877."

Commencement of Act.

2. This Act, except where otherwise expressly provided, shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-eight.

Interpretation of terms.

J. A., 1873, s. 100.

3. In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several expressions hereinafter mentioned shall have, or include, the meanings following; (that is to say,)

Chancery. "High Court of Chancery" and "Court of Chancery" respectively shall mean the High Court of Chancery in Ireland, and shall include the Lord Chancellor.

Queen's Bench. "Court of Queen's Bench" shall mean the Court of Queen's Bench in Ireland.

Common Pleas. "Court of Common Pleas" shall mean the Court of Common Pleas in Ireland.

Exchequer. "Court of Exchequer" shall mean the Court of Exchequer in Ireland.

Admiralty. "High Court of Admiralty" shall mean the High Court of Admiralty of Ireland.

Probate. "Court of Probate" shall mean the Court of Probate in Ireland.

Section 3.

"Court for Matrimonial Causes and Matters" shall mean the Court for Matrimonial Causes and Matters in Ireland. Matrimonial Causes.

"Landed Estates Court" shall mean the Landed Estates Court, Ireland. Landed Estates.

"Court of Bankruptcy" shall mean the Court of Bankruptcy in Ireland. Bankruptcy.

"Lord Lieutenant" shall mean the Lord Lieutenant or other Chief Governor or Governors of Ireland for the time being.

"Lord Chancellor" shall mean Lord Chancellor of Ireland, and shall include Lords Commissioners and Lord Keeper of the Great Seal of Ireland. Lord Chancellor.

"The Lord Chief Justice" shall mean the Lord Chief Justice of Ireland.

"Master of the Rolls" shall mean the Master of the Rolls in Ireland.

"Lord Justice of Appeal" shall mean the Lord Justice of Appeal in Chancery in Ireland.

"Vice-Chancellor" shall mean the Vice-Chancellor of Ireland.

"High Court" shall mean Her Majesty's High Court of Justice in Ireland established by this Act. High Court.

"Court of Appeal" shall mean Her Majesty's Court of Appeal in Ireland established by this Act.

"The Treasury" shall mean the Commissioners of Her Majesty's Treasury for the time being, or any two of them.

"Rules of Court" shall include forms. Rules of Court.

"Cause" shall include any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown. Cause.

"Suit" shall include action. Suit.

"Action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court, and shall not include a criminal proceeding by or in the name of the Crown. Action.

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

(*a*) *Sic.* Not in English Act.

Section 3.

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

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

Party. "Party" shall include every person served with notice of, or attending any proceeding, although not named on the Record.

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

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

Judgment. "Judgment" shall include decree.

"Order" shall include rule.

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

"Crown cases reserved" shall mean such questions of law reserved in criminal trials as are mentioned in the Act of the eleventh and twelfth years of Her Majesty's reign, chapter seventy-eight.

"Pension" shall include retirement and superannuation allowance.

Existing. "Existing" shall mean existing at the time appointed for the commencement of this Act.

"Registration of Voters Acts" shall mean the Act of the session of the thirteenth and fourteenth years of the reign of Her present Majesty, chapter sixty-nine, and all other Acts or parts of Acts relating to the registration or qualification of persons entitled to vote at the election of members to serve in Parliament for Ireland.(*a*)

Land. "Land" shall have the same meaning as in the Act of the session of the twenty-first and twenty-second years of the reign of Her present Majesty, chapter seventy-two, intituled "An Act to facilitate the sale and transfer of land in Ireland."(*a*)

Officers. "Officers" shall include "clerks."(*a*)

(*a*) Not in the English Act.

PART I.

Constitution and Judges of Court of Judicature.

Section 4.
J. A., 1873, s. 3.
Union of existing Courts into one Supreme Court of Judicature.

4. From and after the time appointed for the commencement of this Act, the several Courts hereinafter mentioned (that is to say), the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the Court of Probate, the Court for Matrimonial Causes and Matters, and the Landed Estates Court, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in Ireland.

Section 5.
J. A., 1873, s. 4.
Division of Supreme Court into a Court of original and a Court of appellate jurisdiction.

5. The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of "Her Majesty's High Court of Justice in Ireland," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is hereinafter mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal in Ireland," shall have and exercise appellate jurisdiction, with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal.

Section 6.
J. A., 1873, s. 5.
High Court of Justice.
§ 1.
First Judges.

6. Her Majesty's High Court of Justice in Ireland shall be constituted as follows:—The first Judges thereof shall be the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the Vice-Chancellor, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, the Judge of the Court of Probate and of the Court for Matrimonial Causes and Matters, and the Judges of the Landed Estates Court, except such, if any, of the aforesaid Judges as shall be appointed an ordinary Judge of the Court of Appeal.

Appointments.

§ 2.
Lord Chancellor.

The Lord Chancellor shall be appointed and shall hold his office in the same manner as heretofore.(*a*)

§ 3.
Judges.

Whenever the office of a Judge of the said High Court, other than the Lord Chancellor, shall become vacant, a new Judge may be appointed thereto by Her Majesty by Letters Patent.

§ 4.
Chief Judges.

All persons to be hereafter appointed to fill the places of the Lord Chief Justice, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and their successors respectively, shall

Section 6.

continue to be appointed to the same respective offices, with the same precedence, and by the same respective titles, and in the same manner respectively as heretofore. Every Judge, other than the Lord Chancellor and the Judges last mentioned, who shall be appointed to fill the place of any Judge of the High Court of Justice, shall be styled in his appointment "Judge of Her Majesty's High Court of Justice in Ireland."

§ 5. Vacancies not to be filled.

The vacancy now existing in the office of Puisne Justice of the Court of Common Pleas, and any vacancy which may exist at the time of the passing of this Act in the office of Junior Baron of the Court of Exchequer, or in case there be no such vacancy at that time, then the first such vacancy which shall occur after the passing of this Act shall not be filled up.

§ 6. Landed Estates Judge.

Provided always, that when first after the commencement of this Act one of the existing Judges of the Landed Estates Court shall die, resign, or otherwise vacate his office, the vacancy thus occasioned shall not be filled up until a Commission shall have been issued by Her Majesty under Her Royal Sign Manual to ascertain and report whether the business in connexion with the Division of the High Court of Justice (hereinafter termed the Chancery Division) makes it requisite that such appointment should be made, nor until the expiration of a period of forty days after the date of such report, if Parliament be then sitting, and if Parliament be not then sitting, until the expiration of a period of forty days after the commencement of the then next Session of Parliament.

§ 7. Style and jurisdiction.

All the Judges of the Supreme Court shall be addressed in the manner which is now customary in addressing the Judges of the Superior Courts of Common Law in Ireland, and shall have in all respects, save as in this Act otherwise expressly provided, equal power, authority, and jurisdiction.

§ 8. President.

The Lord Chancellor for the time being, or in his absence the Lord Chief Justice for the time being, shall be President of the High Court of Justice.

Section 7.

§ 1. Landed Estates Court Judges to exercise former jurisdiction.

7. The jurisdiction exercised by the Judges of thy Landed Estates Court shall continue to be exercised by them, and by the Judges who may from time to time be appointed to succeed them, and, in the case of illness, absence, or other inability of them or either of them to discharge their duties, or of a vacancy in the office of the said Judges or either of them, by any other Judge of the Chancery Division of the High Court.

If the state of business in connexion with their peculiar jurisdiction shall permit, the said Judges shall in addition be bound from time to time to assist in the general business of the Chancery Division. *Section 1.* § 2. And aid Chancery Division.

The existing Judges of the Landed Estates Court, and their successors, shall be Judges of the said Chancery Division, and shall be distinguished as the Land Judges of the said Division. The rules and orders and practice of the Landed Estates Court shall continue to be used in proceedings for the sale or partition of estates, declaration or record of titles, and all other proceedings which would have been within the exclusive cognizance of the Landed Estates Court if this Act had not passed, before the Land Judges, unless and until altered by the Lord Chancellor and the said Judges. The Lord Chancellor and the Land Judges, or either of them, may from time to time alter the rules and orders and practice in all proceedings before the Land Judges, and make new rules and orders for the regulation of such practice and proceedings, and for the distribution of business between the Land Judges. All rules made in pursuance of this section shall be laid before each House of Parliament within such time, and shall be subject to be annulled in such manner, as is in the sixty-ninth section of this Act provided. § 3. Land Judges of Chancery Division. Practice to continue. Rules may be altered.

There shall be a separate seal for the Land Judges, and conveyances executed with this seal shall have the same force as those executed with the seal of the Landed Estates Court. § 4. Separate seal.

8. The existing Judges of the Court of Bankruptcy, and their successors in such offices respectively, shall be appointed in the same manner as heretofore, and shall, as to tenure of office, rank, title, patronage, rights, privileges, and powers of appointment and dismissal, salary, pension, jurisdiction, powers, and authority respectively, remain and be in the same condition and be liable to discharge the same duties respectively, and none other, as if this Act had not been passed. *Section 8.* Judges of Court of Bankruptcy, appointment and jurisdiction as before.

The practice and procedure of the Court of Bankruptcy, and the powers to make rules and orders regulating the same, shall continue and be exercised in the same manner as if this Act had not been passed. The tenure, salaries, pensions, rights, privileges, and duties, of the officers of the said Court shall also continue the same as if this Act had not been passed. Practice to continue. Rules.

Appeals from orders of the Judges of the said Court shall lie to the Court of Appeal constituted by this Act Appeals from.

Section 8. Orders by way of appeal.

in the same manner and in respect of the same proceedings as heretofore to the Court of Appeal in Chancery, save so far as the procedure on appeals may be altered by any rules or orders to be made in pursuance of this Act. Every order of the Judges of the said Court made on appeal from any order of a chairman may be appealed from to the Court of Appeal constituted by this Act in the same manner as appeals from other orders of the Judges of the said Court.

Section 9.

9. The existing Judge of the High Court of Admiralty shall retain the same jurisdiction, authority, rights of patronage, and of dismissal, rank, and salary as if this Act had not been passed.

§ 1. High Court of Admiralty.

§ 2. Appeals from.

Appeals from his orders and decrees shall lie to the Court of Appeal constituted by this Act in the same manner and in respect of the same proceedings as heretofore to the Court of Appeal in Chancery, save so far as the procedure on appeals may be altered by any rules or orders to be made in pursuance of this Act.

§ 3. No successor to Judge.

When the existing Judge of the High Court of Admiralty shall die, resign, or otherwise vacate his office, no person shall be appointed to succeed him in his said office; and thereupon the High Court of Admiralty in Ireland shall be united and consolidated with the Supreme Court of Judicature in Ireland, and all the jurisdiction vested in and capable of being exercised by the Judge of the said Court of Admiralty, and all causes and proceedings then pending in the said Court, shall be transferred to the High Court of Justice. The jurisdiction theretofore vested in and capable of being exercised by the Judge of the said Court of Admiralty shall thenceforth, and until the vacancy next ensuing after the passing of this Act in the office of the Judge of the Probate and Matrimonial Division hereinafter constituted shall be filled up by the appointment of a new Judge, be vested in and may be exercised by such Judge of the High Court appointed to be a Judge since the first day of January, one thousand eight hundred and seventy-four, or such Judge of the High Court appointed before that day, and who shall consent thereto, as the Lord Lieutenant shall by order under his hand nominate in that behalf.

Jurisdiction to be vested in a Judge of High Court to be nominated.

§ 4. Nomination.

The power of nomination conferred by this section upon the Lord Lieutenant may be exercised by him in the manner aforesaid at any time after the passing of this Act, and thereafter from time to time whenever any Judge so nominated by him shall die, or resign, or become incapable of executing the duties so imposed upon him.

In case any Judge appointed before the said first day of January, one thousand eight hundred and seventy-four, shall be so nominated, he shall be paid for the performance of the duty so imposed upon him such additional salary as the Lord Lieutenant, with the consent of the Treasury, shall appoint. *Section 9.* § 5. Additional salary.

Upon the filling up of the vacancy next ensuing after the passing of this Act in the office of the Judge of the Probate and Matrimonial Division hereinafter constituted by the appointment of a new Judge, all the jurisdiction then vested in any Judge nominated in that behalf by the Lord Lieutenant in pursuance of the preceding provisions of this section shall be transferred to and vested in and may be exercised by such new Judge, and the power of nomination conferred by this section upon the Lord Lieutenant shall thereupon cease; and all causes and proceedings in Admiralty, whether so transferred or afterwards commenced, shall proceed and be heard before the Judge in whom such Admiralty jurisdiction shall for the time being be vested under the preceding provisions of this section. Until such transfer of jurisdiction to the High Court of Justice as aforesaid the Lord Chancellor, with the concurrence of the Treasury, shall, on vacancy in the offices of the Admiralty Court, make provision for the temporary discharge of the duties of such offices. § 6. On next vacancy in office of Probate Judge Admiralty causes to be transferred. Provision for official duties.

10. Her Majesty's Court of Appeal in Ireland shall be constituted as follows:—There shall be five ex-officio Judges thereof, and two ordinary Judges, who shall from time to time be appointed by Her Majesty. The ex-officio Judges shall be the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. The first ordinary Judges of the said Court shall be the existing Lord Justice of Appeal in Chancery, and such 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, and if made before shall take effect from the commencement of this Act, and may be made upon the terms as to salary and otherwise, and subject to the conditions and in the manner provided by the "Chancery Appeal Court (Ireland) Act, 1856," in respect of the office thereby created. *Section 10.* Court of Appeal. J. A. 1875, s. 4. § 1. Judges of, ex-officio and ordinary. New Lord Justice of Appeal.

Besides the said ex-officio Judges and ordinary Judges, it shall be lawful for Her Majesty (if she shall think fit) to appoint under Her Royal Sign Manual, as additional § 2. Additional judges.

Section 10. Judges of the Court of Appeal, any persons who, having held the office of Lord Chancellor or of Chief Justice, Master of the Rolls, Chief Justice of the Common Pleas, or Chief Baron of the Exchequer in Ireland, shall signify in writing their willingness to serve as such additional Judges.(*a*)

§ 3. Style and jurisdiction. The ordinary and additional Judges of the Court of Appeal shall be styled Lords Justices of Appeal. All the Judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction.

§ 4. Vacancies filled. 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, as provided by the "Chancery Appeal Court (Ireland) Act, 1856."

§ 5. President of. The Lord Chancellor for the time being shall be President of the Court of Appeal.

§ 6. Not required to act as a judge in first instance. Except in matters which are by this Act, or by some other Act, specially reserved to the Lord Chancellor, he shall not be bound or required to exercise any of the functions of a Judge of the High Court, or of the Chancery Division of the same, unless he shall, by special order, direct that any matter shall be disposed of by himself, but all such matters shall be disposed of by one of the other Judges of the Chancery Division, and the Lord Chancellor shall in relation to such matters exercise only the functions of a Judge of the Court of Appeal.(*a*)

Section 11. J. A. 1873, s. 7. Vacancies by resignation of Judges. Effect of vacancies generally. 11. The office of any Judge of the Court of Appeal, or of any Judge of the High Court of Justice, may be vacated by resignation in writing under his hand addressed to the Lord Lieutenant, without any deed of surrender; and the office of any Judge of the said High Court shall be vacated by his being appointed to the office of ordinary Judge of the Court of Appeal. The said Courts respectively shall be deemed to be duly constituted during and notwithstanding any vacancy in the office of any Judge.

Section 12. Qualifications of Judges. J. A., 1873, s. 8. 12. Any person who has practised (*a*) for not less than ten years at the Bar of Ireland shall be qualified to be appointed a Judge of the said High Court of Justice; and any person who if this Act had not passed would have been qualified by law to be appointed Lord Justice of the Court of Appeal in Chancery in Ireland, or has been a Judge of the High Court of Justice of not less than one year's standing, shall be qualified to be ap-

(*a*) Not in English Act.

pointed to the office of ordinary Judge of the said Court of Appeal. *Section* 13.

13. Every Judge of the High Court of Justice other than the Lord Chancellor, and every ordinary Judge of the Court of Appeal, shall hold his office for life(*a*), subject to a power of removal by Her Majesty on an address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every Judge of either of the said Courts (other than the Lord Chancellor) when he enters on the execution of his office, shall take, in the presence of the Lord Chancellor, the oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore. No Judge of the High Court of Justice, while he continues such Judge, shall hereafter, unless otherwise provided by Parliament, be appointed to any place of Profit under the Crown except on a transfer to another judicial appointment.(*b*)

Tenure of office of Judges. Oaths of office. J. A., 1875, s. 5. Incapacities of Judges. Places of profit.

14. The ex-officio Judges of the Court of Appeal shall rank in the Supreme Court of Judicature in Ireland in the order of their present respective official precedence. The ordinary Judges of the Court of Appeal shall rank as provided by The Chancery and Common Law Officers (Ireland) Act (1867), and if not entitled to precedence as Peers or Privy Councillors, between themselves according to the priority of their respective appointments.

Section 14. Precedence of Judges. J. A., 1875, s. 6.

The Judges of the High Court of Justice, who are not also Judges of the Court of Appeal, shall rank next after the ordinary Judges of the Court of Appeal, and among themselves (subject to the provisions hereinafter contained as to existing Judges) according to the priority of their respective appointments.

15. Every existing Judge who is by this Act made a Judge of the High Court of Justice or ordinary Judge of the Court of Appeal shall, as to tenure of office, rank between himself and the other existing Judges, title, patronage, and powers of appointment and dismissal, and all other privileges and disqualifications, and also as to salary and pension, save as is herein provided, remain in the same condition as if this Act had not passed; and, subject to the change effected in their jurisdiction and duties by or in pursuance of the provisions of this Act, every

Section 15. § 1. Rights and obligations of existing judges. J. A., 1873, s. 11.

(*a*) During good behaviour in English Act.
(*b*) Not in English Act.

Section 15.

such existing Judge shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform in pursuance of any Act of Parliament, law, or custom, if this Act had not passed.

§ 2. Judges going on assizes.

No Judge, whether of the High Court of Justice or of the Court of Appeal, who was appointed before the first of January, one thousand eight hundred and seventy-five, except a Land Judge, shall be required, without his own consent, to act under any Commission of Assize, Nisi Prius, Oyer and Terminer, or Gaol Delivery, or for the trial of crimes and offences, unless he was so liable by usage or custom at the time of the passing of this Act; but every Judge, whether of the High Court of Justice or of the Court of Appeal, appointed after the said date shall from and after the passing of this Act be capable and bound to act in such Commission, if named therein.

§ 3. Service for pension.

Service as a Judge in the High Court of Justice, or as an ordinary Judge in the Court of Appeal, shall, in the case of an existing Judge, for the purpose of determining the length of service entitling such Judge to a pension on his retirement, be deemed to be a continuation of his service in the Court of which he is a Judge at the time of the commencement of this Act.

§ 4. Lord Chancellor.

The provisions of this section shall not apply to the Lord Chancellor.

Section 16.

Extraordinary duties of Judges of the former Courts. J. A., 1873, s. 12.

16. If, in any case not expressly provided for by this Act, a liability to any duty, or any authority or power, not incident to the administration of justice in any Court whose jurisdiction is transferred by this Act to the High Court of Justice, shall have been imposed or conferred by any statute, law, or custom upon the Judges or any Judge of any of such Courts, every Judge of the said High Court, except where otherwise expressly directed by this Act, shall be capable of performing and exercising, and shall be liable to perform and empowered to exercise every such duty, authority, and power, in the same manner as if this Act had not passed, and as if he had been duly appointed the successor of a Judge liable to such duty, or possessing such authority or power, before the passing of this Act. Any such duty, authority, or power, imposed or conferred by any statute, law, or custom, in any such case as aforesaid upon the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, or the Lord Chief Baron, shall continue to be performed and exercised by them

respectively, and by their respective successors, in the same manner as if this Act had not passed. *Section* 17.

Salaries of certain existing judges.

17. From and after the time fixed for the commencement of this Act, there shall be paid to the existing Judges hereinafter mentioned the following salaries; that is to say,

To the Master of the Rolls four thousand pounds a year.

To each of the Puisne Justices and Junior Barons three thousand eight hundred pounds a year.

To each of the Land Judges three thousand five hundred pounds a year.

Such salaries shall be instead of the salaries by law payable to such Judges immediately before such commencement, and such salaries shall be paid to such Judges respectively on the same days and in the same manner in every respect as their former salaries; the pension which may be granted to the existing Master of the Rolls shall be such as would be payable to him if this Act had not passed, and the pensions which may be granted to all other existing Judges shall be two-thirds of the salaries which, after the commencement of this Act, shall be payable to them respectively.

Section 18.

Salaries of future judges. J. A., 1873, s. 13.

18. There shall be paid to Judges appointed after the commencement of this Act the following salaries, which shall in each case include any pension to which the Judge may be entitled in respect of any public office previously filled by him:

To the Lord Chief Justice five thousand pounds a year, and to the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, each, four thousand six hundred pounds a year.

To the Master of the Rolls the salary hereinbefore directed to be paid to the existing Master of the Rolls.

To each ordinary Judge of the Court of Appeal such salary as, in pursuance of the "Chancery Appeal Court (Ireland) Act, 1856," might have been assigned for him if he had been appointed under the said Act.

To each of the other Judges of the High Court of Justice the sum of three thousand five hundred pounds a year.

Allowance for circuits

The Chiefs of the Divisions termed in this Act the Queen's Bench, Common Pleas, and Exchequer Divisions, whether appointed before or after the commencement of this Act, and the other Judges of the same Divisions who

Section 18. were appointed before the commencement of this Act, shall not be entitled to any allowance in addition to their salaries in respect of circuit. Every other Judge of the High Court of Justice, or of the Court of Appeal, whether appointed before or after the commencement of this Act, who shall actually go circuit as a Judge, shall be entitled to receive in respect of such circuit one hundred and fifty pounds. This last provision shall apply, immediately on the passing of this Act, to any Judge who, not being a Judge of a Common Law Court, shall be named in the commission and shall actually go circuit.

Winter assizes and special commission.

Any Judge, whether appointed before or after the passing of this Act, who shall be sent as Judge for a winter assizes or special commission, shall be entitled to receive in respect thereof such additional payment, not exceeding the amount allowed for a circuit, as the Lord Lieutenant shall determine; but no Judge shall receive any additional or extra payment in respect of an adjourned assizes: Provided always, that nothing herein contained shall affect such rights to remuneration in respect of any special commission or adjourned assizes as the existing Lord Chief Justice, Chief Justice of the Common Pleas, and Lord Chief Baron possessed before the passing of this Act.

Adjourned assizes.

No salary shall be payable to any additional Judge of the Court of Appeal, but nothing in this Act shall in any way prejudice the right of any such additional Judge to any pension to which he may be by law entitled.

Section 19. 19. Her Majesty may, by Letters Patent, grant to any Judge of the High Court of Justice other than the Lord Chancellor, and also to any ordinary Judge of the Court of Appeal appointed after the commencement of this Act who as served for fifteen years as a Judge in such Courts, or either of them, or who 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, of the amount following; (that is to say,)

Pensions of future judges. J. A., 1873, s. 14.

In the case of the ordinary Judges of the Court of Appeal, the same amount of pension which might have been granted to the Lord Justice of the Court of Appeal in Chancery in Ireland if this Act had not passed:

In the case of the Judges of the High Court of Justice, two-thirds of their respective salaries.

Section 20. 20. The salaries, allowances, and pensions payable to the Judges of the High Court of Justice and the ordinary Judges of the Court of Appeal respectively under this

Salaries and pen-

Act shall be charged on and paid out of the Consolidated Fund of the United Kingdom of Great Britain and Ireland, or the growing produce thereof. Such salaries and pensions shall grow due from day to day, but shall be payable to the persons entitled thereto, or to their executors or administrators, on the usual quarterly days of payment, or at such other periods in every year as the Treasury may from time to time determine.

Section 20.
Pensions how paid.
J. A., 1873, s. 15.

PART II.

Jurisdiction and Law.

21. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following; (that is to say,)

Section 21.
Jurisdiction of High Court of Justice.
J. A., 1873, s. 16.

(1.) The High Court of Chancery as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him [or the Lord Chancellor](*a*) in relation to the Court of Chancery as a Common Law Court, and [including any jurisdiction of the Masters in Chancery]:(*a*

Constituent members of.

(2.) The Court of Queen's Bench:

(3.) The Court of Common Pleas:

(4.) The Court of Exchequer as a Court of Revenue as well as a Common Law Court:

(5.) The Court of Probate:

(6.) The Court for Matrimonial Causes and Matters:

(7.) The Landed Estates Court, including the control and direction of the Record of Title Office of the said Court, and all powers and authorities exercised by the Judges of the said Court, or any of them, under the Record of Title Act, 1865:(*a*)

(8.) The Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such commissions:

28 & 29 Vic. c. 88.

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commence-

(*a*) Not in English Act.

Section 21.

ment of this Act, was vested in or capable of being exercised by all or any one or more of the Judges of the said Courts, respectively, sitting in Court or Chambers, or elsewhere [or by any Master of the Court of Chancery,](*a*) when acting as Judges or a Judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such Judges or Judge, Masters or Master, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdiction so transferred.

[Provided always, that nothing herein contained shall abridge or alter the jurisdiction conferred by any Act or Acts upon any Judge or Judges, Commissioner or Commissioners, of Assize.](*a*)

Section 22.

Jurisdiction not transferred to High Court. J. A. 1873, s. 17.

22. There shall not be transferred to or vested in the High Court of Justice, by virtue of this Act,—

(1.) Any appellate jurisdiction of the Court of Appeal in Chancery, or of the same Court sitting as a Court of Appeal from the Court of Probate, the Court for Matrimonial Causes and Matters, the Landed Estates Court, the Court of Bankruptcy, or the High Court of Admiralty:

(2.) Any jurisdiction usually vested in the Lord Chancellor in relation to the custody of the persons and estates of idiots, lunatics, and persons of unsound mind:

(3.) Any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent, or the issue of commissions or other writings, to be passed under the Great Seal of Ireland:

(4.) Any jurisdiction exercised by the Lord Chancellor in right of or on behalf of Her Majesty as visitor of any College, or of any charitable or other foundation:

(5.) Any jurisdiction of the Master of the Rolls in relation to records in Dublin or elsewhere in Ireland.

Section 23.

Jurisdiction transferred to Court of Appeal. J. A., 1873, s. 18.

23. The Court of Appeal 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 sitting as a Court of Appeal from the Court of Probate, the Court for Matrimonial Causes and Matters, the Landed Estates Court, the High Court of Admiralty, or the Court of Bankruptcy:

Chancery Appeal Court.

Exchequer Chamber.

(2.) All jurisdiction and powers of the Court of Ex-

(*a*) Not in English Act.

chequer Chamber, including its appellate jurisdiction in appeals under the Registration of Voters Acts:

Section 23.

Registration of voters.

(3.) All jurisdiction and powers of the Court for Land Cases Reserved at Dublin under the provisions of the "Landlord and Tenant, Ireland, Act, 1870."

Land cases reserved.

(4.) Jurisdiction on writs of error in criminal cases on appeal from the Queen's Bench Division of the High Court of Justice.(*a*)

Section 24.

Appeals from High Court of Justice. J. A., 1873, s. 19.

24. The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of the 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.

Powers of Court of Appeal.

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.

§ 1. Transfer of pending business to High Court and Court of Appeal. J. A., 1873, s. 22.

25. From and after the commencement of this Act the several jurisdictions which by this Act are transferred to and vested in the High Court of Justice and the Court of Appeal respectively shall cease to be exercised, except by the High Court of Justice and the Court of Appeal respectively, as provided by this Act; and no further or other appointment of any Judge to any Court whose jurisdiction is so transferred shall be made except as provided by this Act:

§ 2. Cases fully heard. Judgment to follow.

Provided, that in all causes, matters, and proceedings whatsoever which shall have been fully heard, and in which judgment shall not have been given, or having been given shall not have been signed, drawn up, passed, entered, or otherwise perfected at the time appointed for the commencement of this Act, such judgment, decree, rule, or order may be given or made, signed, drawn up, passed, entered, or perfected respectively, after the commencement of this Act, in the name of the same Court, and by the same Judges and officers, and generally in the same manner in all respects as if this Act had not passed; and the same shall take effect, to all intents

(*a*) Not in English Act. But an Appeal from Orders in Lunacy is given by English Act, 1877, section 18, subs. (5).

Section 25.

and purposes, as if the same had been duly perfected before the commencement of this Act;

§ 3. Judgments and decrees to be executed, &c.

And every judgment, decree, rule, or order of any Court whose jurisdiction is hereby transferred to the High Court of Justice or the Court of Appeal, which shall have been duly perfected at any time before the commencement of this Act, may be executed and enforced, and, if necessary, amended or discharged by the High Court of Justice and the Court of Appeal respectively in the same manner as if it had been a judgment, decree, rule, or order of the said High Court or of the Court of Appeal;

§ 4. Pending proceedings continued.

And all causes, matters, and proceedings whatsoever, whether civil or criminal, which shall be pending in any of the Courts whose jurisdiction is so transferred as aforesaid at the commencement of this Act, shall be continued as follows; (that is to say,) in the case of proceedings in Error or on Appeal, or of proceedings before the Court of Appeal in Chancery, or in the Court for Land Cases Reserved at Dublin, in and before the Court of Appeal; and as to all other proceedings, in and before the High Court of Justice.

§ 5. New courts to have same jurisdiction as former.

The said Courts respectively shall have the same jurisdiction in relation to all such causes, matters and proceedings as if the same had been commenced in the High Court of Justice, and continued therein (or in the said Court of Appeal, as the case may be), down to the point at which the transfer takes place;

§ 6. As to the form of procedure.

And so far as relates to the form and manner of procedure, such causes, matters, and proceedings, or any of them, may be continued in and before the said Courts respectively, either in the same or the like manner as they would have been continued in the respective Courts from which they shall have been transferred as aforesaid, or according to the ordinary course of the High Court of Justice and the Court of Appeal respectively (so far as the same may be applicable thereto), as the said Courts respectively may think fit to direct.

Section 26.

Jurisdiction transferred to be exercised as nearly as may be as heretofore. J. A., 1873, s. 23.

26. The jurisdiction by this Act transferred to the High Court of Justice and the Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by 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. *Section 26.*

27. In every civil cause or matter commenced in the High Court of Justice law and equity shall be administered by the High Court of Justice and the Court of Appeal respectively according to the rules following: *Section 27.* Law and equity to be concurrently administered. J. A. 1873, s. 24.

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

(2.) If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said Courts respectively, and every Judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court for the same or the like purpose before the passing of this Act. (2.) Equitable relief to defendants by way of defence.

(3.) The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right, or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner. (3.) § 1. Relief by way of counter-claim.

And also all such relief relating to or connected § 2. Relief

Section 27.

against third persons.

with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any Rule of Court or any Order of the Court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose.

§ 3. Persons served with notice deemed parties.

And every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant.

(4.) Equitable rights incidentally appearing.

(4.) The said Courts respectively, and every Judge thereof, shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognised and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act.

(5.) § 1. No cause to be restrained by injunction.

(5.) No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction.

§ 2. Matter of equity to be pleaded.

But every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto.

§ 3. Application to stay proceedings.

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

(6.) Legal rights to be recognised.

(6.) Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner

aforesaid, and to the other express provisions of this Act, the said Courts respectively, and every Judge thereof, shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities existing by the Common Law or by any custom, or created by any Statute, in the same manner as the same would have been recognised and given effect to, if this Act had not passed, by any of the Courts whose jurisdiction is hereby transferred to the said High Court of Justice. *Section* 27.

(7.) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. (7.) Plenary relief to be given.

28. And whereas it is expedient to take occasion of the union of the several Courts whose jurisdiction is hereby transferred to the said High Court of Justice to amend and declare the law to be hereafter administered in Ireland as to the matters next hereinafter mentioned : Be it enacted as follows : *Section* 28. J. A., 1873, s. 25. Amendment and declaration of law upon certain points.

(1.) In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt in Ireland ; and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets (1.) Administration of assets of insolvent estates. Rule in Bankruptcy followed. T. A., 1875, s. 10.

Section 28.

of any such company, may come in under the decree or order for the administration of such estate, or under the winding up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.

(2.) Statutes of Limitation not to apply to express trusts.

(2.) No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations. This provision, however, is not to affect the enactments contained in the tenth section of the Real Property Limitation Act, 1874,(*a*) when the same shall come into effect.(*b*)

(3.) Equitable waste—tenant for life impeachable of.

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

(4.) Merger by operation of law not where beneficial interest remains.

(4.) There shall not, after the commencement of this Act, be any merger by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

(5.) § 1. Suits for possession of land by mortgagors in their own name.

(5.) 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 sign and,cause to be served notices to quit, determine tenancies or accept surrenders thereof and](*b*) 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.

§ 2. Action not defeated by proof of legal estate in mortgagee.

And such action, suit, or proceeding shall not be defeated by proof that the legal estate in the lands the possession of which is sought to be recovered, or in respect of which the rents or profits are sought to be recovered, or in respect to which the trespass or other wrong has been committed, is vested in such mortgagee:

§ 3. Express declaration to contrary.

Provided always, that a mortgagor shall not be at liberty to exercise any of the powers hereby conferred if an express declaration that they shall not be exercised is contained in the mortgage.(*b*)

(*a*) 37 & 38 Vic., c. 57, comes into effect on 1st day of January, 1879.

(*b*) This clause is not in English Act.

(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 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:

Section 28.
(6)
§ 1.
Debts and choses in action made assignable at law.

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 anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same.

§ 2.
If assignment disputed debtor may call for interpleader.

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.

§ 3.
May pay into Court under Trustee Relief Act.

(7.) Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have theretofore received in equity.

(7.)
Stipulations not of the essence of contracts in equity.

(8.) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just;

(8.)
§ 1.
Injunctions and receivers may be granted when just.

And if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title.

§ 2.
Whether defendant in possession or not under claim of title.

Section 28.

§ 3. Whether estates legal or equitable.

(9.) Damages by collisions at sea as in Court of Admiralty.

(10.) Infants—Rules of Equity to prevail.

(11.) In cases of conflict, Rules of Equity to prevail.

And whether the estates claimed by both or by either of the parties are legal or equitable.

(9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the High Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.

(10.) In questions relating to the custody and education of infants the Rules of Equity shall prevail.

(11.) Generally, in all matter not hereinbefore particularly mentioned in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail.

PART III.

Sittings and Distribution of Business.

Section 29.

Abolition of terms. J. A., 1873, s. 26.

29. The division of the legal year into terms shall be abolished so far as relates to the administration of justice, and there shall no longer be terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any Commissioners to whom any jurisdiction may be assigned under this Act; but in all other cases in which, under the law now existing, the terms into which the legal year is divided, are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose, unless and until provision is otherwise made by any lawful authority. Subject to Rules of Court, the High Court of Justice, the Court of Appeal, and the Judges thereof respectively, or any such Commissioners as aforesaid, shall have power to sit and act, at any time, and at any place, for the transaction of any part of the business of such Courts respectively, or of such Judges or Commissioners, or for the discharge of any duty which by any Act of Parliament, or otherwise, is required to be discharged during or after term.

Section 30.

Vacations regulated by Orders in Council. J. A., 1873, s. 27.

30. The Lord Lieutenant, by and with the advice of the Privy Council in Ireland, may before the commencement of this Act, upon any report or recommendation of the Judges by whose advice the Lord Lieutenant is hereinafter authorized to make rules before the commencement of this Act, and after the commencement of this

Act upon any report or recommendation of the Council of Judges of the Supreme Court hereinafter mentioned, with the consent of the Lord Chancellor, from time to time make, revoke, or modify orders regulating the vacations to be observed by the High Court of Justice and the Court of Appeal, and in the offices of the said Courts respectively; and any Order in Council made pursuant to this section shall, so long as it continues in force, be of the same effect as if it were contained in this Act, and Rules of Court may be made for carrying the same into effect in the same manner as if such Order in Council were part of this Act. In the meantime, and subject thereto, the said vacations shall be fixed in the same manner, and by the same authority, as if this Act had not passed. *Section 30.*

31. Provision shall be made by Rules of Court for the hearing, in Dublin, during vacation, by Judges of the High Court of Justice and the Judges of the Court of Appeal respectively, of all such applications as may require to be immediately or promptly heard. *Section 31.* Sittings in vacation to be regulated. J. A., 1873, s. 28.

32. Her Majesty, by commission of assize, or by any other commission, either general or special, may assign to any Judge or Judges of the High Court of Justice or other person or persons usually named in commissions of assize, the duty of trying and determining, within any place or district specially fixed for that purpose by such commission, any causes or matters, or any questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in the said High Court, or the exercise of any civil or criminal jurisdiction capable of being exercised by the said High Court; and any commission so granted by Her Majesty shall be of the same validity as if it were enacted in the body of this Act; and any Commissioner or Commissioners appointed in pursuance of this section shall, when engaged in the exercise of any jurisdiction assigned to him or them in pursuance of this Act, be deemed to constitute a Court of the High Court of Justice; and, subject to any restrictions or conditions imposed by Rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may with the leave of the Judge or Judges to whom or to whose Division the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner or Commissioners *Section 32.* Commission to Judges to try questions of fact or law. J. A., 1873, s. 29. Commissioners constitute a court. May try any question of fact, or fact and law.

(*a*) Not in English Act.

Section 32. as aforesaid, or at sittings to be held in Dublin as hereinafter in this Act mentioned, and such question or issue shall be tried and determined accordingly.

A cause or matter not involving any question or issue of fact may be tried and determined in like manner with the consent of all the parties thereto.

Section 33. 33. Subject to Rules of Court, sittings for the trial by jury of causes and questions or issues of fact shall be held in Dublin, and such sittings shall, so far as is reasonably practicable, and subject to vacations, be held continuously throughout the year by as many Judges as the business to be disposed of may render necessary. Any Judge of the High Court of Justice sitting for the trial of causes and issues in Dublin, at any place heretofore accustomed, or to be hereafter determined by Rules of Court, shall be deemed to constitute a Court of the High Court of Justice.

§ 1. Sittings for trial by jury in Dublin to be continuous. J. A., 1873, s. 30.

§ 2. Plaintiff to name some place for trial.

Subject to Rules of Court, the plaintiff shall, in the document by which each cause shall be commenced, name the county or place in which he proposes that the cause shall be tried or proceeding shall take place, but the Court or a Judge may, in their or his discretion, direct the same to be tried in any other county or place.

§ 3. Issues to be tried in county where cause of action arises.

And so far as shall be reasonably consistent with the convenient and speedy discharge of the business, every issue and question of fact to be submitted to a jury shall be tried in the county or place where the cause of action shall have arisen. Any order of a Judge as to the place of trial of any such issue or question may be discharged or varied by a Divisional Court.](*a*)

§ 4. Applications to serve out of the jurisdiction.

Whenever application shall be made for leave to serve any document by which a cause may be commenced upon a defendant resident out of the jurisdiction of the Supreme Court, whether by serving such defendant personally or by substituting service upon another person for him, the Court or Judge to whom such application shall be made shall have regard to the amount or value of the claim or property affected, and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence ; and no such leave shall be granted without an affidavit stating the particulars necessary for enabling the Court or Judge to exercise a due discretion in the manner aforesaid.](*a*)

Section 34. 34. For the more convenient despatch of business in the High Court of Justice (but not so as to prevent any

§ 1. Divisions of

(*a*) Not in English Act.

Judge from sitting whenever required in any Divisional Court, or for any Judge of a different Division from his own,) there shall be in the said High Court five Divisions consisting of such Judges respectively as herein-after mentioned. Such five Divisions shall respectively include, immediately on the commencement of this Act, the several Judges following; (that is to say,)

Section 34.

the High Court of Justice, number of. J. A., 1873, s. 31.

§ 1. Chancery.

(1.) One Division shall consist of the Lord Chancellor, who shall be President thereof, The Master of the Rolls, The Vice-Chancellor and the Judges of the Landed Estates Court;(*a*)

§ 2. Queen's Bench.

(2.) One other Division shall consist of The Lord Chief Justice, who shall be president thereof, and the other Judges of the Court of Queen's Bench;

§ 3. Common Pleas.

(3.) One other Division shall consist of The Lord Chief Justice of the Common Pleas, who shall be President thereof, and the other Judges of the Court of Common Pleas;

§ 4 Exchequer

(4.) One other Division shall consist of The Lord Chief Baron of the Exchequer, who shall be President thereof, and the other Barons of the Court of Exchequer;

§ 5. Probate.

(5.) One other Division shall consist of the Judge of the Courts of Probate and for Matrimonial Causes and Matters.

The said five Divisions shall be called respectively the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate and Matrimonial Division;

§ 6. Admiralty to be annexed.

After the Admiralty jurisdiction shall, under the provisions in that behalf herein-before contained, have become vested in the Judge of the Probate and Matrimonial Division, such Division shall be called "the Probate, Matrimonial, and Admiralty Division."

§ 7. Number of Judges.

The Queen's Bench, Common Pleas, and Exchequer Divisions shall consist of the number of Judges following and no more, viz.:

The Queen's Bench Division of four Judges;

The Common Pleas Division of three Judges;

The Exchequer Division (from and after the next vacancy in the office of one of the Junior Barons) of three Judges; and

The Probate and Matrimonial Division shall have one Judge.

§ 8. Vacancies existing now.

Any vacancy at the time of the commencement of this Act in the office of Judge of any Court the jurisdiction of

(*a*) Not in English Act.

Section 34.

which is by this Act transferred to the High Court of Justice or the Court of Appeal, If such office be continued by this Act, may be supplied by the appointment of a new Judge in his place in the same manner as if a vacancy in such office had occurred after the commencement of this Act.

§ 9. Transfer of Judges.

Save as by this Act expressly provided, any Judge of any of the said Divisions may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the said Divisions; provided, that in the case of an existing Judge, such transfer shall not be without his own consent.

§ 10. Future vacancies.

Upon any vacancy happening among the Judges of the said High Court, the Judge appointed to fill such vacancy shall, subject to the provisions of this Act, and to any Rules of Court which may be made pursuant thereto, become a member of the Division to which the Judge whose place has become vacant belonged, and shall succeed to the duties of such Judge.(*a*)

Section 35.

Rules of Court to provide for distribution of business. J. A., 1873, s. 33.

35. All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several Divisions and Judges of the said High Court in such manner as may from time to time be determined by any Rules of Court, or Orders of Transfer, to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said Divisions respectively in the manner herein-after provided.

Distribution between Common Law Divisions.

In distributing the general business between the Queen's Bench, Common Pleas, and Exchequer Divisions, regard shall be had to any special jurisdiction vested in them respectively so as to apportion the business fairly between them.(*a*)

Section 36.

Assignment of certain business to particular Divisions of High Court. J. A., 1873, s. 34.

36. There shall be assigned (subject as aforesaid) to the Chancery Division of the said Court:

(1.) All causes and matters pending in the Court of Chancery at the commencement of this Act:

(2.) All causes and matters to be commenced after the commencement of this Act under any Act of Parliament by which exclusive jurisdiction in respect to such causes or matters has been given to the Court of Chancery, or to any Judges or Judge thereof respectively:

(3.) All matters pending in the Landed Estates Court at the commencement of this Act: (*a*)

(*a*) Not in English Act.

(4.) All matters which would have been within the exclusive cognizance of the Landed Estates Court, or of any Judge or Judges thereof, if this Act had not passed: (*a*) *Section* 36.

(5.) All causes and matters for any of the following purposes: § 1. Chancery causes.

1. The administration of the estates of deceased persons;

2. The dissolution of partnerships, or the taking of partnership or other accounts;

3. The redemption or foreclosure of mortgages;

4. The raising of portions, or other charges on land;

5. The sale and distribution of the proceeds of property subject to any lien or charge;

6. The execution of trusts, charitable or private;

7. The rectification, or setting aside, or cancellation of deeds or other written instruments;

8. The specific performance of contracts between vendors and purchasers of land, (*b*) including contracts for leases, [and also the specific performance of any other contracts in respect of which a Court of Equity decrees performance;] (*a*)

9. The partition or sale of real estates, [including chattels real;] (*a*)

10. The wardship of infants and the care of infants' estates.

All causes and matters included under the heads above numbered (3) and (4) shall be assigned to the Land Judges of the Chancery Division.(*a*)

There shall be assigned (subject as aforesaid) to the Queen's Bench Division of the said Court: § 2. Queen's Bench causes.

(1.) All causes and matters, civil and criminal, pending in the Court of Queen's Bench at the commencement of this Act:

(2.) All causes and matters, civil and criminal, which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction if this Act had not passed.

There shall be assigned (subject as aforesaid) to the Common Pleas Division of the said Court: § 3. Common Pleas causes.

(1.) All causes and matters pending in the Court of Common Pleas at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Common Pleas if this Act had not passed.

[Provided always, that if and whenever the said Division § 4 Junior Judge of

(*a*) Not in English Act.
(*b*) In English Act, "of real estates."

Section 36. Queen's Bench Division to assist in Parliamentary Election cases.

shall be engaged in the hearing or despatch of any business relating to a parliamentary election which would have been within the exclusive cognizance of the Court of Common Pleas, but only so long as there shall be but three Judges of the Common Pleas Division, the junior Puisne Judge for the time being of the Queen's Bench Division shall be empowered and bound to attend and take part in the hearing and despatch by the Common Pleas Division of such business, and shall, for all the purposes of such business, be a fourth member of the Common Pleas Division.] (*a*)

§ 5. Exchequer causes.

There shall be assigned (subject as aforesaid) to the Exchequer Division of the said Court:

(1.) All causes and matters pending in the Court of Exchequer at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court, if this Act had not passed.

§ 6. Probate and Matrimonial causes.

There shall be assigned (subject as aforesaid) to the Probate and Matrimonial Division of the said Court:

(1.) All causes and matters pending in the Court of Probate, or in the Court for Matrimonial Causes and Matters, at the commencement of this Act:

(2.) All causes and matters which would have been within the exclusive cognizance of the Court of Probate, or of the Court for Matrimonial Causes and Matters, if this Act had not passed.

Section 37. Option to plaintiff to choose Division. J. A., 1873, s. 11.

37. Subject to any Rules of Court, and to the provisions hereinbefore contained, and to the power of transfer, every person by whom any cause or matter may be commenced in the said High Court of Justice shall assign such cause or matter to one of the Divisions of the said High Court as he may think fit by marking the document by which the same is commenced with the name of such Division, and giving notice thereof to the proper officer of the Court: Provided that—

Interlocutory steps.

(1.) All interlocutory and other steps and proceedings in or before the said High Court, in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any Rules of Court and to the power of transfer) in the Division of the said High Court to which such cause or matter is for the time being attached; and

Assignment to wrong Division, transfer.

(2.) If any plaintiff or petitioner shall at any time assign his cause or matter to any Division of the said

(*a*) Not in English Act.

High Court to which according to the Rules of Court or the provisions herein-before contained the same ought not to be assigned, the Court, or any Judge of such Division, upon being informed thereof, may, on a summary application, at any stage of the cause or matter, direct the same to be transferred to the Division of the said Court to which according to such rules or provisions the same ought to have been assigned, or he may, if he think it expedient so to do, retain the same in the Division in which the same was commenced; and all steps and proceedings whatsoever taken by the plaintiff or petitioner, or by any other party in any such cause or matter, and all orders made therein by the Court or any Judge thereof before any such transfer, shall be valid and effectual to all intents and purposes in the same manner as if the same respectively had been taken and made in the proper Division of the said Court to which such cause or matter ought to have been assigned; and *Section 37.*

(3.) Every testamentary or matrimonial proceeding shall be commenced in the Probate and Matrimonial Division, and addressed to the Judge of that Division for the time being: (*a*) Testamentary matters.

(4.) Every proceeding in any other matter within the exclusive jurisdiction of the Landed Estates Court before the passing or under the provisions of this Act shall be commenced in the Chancery Division and addressed to the Land Judges of that Division. Land cases.

38. Any cause or matter may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred, by such authority and in such manner as Rules of Court may direct, from one Division or Judge of the High Court of Justice to any other Division or Judge thereof, or may by the like authority be retained in the Division in which the same was commenced, although such may not be the proper Division to which the same cause or matter ought in the first instance to have been assigned. *Section 38.*

Power of transfer from one Division to another. J. A., 1873, s. 36.

39. Every application to appoint a receiver over land, when such land is the subject of a proceeding before the Land Judges, shall be made to the Land Judge to whom such proceeding is attached. *Section 39.*

§ 1. Procedure before Land Judges as to receivers.

In any proceeding before a Land Judge, the Judge shall decide all controversies and questions as to the

§ 2. All controversies and questions to be decided.

(*a*) In J. A. 1875, s. 11, subs. (3), no case shall be assigned to Probate &c., Division, unless it would have been entitled to be commenced in that Division heretofore.

Section 39. validity or effect of any deed, instrument, or contract affecting land, or any charge or incumbrance thereon, or as to the construction or effect of any devise or bequest of any estate or interest in or of any charge or incumbrance upon, land, which it may be necessary to decide for the purpose of such proceeding, including the validity or effect of any lease or instrument of tenancy affecting land requisite to be ascertained for the due settlement of a rental.

§ 3. Accounts and administration of assets.

And shall take accounts of and administer the assets of any deceased person whenever it may be necessary for a distribution of the purchase-money of any land sold before him, provided there shall not be then depending before any of the Judges of the High Court a suit for the administration of such assets; and it shall not be necessary to institute any other cause or matter for any of such purposes.

§ 4. Procedure settled by Rules.

The procedure in such cases shall be settled by Rules of Court, to be made by the Lord Chancellor, with the Land Judges, or either of them.

§ 5. Service of notice on parties.

And any person, whether already a party to the proceeding or not, who shall have been duly served with notice in writing pursuant to any Rule of Court or order of the Court shall thenceforth be deemed a party to such cause or matter with the same rights in respect of his claim or defence as if he had duly sued or been sued in a suit instituted for the purpose of deciding any such question or controversy.

Section 40. Applications to extend receivers to a Land Judge.

40. When a receiver is appointed over land, either by a Land Judge or by any other Judge of the High Court of Justice having power to appoint the same, it shall not be necessary for any party claiming to be entitled to or interested in the rents of the lands over which the receiver shall have been appointed to file any bill or institute any other cause or proceedings to have the receiver extended to his claim, but such party may apply, by summary motion, to a Land Judge to have the receiver extended to his claim; and, on the hearing of such application, the Judge may either grant the application or order a bill to be filed, or other proceeding to be instituted for the purpose of ascertaining the rights of the party applying, and the costs of a suit, cause, or other proceeding, the object of which shall be the taking an account on foot of any mortgage or other security affecting land, and the extension of a receiver already appointed to the matter of said suit, cause, or other proceeding, shall not be allowed, unless such suit, cause, or other proceeding

shall have been commenced by direction of one of the Land Judges. *Section* 40.

41. Subject to any arrangements which may be from time to time made by agreement between the Judges of the said High Court, the sittings for trials by jury in Dublin, and the sittings of Judges of the said High Court under Commissions of Assize, Oyer and Terminer, and Gaol Delivery, shall be held by or before Judges of the Queen's Bench, Common Pleas, or Exchequer Division of the said High Court; provided that it shall be lawful for Her Majesty, if she shall think fit, to include in any such commission any Ordinary Judge of the Court of Appeal, or any Judge of the Chancery Division appointed after the first of January one thousand eight hundred and seventy-five, or any of Her Majesty's Serjeants-at-Law or Counsel learned in the law, who, for the purposes of such Commission, shall have all the power, authority, and jurisdiction of a Judge of the said High Court. *Section* 41.

§ 1. Trials in Dublin and on circuits before Judges of Common Law Divisions. J. A., 1873, s. 37. Judges of Court of Appeal.

And any person not a Judge of the High Court who shall be sent as a Commissary shall be paid the same amount and in the same manner as such person would have been paid if before the passing of this Act he had been sent as a Commissary, and if he shall be sent in place of a judge, who, under the provisions of this Act, was bound to go circuit without payment in respect thereof in addition to his salary, then one hundred and fifty pounds shall be deducted from the salary of such Judge:

§ 2. Commissary payment of.

Provided also, that, any law or custom to the contrary, it shall not be necessary in any commission for the trial of crimes and offences in the county of the city and county of Dublin to nominate more than one Judge to preside, nor for more than one judge to preside under any commission existing at the commencement of this Act.

§ 3. One Judge for Dublin Commission.

42. All the provisions with reference to the assessment of the amount of damages, or the trial of questions of fact, by or before the High Court of Chancery in Ireland, which are contained in "The Chancery Amendment Act, 1858,"(*a*) or "The Chancery Regulation (Ireland) Act, 1862,"(*b*) shall apply to the assessment of damages and the determination of questions of fact by or before the Chancery Division of the High Court as constituted by this Act, or any judge thereof, anything in this Act to the contrary notwithstanding.(*c*) *Section* 42.

Assessment of damages and trials of fact in Chancery actions.

(*a*) 21 & 22 Vic., c. 27. (*b*) 25 & 26 Vic., c. 40.
(*c*) Not in English Act.

Section 43.

Rota of Judges for election petitions. J. A., 1873, s. 38.

43. The Judges to be placed on the rota for the trial of election petitions for Ireland in each year, under the provisions of the "Parliamentary Elections Act, 1868,"(*a*) shall be selected out of the Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions of the High Court of Justice in such manner as may be provided by any Rules of Court to be made for that purpose; and in the meantime, and subject thereto, shall be selected out of the Judges of the said Queen's Bench, Common Pleas, and Exchequer Divisions of the said High Court, by the Judges of such Divisions respectively, as if such Divisions had been named instead of the Courts of Queen's Bench, Common Pleas, and Exchequer respectively, in such last-mentioned Act; Provided that the Judges who, at the commencement of this Act, shall be the Judges upon the rota for the trial of such petitions during the then current year shall continue upon such rota for the same period and in the same manner, as if this Act had not passed.

Section 44.

Powers of one or more Judges not constituting a Divisional Court. J. A., 1873, s. 39.

44. Any Judge of the 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 authorised 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.

Section 45.

Divisional Courts of the High Court of Justice. J. A., 1873, s. 40.

45. Such causes and matters as are not proper to be heard by a single Judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts may sit at the same time. A Divisional Court of the said High Court of Justice shall be constituted by two or(*b*) more of the Judges thereof. Every Judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The President of every such Divisional Court of the High Court of Justice shall be the senior Judge of those present, according to the order of their precedence under this Act.

(*a*) 31 & 32 Vic., c. 49.

(*b*) In English Act "by two or three and no more," Vid.

Section 46.

Divisional Courts for business of Queen's Bench, Common Pleas, and Exchequer Divisions. J. A., 1873, s. 41.

46. Subject to any Rules of Court, and in the meantime until such Rules shall be made, all such business belonging to the Queen's Bench, Common Pleas, and Exchequer Divisions respectively of the said High Court, as, according to the practice now existing in the Superior Courts of Common Law in Ireland, would have been proper to be transacted or disposed of by the Court sitting in Banco if this Act had not passed, may be transacted and disposed of by Divisional Courts, which shall, as far as may be found practicable and convenient, include one or more Judge or Judges attached to the particular Division of the said Court to which the cause or matter out of which such business arises has been assigned ; and it shall be the duty of every Judge of such last-mentioned Division, and also of every other Judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other Divisional Court, to take part, if required, in the sittings of such Divisional Courts as may from time to time be necessary for the transaction of the business assigned to the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively ; and all such arrangements as may be necessary or proper for that purpose, or for constituting or holding any Divisional Courts of the said High Court of Justice for any other purpose authorised by this Act, and also for the proper transaction of that part of the business of the said Queen's Bench, Common Pleas, and Exchequer Divisions respectively, which ought to be transacted by one or more Judges not sitting in a Divisional Court, shall be made from time to time under the direction and superintendence of the Judges of the said High Court of Justice, and in case of difference among them, in such manner as the majority of the said Judges, with the concurrence of [either the Lord Chancellor or](*a*) the Lord Chief Justice, shall determine.

Section 47.

§ 1. Business in Chancery and Probate Divisions to be disposed of by single Judge. J. A., 1873, s. 42.

47. Subject to any Rules of Court, and in the meantime until such Rules shall be made, all business arising out of any cause or matter assigned to the Chancery Division of the said High Court, or out of any testamentory or matrimonial cause or proceeding assigned to the Probate and Matrimonial Division, shall be transacted and disposed of in the first instance by one Judge only, as has been heretofore accustomed in the Court of Chancery, the Court of Probate, and the Court for Matrimonial Causes and Matters respectively.

(*a*) Not in English Act.

Section 47.

§ 2. Pending causes before same Judge.

And every cause or matter which, at the commencement of this Act, may be depending in the Court of Chancery, the Court of Probate, the Court for Matrimonial Causes and Matters, and the Landed Estates Court respectively, shall (subject to the power of transfer) be assigned to the same Judge in or to whose Court the same may have been depending or attached at the commencement of this Act.

§ 3. Future cases assigned as heretofore.

And every cause or matter which, after the commencement of this Act, may be commenced in the Chancery Division of the said High Court shall be assigned to one of the Judges thereof in the same manner as heretofore:

§ 4. Testamentary causes.

Provided that (subject to any Rules of Court, and to the power of transfer) all causes and matters which, if this Act had not passed, would have been within the exclusive cognizance of the Court of Probate or the Court for Matrimonial Causes and Matters shall be assigned to the Judge of the Probate and Matrimonial Division for the time being.(*a*)

§ 5. Land causes.

And all matters within the exclusive jurisdiction of the Landed Estates Court shall be assigned to the Land Judges.

Section 48.

§ 1. Cases and points reserved for Divisional Courts [or Courts of Appeal].(*b*)

48. 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 any such Court; and any such Court shall have power to hear and determine any such case or point so reserved or so directed to be argued:

§ 2. J. A., 1875, s. 22. Right to have issues properly submitted to jury.

Provided that nothing in this Act, or in any rule made under its provisions, shall take away or prejudice the right of any party to any action to have [questions of fact tried by a jury in such cases as he might heretofore of right have so required, nor upon any trial before a jury to have](*c*) the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues:

§ 3. Right enforced by exception on record.

Provided also, that such right may be enforced by motion in the High Court of Justice, or by motion in the Court of Appeal founded upon an exception entered upon or annexed to the record.

(*a*) *Vide ante*, section 3, § 8.
(*b*) This seems to be an error in authorized copy of Act.
(*c*) Not in English Act.

Section 49.

Land cases reserved for Court of Appeal.

49. From and after the commencement of this Act, any person aggrieved by any decision or order upon any question of law, made by any Judge or Judges of Assize under the Landlord and Tenant (Ireland) Act, 1870,(*a*) or, in the case of the county or the county of the city of Dublin, made by the Judges mentioned in that Act in that behalf, may require the Judge or Judges making such decision or order to reserve such question of law by way of case stated for the consideration of the Court of Appeal; and the same shall thereupon be reserved accordingly in such manner and form as shall be prescribed by rules made in pursuance of the thirty-first section of the said Act.

Section 50.

§ 1. Jurisdiction as to Crown cases reserved to be exercised by five of the Judges. J. A., 1873, s. 47.

50. The jurisdiction and authorities in relation to questions of law arising in criminal trials which are now vested in the Justices of either Bench and the Barons of the Exchequer by the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter seventy-eight, intituled "An Act for the further amendment of the administration of the Criminal Law," or any Act amending the same, shall and may be exercised after the commencement of this Act by the Judges of the High Court of Justice, or five of them at the least, of whom the Lord Chief Justice, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer, or one of such Chiefs at least, shall be part.

§ 2. Decision final.

The determination of any such question by the Judges of the said High Court in manner aforesaid shall be final and without appeal.

§ 3. No appeal in criminal cases but for error in law apparent.

And 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.

Section 51.

New trial motions before Divisional Courts. J. A., 1873, s. 48, now repealed.

51. [In proceedings in the Queen's Bench, Common Pleas, and Exchequer Divisions respectively], (*b*) every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a Judge without a jury, and every motion in arrest of judgment, or to enter judgment non obstante veredicto, or to enter a verdict for plaintiff or defendant, or to enter a nonsuit, or to reduce damages, shall be heard before a Divisional Court; and no appeal shall lie from any judgment founded upon and applying any verdict unless a motion has been made or other proceeding taken before a Divi-

(*a*) 33 & 34 Vic. c. 40. (*b*) Not in English Act.

Section 51. sional Court to set aside or reverse such verdict, or the judgment, if any, founded thereon, in which case an appeal shall lie to the Court of Appeal from the decision of the Divisional Court upon such motion or other proceeding.

Section 52. Orders not subject to appeal. J. A., 1873, s. 49.

52. No order made by the High Court of Justice or any Judge thereof, by the consent of parties, or as to costs only, being costs which by law are left to the discretion of the Court, shall be subject to any appeal, unless by leave of the Court or Judge making such order.

Section 53. Costs. Order LV. J. A., 1875.

53. Subject to the provisions of this Act and of Rules of Court, the costs of and incident to every proceeding in the High Court of Justice [and Court of Appeal respectively] (*a*) shall be in the discretion of the Court, but nothing herein contained shall deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted on in Courts of Equity: Provided, that [(subject to all existing enactments, limiting, regulating, or affecting the costs payable in any action by reference to the amount recovered therein)], (*b*) the costs of every action, question, and issue tried by a jury shall follow the event, unless, upon application made, (*c*) the Judge at the trial or the Court shall for special cause shown and mentioned in the order otherwise direct; [and any order of a Judge as to such costs may be discharged or varied by a Divisional Court: And provided also, that in all actions for libel where the jury shall give damages under forty shillings, the plaintiff shall not be entitled to more costs than damages]. (*b*)

[Where in any proceeding in the High Court of Justice or Court of Appeal the costs of any party to the proceeding are ordered to be paid or borne by another party to the proceeding, or by a fund or estate, those costs shall, if the Court so directs, include, in addition to the costs now allowed on taxation as between party and party, all or any other costs, charges, and expenses reasonably incurred for the purposes of the proceeding; but this enactment shall not apply to any proceeding for the recovery of a penalty.](*b*)

Section 54. Discharging orders made in Chambers. J. A., 1873, s. 50.

54. Every order made by a Judge of the said High Court in Chambers, except orders made in the exercise of his discretion as to costs in cases where under the provisions of the next preceding section a right of appeal is not expressly given, may be set aside or discharged upon notice by any Divisional Court, or by the Judge sitting

(*a*) Not in English Act. (*b*) Not in English Order.
(*c*) Made "at the trial" in English Order.

in Court, 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. *Section* 54.

55. In case in the Chancery Division of the High Court of Justice from the amount of business, or in any Division of the said Court from the absence of a Judge or Judges through illness, it shall be found expedient that some or one of the Ordinary Judges of the Court of Appeal appointed after the passing of this Act should assist in transacting the business of such Division, it shall be lawful for them and him so to do; and while so sitting and acting such Judge or Judges shall have all the power, jurisdiction, and authority of a Judge or Judges of the said High Court of Justice. *Section* 55. Judge of Appeal may sit in Chancery Division. J. A., 1873, s. 51.

56. 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 order, decree, or judgment, be heard before not less than two Judges of the said Court sitting together. *Section* 56. § 1. Court of Appeal, three Judges. J. A., 1875, s. 12.

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. § 2.

Any direction incidental to a proceeding in appeal, not involving the hearing of such decrees, judgments, or orders, final or interlocutory, as aforesaid, 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. § 3. Power of single Judge. J. A., 1873, s. 52.

57. 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 in a cause or matter heard by himself either sitting alone or with other Judges. *Section* 57. No judge to sit on appeal from his own order. J. A., 1875, s. 15.

58. All such arrangements as may be necessary or proper for the transaction of the business from time to time pending before the Court of Appeal shall be made by and under the direction of the President and the other(*a*) Judges of the said Court of Appeal. *Section* 58. Arrangements for business of Court of Appeal. J. A., 1873, s. 55.

(*a*) "Ex-officio and ordinary," English Act.

PART IV.

Trial and Procedure.

Section 59.

Assessors may be called. J. A., 1873, s. 56.

59. 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, the High Court or the Court of Appeal may, in any civil cause or matter as aforesaid in which it may think 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 assessors shall be determined by the Court.

Section 60.

§ 1. Provisions as to arbitration applied to new Courts.

60. The provisions contained in the sections of "The Common Law Procedure Act (Ireland), 1856,"(*a*) in reference to arbitration, shall apply to the High Court of Justice and the several Divisions thereof, and the Judges of the same respectively, in the same manner as formerly to the Superior Courts of Common Law and the Judges of the same respectively.

§ 2. Remitter of actions to Civil Bill Courts.

The powers conferred by the fifth and sixth sections of "The Common Law Procedure Act (Ireland), 1870,"(*b*) upon the Superior Courts of Common Law and the Judges of the same respectively shall apply to the High Court of Justice, the Divisions of the same, and the Judges of such Divisions respectively, in the same manner as formerly to the Superior Courts of Common Law and the Judges of the same respectively.

§ 3. To include ejectments for non-payment of rent.

The provisions contained in the said last-mentioned sections, enabling actions to be remitted to the Civil Bill Courts, shall apply to ejectments for non-payment of rent commenced or pending in the High Court of Justice where the same shall be within the jurisdiction of the Civil Bill Courts. Such powers to be exercised upon such application and in such manner as shall be provided by general Rules of Court.

Section 61.

Rules of Court may be made before the commencement of Act by Order in Council. J. A., 1875, s. 17.

61. The Lord Lieutenant may at any time after the passing and before the commencement of this Act, by Order in Council, made upon the recommendation of the Lord Chancellor, the Lord Justice of Appeal, the Chief Justice, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron, or any three of them, and of the other Judges of the several Courts intended to be united and consolidated by this Act, or of a majority of such other Judges, make rules, to be styled Rules of Court, for carrying this Act into effect, and in

(*a*) 19 & 20 Vic., c. 102. (*b*) 33 & 34 Vic., c. 109.

particular for all or any of the following matters ;(*a*) that is to say, *Section* 61.

(1.) For regulating the sittings of the High Court of Justice and the Court of Appeal, and of any Divisional or other Courts thereof respectively, and of the Judges of the said High Court sitting in Chambers ; and — As to sittings.

(2.) For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal [including all matters connected with writs, forms of actions, parties to actions, evidence, and mode and place of trial, and for the reporting by a competent shorthand writer of the evidence in all cases of trials by jury whenever it may be expedient or desirable to do so ; and](*b*) — Pleadings, practice, and procedure. Short-hand writers.

(3.) Generally, for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein [(including the costs to be allowed to solicitors of the Supreme Court in respect of business transacted in or before any of such Courts or the offices thereof, or the fees, remuneration, and expenses to be allowed to witnesses, or the fees to be payable to or receivable by sheriffs for the discharge of any duties under this Act or in obedience to the order of the Supreme Court, or any Division or Master thereof), or relating to the conduct of civil or criminal business coming within the cognizance of the said Courts respectively, for which provision is not expressly made by this Act ;(*b*) and] — Duties of officers. Costs to solicitors. Fees, &c., see J. A., 1875, s. 26. Conduct of civil or criminal.

(4.) [For regulating the sittings of Judges in Chambers, the issuing and hearing of summonses, and the allowance or disallowance of the expense of the attendance of counsel upon such hearings, and, generally, for the efficient despatch of Chamber business under the provisions of this Act] ; and(*b*) — Chamber sittings.

(5.) [For prescribing, regulating, or doing anything which under this Act may be prescribed, regulated, or done by Rules of Court].(*b*) — General Powers.

§ 6. Commencement of altered Rules by Order in Council with concurrence of Judges.

From and after the commencement of this Act, the Lord Lieutenant may at any time, with the concurrence of a majority of the Judges of the Supreme Court present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), by Order in Council alter and annul any Rules of Court for the time being in force, and have and exercise the same power of making

(*a*) English Act adds " So far as they are not provided for by the rules in the First Schedule to this Act."

(*b*) Not in English Act.

Section 61. Rules of Court as is by this section vested in the Lord Lieutenant, on the recommendation of the Judges hereinbefore specified, before the commencement of this Act.(*a*)

§ 7. Regard had to English Rules of Court.

In making, altering, or annulling Rules of Court in pursuance of this Act, regard shall be had to the Rules of Court for the time being in force under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, so as that the pleading, practice, and procedure in the High Court of Justice and Court of Appeal respectively constituted by this Act shall, so far as may be practicable and convenient, having regard to the difference of the laws and circumstances of the two countries, be the same as the pleading, practice, and procedure in the High Court of Justice and Court of Appeal respectively constituted by the said Acts.

§ 8. Parliamentary sanction.

All Rules of Court made in pursuance of this part of this Act shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided.

§ 9.

All Rules of Court made in pursuance of this part of this Act, if made before the commencement of this Act, shall, from and after the commencement of this Act, and if made after the commencement of this Act, shall, from and after the time when they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this Act.

§ 10. Other special provisions as to Rules.

The powers to make Rules of Court contained in this section are not to affect special provisions in this Act enabling rules to be made in particular instances.

§ 11. Scheduled Rules to regulate proceedings.

The Rules contained in the schedule to this Act (which shall be read and taken as part of this Act) shall come into operation immediately on the commencement of this Act, and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and the Court of Appeal respectively, unless and until, by the authority herein provided in that behalf, any of them may be altered or varied; but such Rules, and also all Rules to be made before the commencement of this Act as herein mentioned, shall, for all the purposes of this Act, be Rules of Court capable of being annulled or altered by the same authority by which any other Rules of Court may be made, altered, or annulled after the commencement of this Act.

Section 62. Circuits and assizes. J. A., 1875, s. 23.

62. The Lord Lieutenant may from time to time, after the commencement of this Act, by Order in Council, re-

(*a*) The English Act enables the Supreme Court by a majority of its Judges, including the Lord Chancellor, to do this without any order in Council.

arrange the circuits or reduce their number, and direct what counties and towns shall be upon each circuit. All Orders in Council made in pursuance of this section shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided. *Section 62.*

63. "The Winter Assizes Act, 1876,"(*a*) (excepting section 5,) shall from and after the passing of this Act extend to Ireland, and all the powers thereby vested as to England in Her Majesty shall as to Ireland be vested in and may be exercised by the Lord Lieutenant, by and with the advice and consent of the Privy Council in Ireland, and every Order of the Lord Lieutenant in Council made in pursuance of the said Act, and published in the Dublin Gazette, shall have the like effect in Ireland as an Order in Council made in pursuance of the said Act would have in England, and provision may be made by such Order for the hearing and despatch at any winter assizes as well of criminal business as also of such civil business as may be by such Order prescribed. *Section 63.* Winter Assizes Act. Powers may be exercised by Order in Council.

64. All Rules and Orders of Court which shall be in force in the Court of Probate and the Court for Matrimonial Causes and Matters respectively at the time of the commencement of this Act except so far as they shall by Rules of Court be expressly varied, shall remain and be in force in the High Court of Justice and in the Court of Appeal respectively in the same manner in all respects as if they had been Rules of Court under this Act. *Section 64.* Probate and Matrimonial Causes Rules of the High Court. See J.A., 1875, s. 18.

65. Subject to any Rules of Court to be made under and by virtue of this Act, the practice and procedure in all criminal causes and matters whatsoever in the High Court of Justice, including the practice and procedure with respect to Crown cases reserved, shall be the same as the practice and procedure in similar causes and matters before the passing of this Act. *Section 65.* § 1. Criminal procedure to remain unaltered.

[In cases on the Crown side of the Queen's Bench Division a writ of error to the House of Lords may issue in like manner, and subject to like conditions and permission, and in respect of like proceedings, as such writ would have issued from the Court of Queen's Bench if this Act had not been passed.] (*b*) § 2. Writ of Error to House of Lords.

66. Nothing in this Act, or in any Rules of Court to be made by virtue hereof, save so far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by *Section 66.* Rules of evidence not affected. J. A., 1875.

(*a*) 39 & 40 Vic. c. 57. (*b*) Not in English Act.

Section 66. jury, or the rules of evidence, or the law relating to jurymen or juries.

Section 67.

Existing procedure of Courts not inconsistent with Act preserved. J. A., 1875, s. 21.

67. Save as by this Act or by any Rules of Court may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is hereby transferred to the said High Court, and to the said Court of Appeal, respectively, under or by virtue of any law, custom, general orders, or rules whatsoever, and which are not inconsistent with this Act or any Rules of Court, may continue to be used and practised in the said High Court of Justice, and the said Court of Appeal, respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred if this Act had not passed.

Section 68.

Statutory provisions of practice may be modified by Rules of Court.

68. Where any provisions in respect of the practice or procedure of any Courts, the jurisdiction of which is transferred by this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court of Justice and the Court of Appeal.

Any provisions relating to the payment, transfer, or deposit into, or in, or out of any Court of any money or property, or to the dealing therewith, shall, for the purposes of this section, be deemed to be provisions relating to practice and procedure.

Section 69.

Orders and Rules to be laid before Parliament, &c. J. A., 1875, s. 25.

69. Every general rule, order in Council, rule of Court, and general order required by this Act to be laid before each House of Parliament, shall be so laid within forty days next after it is made, if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament, within the next subsequent one hundred(*a*) days on which the said House shall have sat, praying that any such rule or order may be annulled, Her Majesty may thereupon by Order in Council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

Section 70.

Council of Judges to consider

70. A Council of the Judges of the Supreme Court, of which due notice shall be given to all the said Judges,

(*a*) Forty days in English Act.

shall assemble once at least in every year, on such day or days as shall be fixed by the Lord Chancellor, with the concurrence of the Lord Chief Justice, for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the said Courts respectively, and of inquiring and examining into any defects which may appear to exist in the system of procedure or the administration of the law in the High Court of Justice or the said Court of Appeal, or in any other Court from which any appeal lies to the said High Court or any Judge thereof, or to the Court of Appeal; and they shall report annually to the Chief Secretary to the Lord Lieutenant of Ireland what (if any) amendments or alterations it would in their judgment be expedient to make in this Act, or otherwise relating to the administration of justice, and what other provisions, (if any,) which cannot be carried into effect without the authority of Parliament, it would be expedient to make for the better administration of justice. An Extraordinary Council of the said Judges may also at any time be convened by the Lord Chancellor.

Section 70.
procedure and administration of justice.
J. A., 1873, s. 75.

71. All Acts of Parliament relating to the several Courts and Judges whose jurisdiction is hereby transferred to the High Court of Justice and the Court of Appeal respectively, or wherein any of such Courts or Judges are mentioned or referred to, shall be construed and take effect, so far as relates to anything done or to be done after the commencement of this Act, as if the High Court of Justice or the Court of Appeal, and the Judges thereof, respectively, as the case may be, had been named therein instead of such Courts or Judges whose jurisdiction is so transferred respectively; and in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the Judge or any Judges, or of any number of the Judges, of any one or more of the Courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of Judges of the High Court of Justice: Provided always, that any provisions of such Acts inconsistent with the provisions of this Act shall be and the same are hereby repealed.] (*a*)

Section 71.
Statutes relating to former Courts to apply under this Act.
J. A., 1873, s. 76.

(*a*) Not in English Act.

PART V.

Officers and Offices.

Section 72.

§ 1. Transfer of existing staff of officers to Court of Judicature. J. A., 1873, s. 77.

72. The Receiver Master and the Accountant-General in Chancery, and the Masters in the Courts of Common Law, the Clerk of the Crown and Hanaper, the Clerk of the Crown of the Court of Queen's Bench, and the Taxing Masters, Secretaries, Registrars, Clerk of Records and Writs, Examiner in the Court of Chancery, Registrar of the Consolidated Nisi Prius Court, Clerks of the Rules and Pleadings and Record Assistants, Chief and other Clerks, Commissioners to take oaths or affidavits, or the acknowledgment of deeds by married women, Stamp Distributors, Messengers, Court and Office Keepers, *Hall Porters*, (*a*) Tipstaves, Criers, and other officers and assistants at the time of the commencement of this Act attached to any Court or Judge whose jurisdiction is hereby transferred to the High Court, or to the Court of Appeal, and also all Registrars, Clerks, officers, and other persons at the time of the commencement of this Act engaged in the preparation of commissions or writs, or in the registration of judgments or any other ministerial duties in aid of or connected with any Court the jurisdiction of which is hereby transferred to the said Courts respectively, also all persons who were officers of or connected with the late Masters of the Court of Chancery, or their offices, shall, from and after the commencement of this Act, be attached to the Supreme Court of Judicature consisting of the High Court of Justice and the Court of Appeal.

§ 2. Rank, &c. Tenure of office, &c.

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, as if this Act had not passed; any such officer who is removable by the Court to which he is now attached shall be removable by the Court or Division to which he shall be attached under this Act, or by the majority of the Judges thereof, for the same causes as heretofore.

§ 3. Clerk of Errors.

[Provided, however, that the existing Third Assistant in the Writ and Seal Office and the existing Clerk of Errors shall not be entitled to the benefit of this provision, and shall cease to be officers of the High Court upon an order of the Lord Chancellor to that effect without being entitled to compensation.] (*b*)

§ 4. Rights of

The existing Registrars, Assistant Registrars, and

(*a*) Quere. (*b*) Not in English Act.

Clerks to the Registrars in the Chancery Registrars' office, and also the existing officers of the three law courts, shall, so long as they continue officers of the Courts, retain any right of succession secured to them by Act of Parliament, so as to entitle [those who are thus secured](*a*) in their respective offices, or in any substituted offices, to the succession to appointments with similar or analogous duties and with equivalent salaries.

Section 72. succession in Registrars' office and Law Courts.

All officers who at the time of the commencement of this Act shall be attached to the Court of Chancery, or any Judge or Master thereof, shall be attached to the Chancery Division of the High Court of Justice; all officers who at the time of the commencement of this Act shall be attached to the Landed Estates Court, or the Judges thereof, shall be attached to the Land Judges of the Chancery Division; all officers who at the time of the commencement of this Act shall be attached to the Court of Queen's Bench shall be attached to the Queen's Bench Division of the said High Court; and all officers who at the time of the commencement of this Act shall be attached to the Court of Common Pleas shall be attached to the Common Pleas Division of the said High Court; and all officers who at the time of the commencement of this Act shall be attached to the Court of Exchequer shall be attached to the Exchequer Division of the said High Court; and all officers who at the time of the commencement of this Act shall be attached to the Court of Probate and the Court for Matrimonial Causes and Matters shall be attached to the Probate and Matrimonial Division of the said High Court.

§ 5. Attachment of Officers to Courts. J. A., 1875. Ord. LX.

All clerks and other officers attached to any existing Judge who under the provisions of this Act shall become a Judge of the High Court of Justice or of the Court of Appeal shall continue attached to such Judge, and shall perform the same duties as those which they have hitherto performed, or duties analogous thereto, and 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, as if this Act had not passed.

§ 6. Personal officers.

The distribution of business among the officers so attached to the said respective Divisions, the duties to be discharged by them, and any re-arrangement connected therewith, shall be regulated, controlled, and directed by Rules of Court.

§ 7. Distribution of business.

(*a*) Not in English Act.

Section 72.

§ 8. Transfer of officers from one Division to another.

If the services of any existing officer attached in manner aforesaid to a Division shall not be required in the Division to which he is attached, it shall be lawful for the Lord Chancellor, with the concurrence of the other Presidents of Divisions, or two of them, by order, to transfer such officer to some other office of the High Court of Justice, or some Division thereof, subject, however, to the conditions herein-after imposed as to the nature of the duties he is to perform.

§ 9. Offices consolidated presently.

The following offices shall at dates to be fixed by the Lord Chancellor, with the concurrence of the Treasury, but within two years from the commencement of this Act, be consolidated in manner following: the Taxing Offices of the Common Law Courts and of the Landed Estates Court with the Taxing Office of the Court of Chancery, so as to have but one Taxing Office for the Supreme Court and the several Courts and Divisions thereof; the Office of Accountant in the Landed Estates Court with the Office of Accountant-General in the Court of Chancery, so as to have but one accounting department for the Supreme Court and all Courts and Divisions thereof; the Writ and Seal Office of the Law Courts with the Record and Writ Office in Chancery, so as to have but one office out of which all writs and summonses to commence proceedings in the High Court or any Division thereof may issue, and in which the records of all proceedings therein may be preserved; and the Notice Office of the Landed Estates Court with the Notice Office of the Court of Chancery.

§ 10. Future consolidation of offices.

Subject to the provisions in this Act as to tenure and salary of existing officers, and as to the discharge by them of analogous duties only, the Lord Chancellor, the Chief Justice, the Chief Justice of the Common Pleas, and the Chief Baron, or any two of them, of whom the Lord Chancellor shall be one, with the concurrence of the Treasury, may, by order, consolidate any other offices of the Courts whose jurisdiction is hereby transferred to the Supreme Court in any cases where the union of the existing Courts into one Supreme Court shall render it no longer necessary or expedient to retain such offices separate.

§ 11. Distribution of business.

The distribution of business in the offices so united and consolidated, and the duties to be discharged by the officers thereof, shall be regulated and directed by Rules of Court.

§ 12. Duties of officers not defined.

All other officers and persons (if any) hereby attached to the Supreme Court, for the regulation of whose duties

provision has not been herein-before made, shall have their duties defined by the Lord Chancellor. *Section 72.*

§ 13. Officers not required to discharge duties not the same or analogous.

An existing officer hereby attached to the Supreme Court or any Court or Division thereof shall not be required to discharge any duties which are not either the same as or similar or analogous to those which he performed immediately before the commencement of this Act; and in case of question as to the duties proposed to be imposed upon an officer being similar or analogous, the Lord Chancellor shall decide, having regard to the rank and position previously held by such officer.

§ 14. Increase of salary with duties.

The Lord Chancellor may, with the consent of the Treasury, increase the salary of any officer who is by this Act attached to the Supreme Court, or any Court, Division, or Judge thereof, and whose duties are increased by reason of the passing of this Act.

§ 15. Release of officers on compensation.

In case it shall appear to the Lord Chancellor that, by reason of the consolidation or abolition of offices under the provisions of this Act, the continuance of the services of any officer holding during good behaviour, or during good behaviour subject to removal for cause by some Court or Judge, is unnecessary, the Lord Chancellor may, with the concurrence of the Treasury, make arrangements for the release of such officer from his duties, and thereupon it shall be in the power of the Treasury to award to such officer such compensation as, having regard to his period of service, to the tenure of the office held by him, the Treasury shall consider just and reasonable:

Scale of.

Provided always, where such officer shall have served for any period not exceeding fifteen years, the annual amount so to be awarded shall not be more than one half of the salary and emoluments of the office held by him, and for each year of completed service exceeding fifteen years there shall be awarded in addition one thirtieth part of the salary and emoluments of the office, but in no case shall the sum awarded exceed three fourth parts of the salary and emoluments of such office:

Compensation for loss of right of succession.

Provided also, that in addition to any compensation to be awarded under the foregoing provisions the Lord Chancellor, with the concurrence of the Treasury, may award to any officer having by statute any right of succession to a position of higher rank and emolument such further compensation in respect of such right as, having regard to the circumstances of the case and to the amount awarded under the foregoing provisions, shall appear just and reasonable:

Consent of

Provided also, that no such officer appointed before

Section 72. existing officer.

the passing of this Act shall be so released without his consent.

§ 16. Compensation exceeding limits of Superannuation Act.

In every case in which the compensation awarded under such special circumstances affecting the tenure or position of an officer as are above referred to shall exceed the amount which might be awarded under the provisions of the seventh section of the Superannuation Act, 1859, (*a*) without a special minute being laid before Parliament, the compensation shall be awarded by special minute of the Treasury, stating the reasons for it, and a copy of the minute shall be laid before Parliament within fourteen days of the date of the minute, if Parliament be then sitting, or if not, then within fourteen days of its next meeting.

§ 17. Claims for compensation for loss of emoluments and rights of succession.

Any existing officer attached to any existing Court or Judge whose jurisdiction is abolished or transferred by this Act, and whose emoluments or statutory rights of promotion or succession are affected by the passing of this Act, shall be entitled to prefer a claim to the Treasury; and the Treasury, if it shall consider his claim to be established, shall have power to award to him such sum, either by way of compensation or as an addition to his salary, as it thinks just, having regard to the tenure of office by such officer and to the other circumstances of the case.

Section 73. § 1. Future reorganization of official staff.

73. Subject to the provisions in this Act contained as to existing officers of the courts whose jurisdiction is hereby transferred to the Supreme Court, the Lord Chancellor, the Chief Justice, the Chief Justice of the Common Pleas, and the Chief Baron, or any two of them, of whom the Lord Chancellor shall be one, with the concurrence of the Treasury, shall, within two years from the commencement of the Act, determine what officers, clerks, or other persons holding subordinate positions, requisite for the permanent organization of the official staff of the Supreme Court, and every Court and Division thereof, shall be retained or employed; and may, with the like concurrence, abolish any unnecessary office, or reduce, or in case of additional duties increase, the salary of an office, or alter the designation or duties thereof, notwithstanding that the patronage thereof may be vested in an existing Judge.

Regard to rights of succession.

Provided always, that if and when under the provisions of this Act any office shall be abolished to which any junior officer shall have by statute a direct or qualified

(*a*) 22 Vic., c. 26.

right of succession, such compensation shall be given to such last-mentioned officer in respect of the loss of such right of succession as to the Lord Chancellor, with the concurrence of the Treasury, shall seem just. *Section 73.*

When a vacancy occurs in any office after the passing of this Act, an appointment shall not be made thereto for the period of one month without the assent of the Lord Chancellor given with the concurrence of the Treasury; and further the Lord Chancellor may, with the concurrence of the Treasury, suspend the making any appointment to such office for any period not later than the first day of December, one thousand eight hundred and seventy-nine, and may, if it be necessary, make provision in such manner as he thinks fit for the temporary discharge in the meantime of the duties of such office. § 2. Temporary suspension of appointment to vacancies after passing of Act.

Subject to the provisions of this Act preserving their patronage to existing Judges, all offices which may not be abolished in manner aforesaid shall continue, and shall when vacant be filled up in manner following:— § 3. Future vacancies filled.

All junior clerkships in the High Court of Justice shall be filled up by open competition, but this provision shall not apply to any person holding any office or clerkship at the time of the passing of this Act. § 4. Junior clerkships by open competition.

The Lord Chancellor shall, with the concurrence of the Civil Service Commissioners, make regulations as to the qualification of candidates, and the subjects of examination. § 5. Regulations for qualifications of candidates.

All officers attached to the High Court, or the Chancery Division thereof, who have been heretofore appointed by the Master of the Rolls or Vice-Chancellor, save those appointed by competition as aforesaid, shall continue, while so attached, to be appointed by the Master of the Rolls and Vice-Chancellor and their successors respectively in the same manner and on the same conditions and occasions as heretofore. § 6. Chancery officers.

All officers of the Chancery Division attached to the Land Judges, heretofore appointed by such Judges, or who under the provisions of this Act shall be attached to the Land Judges, save those appointed by competition as aforesaid, shall be appointed by them with such approval as heretofore. § 7. Law officers.

All other officers attached to the Divisions of the High Court shall, save those appointed by competition as aforesaid, be appointed for each such Division by the President thereof. § 8. Divisional officers.

All officers attached to any Judge shall be appointed by the Judge to whom they are attached. § 9. Personal officers.

Section 73.

§ 10. General officers and Commissioners by Lord Chancellor.

Subject to these provisions, all officers assigned to perform duties with respect to the Supreme Court of Judicature generally, or attached to the High Court of Justice generally, or the Court of Appeal, and all Commissioners to take oaths or affidavits in the Supreme Court, and all officers for whose appointment other provision is not expressly made in this section, shall be appointed by the Lord Chancellor.

§ 11. Approval of Lord Lieutenant.

Provided, however, that all officers attached to the Supreme Court of Judicature, or to the High Court, or to any Division or Judge thereof, who have been heretofore appointed by the Lord Lieutenant, shall not be appointed without the approval of the Lord Lieutenant.

§ 12. Officers' power to appoint repealed.

Any statutable power existing at the passing of this Act to enable any officer or officers of any Court to appoint to any office, or to employ any persons in duties appertaining to any office, is hereby repealed, and the right of appointing to such offices, if they shall be continued, shall vest, in the case of offices attached to Divisions, in the Presidents of the Divisions, and in all other cases in the Lord Chancellor, but no vacancy in any of such offices shall be filled without the concurrence of the Treasury. Nothing herein contained shall affect or be taken as affecting the right of appointment at present vested in the district registrars of the Court of Probate, under the Act twentieth and twenty-first Victoria, chapter seventy-nine, section one hundred and fourteen.

§ 13. Qualifications preserved.

Any qualification required for appointment to any office by any statute in force at the commencement of this Act shall continue.

§ 14. Removal of officers.

Any officer of the Supreme Court of Judicature, or of the Court of Appeal, or of the High Court, or of any Division or Judge thereof (other than such officers attached to the person of a Judge as are removable by him at his pleasure) may be removed by the person having the right of appointment to the office held by him, with the approval of the Lord Chancellor, for reasons to be assigned in the order of removal.

§ 14. Authority over officers.

The authority of the Supreme Court of Judicature, and of the Court of Appeal and of the High Court of Justice, over all or any of the officers attached to the said Courts, or any of them generally, with respect to any duties to be discharged by such officers respectively, may be exercised by the Lord Chancellor, and over the officers attached to any Division of the High Court by the President of such Division, with respect to any duties to be discharged by them respectively.

Section 74.

Powers of commissioners to administer oaths. J. A., 1873, s. 82.

74. Every person who is or shall be authorized to administer oaths in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice shall be a commissioner to administer oaths in all causes and matters whatsoever which may from time to time be depending in the said High Court or in the Court of Appeal;(*a*) and every such commissioner, if a solicitor, is hereby authorized to exercise his functions as such commissioner in any part of Ireland without regard to any limit of place specified in his commission. And all answers, disclaimers, examinations, and affidavits in causes or matters depending in any of the Courts whose jurisdiction is hereby transferred to the High Court of Justice or Court of Appeal, or in the said High Court of Justice or Court of Appeal, and also acknowledgments required for the purpose of enrolling any deed in any of the said Courts, or affidavits to memorials for the purpose of registering deeds in Ireland, shall and may be sworn and taken in England or Scotland, or the Isle of Man, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the Judges and other officers of the several Divisions of the said High Court or Court of Appeal, and also the Registrar and other officers of the Office for the Registry of Deeds in Ireland shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul attached, appended, or subscribed to any such answers, disclaimers, examinations, and affidavits, acknowledgments, memorials, or other documents to be used in the said High Court, or in any of the Divisions thereof, or in the Court of Appeal, or in the Office for the Registry of Deeds in Ireland.(*a*)

Section 75.

§ 1. Receiver Master may be released.

75. After the passing of this Act no successor to the existing Receiver Master shall be appointed; and it shall be lawful for the Lord Lieutenant, with the consent of the Lord Chancellor, to release the existing Receiver Master from the further discharge of his duties in the same manner, and upon the same terms, as the Lord Chancellor was empowered to release the other Masters by the Chancery (Ireland) Act, 1867;(*b*) and upon the death, resignation, or release of such existing Receiver

(*a*) Not in English Act. (*b*) 30 & 31 Vict. c. 44.

Section 75.

Master, the powers and duties in Lunacy matters vested in and performed by the Receiver Master, other than those connected with the management of land, shall be exercised and performed by the Lord Chancellor and the officers attached to him according to the course of procedure in the Chancellor's court and offices.

§ 2. Powers and duties as to receivers and lands transferred to Land Judges.

And the powers and duties vested in and performed by such Receiver Master in reference to the management of landed estates, and the supervision and control of receivers over the same, shall be exercised by the Land Judges, and all matters and business which shall be then pending in the office of such Receiver Master in reference to receivers appointed over any estate by or in pursuance of any order of the Court of Chancery, or any of the Judges or Masters thereof, or of the Lord Chancellor entrusted by the Queen's Sign Manual with jurisdiction in Lunacy, and the accounting of such receivers, and the letting and management of the estates over which any such receiver shall have been appointed, shall be thereupon transferred to the said Land Judges, and shall thenceforth, subject to any Rules of Court to be made by the Lord Chancellor, with the concurrence of the Land Judges or either of them, be prosecuted and conducted before such Judges or one of them in the same manner as the same would have been prosecuted or conducted before the Receiver Master if this Act had not been passed.

§ 3. Other matters among Chancery Judges.

And all matters and business, other than as aforesaid and other than the audit of public accounts, which shall be then pending in the office of such Receiver Master shall, subject to Rules of Court and to the power of transfer, be distributed among the Judges of the Chancery Division of the said High Court as the Lord Chancellor, with the concurrence of any two of the Judges of the said Division, shall direct.

§ 4. Future reference to appoint receivers to Land Judges.

Any references to appoint receivers over land which may be made by any Judge of the High Court of Justice, including the Lord Chancellor entrusted in Lunacy as aforesaid, after the death, resignation, or release of said Receiver Master, shall be made to the said Land Judges, or one of them, and the accounting of the receivers appointed either under such references or by the Land Judges themselves, or by any other Judge, and the control of such receivers, and the management of the estates over which they shall be appointed, shall be exercised by the Land Judges. (*a*)

(*a*) See § 13, committing this duty to the Junior of the Land Judges.

Section 75.

§ 5. Lunacy, appointing receivers in.

Provided always, that nothing herein contained shall prevent any Judge, or the Lord Chancellor entrusted in Lunacy as aforesaid, from himself appointing a receiver over land, or over personal estate other than land, in any case in which he shall think it expedient to do so; and in any such case the Judge may, if he shall think it expedient, and in all cases in which he shall appoint a receiver over personal estate other than land he shall, by order direct that all subsequent proceedings with regard to such receiver shall be taken in his own Court, and thereupon all such proceedings shall be taken before such Judge or his officers.

§ 6. Appeals from orders in receiver matters.

Appeals from any orders made by the said Land Judges with regard to any matters connected with receivers or the management of land shall lie to the Court of Appeal and not to the Court or Judge by whom reference to them to appoint or take the accounts of a receiver shall have been made, and no order so made shall require to be confirmed by such last-mentioned Court or Judge.

§ 7. Moneys in hands of receivers to be lodged in Court.

Subject to any Rules of Court, and unless the Court or Judge by whom any such reference shall be made shall otherwise order, all sums of money received by any receiver shall, after payment of or providing for the necessary outgoings of and allowances in respect of the estate over which he shall be so appointed, be lodged to the credit of the cause or matter in which the reference to the Land Judges shall have been made, or shall be paid by said Receiver according to the orders of the Judge to whom such cause or matter is attached.

§ 8. Audit of public accounts to Local Government Board.

The jurisdiction to audit certain public accounts (including accounts of the Commissioners of Charitable Donations and Bequests in Ireland), and every other jurisdiction (if any) not in reference to causes, matters, or proceedings in Chancery, now vested in the Receiver Master, shall (unless the Lord Lieutenant in Council shall otherwise direct), after the death, resignation, or release of the existing Receiver Master, vest in and be exercised by the Local Government Board for Ireland. It shall be lawful for the Lord Lieutenant in Council at any time and from time to time after the passing of this Act to make such rules and regulations as to the Lord Lieutenant in Council shall seem fit for providing for the complete, proper, and efficient exercise by the Local Government Board, or by such other authority or authorities, or person or persons as by the Lord Lieutenant in Council may be appointed in that behalf, of the jurisdiction or jurisdictions aforesaid.

Section 75.

§ 9. Officers of Receiver Master transferred to Land Judges.

The officers connected with the office of the Receiver Master shall (subject to the provisions herein-after contained) be transferred and attached to the Land Judges, and the said officers shall be employed in duties similar or analogous to those which they at present discharge, and they shall 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 such salaries and pensions shall be chargeable upon and payable out of the same funds, as if this Act had not been passed.

§ 10. Transfer to Local Government Board.

Notwithstanding anything herein-before provided, it shall be lawful for the Lord Lieutenant in Council to transfer and attach to the Local Government Board, or to any other authority or person appointed to exercise any jurisdiction now vested in the Receiver Master, any of the said officers heretofore engaged in the performance of duties connected with any jurisdiction which shall, under or in pursuance of this Act, be vested in such Board, authority, or person, and to require any of the said officers to perform such duties connected with the said jurisdiction, and similar or analogous to those which they at present perform, in such manner, and subject to such authority and control, as the Lord Lieutenant in Council may prescribe, and also to require any of the officers hereby transferred and attached to the Land Judges to give assistance, by the discharge of any duties similar or analogous to those which they at present discharge, to the Local Government Board, or any other authority or person exercising any jurisdiction which shall under or in pursuance of this Act be vested in such Board, authority, or person, at such times, in such manner, and subject to such control and conditions as the Lord Lieutenant in Council may prescribe.

§ 11. Subject to same powers as other officers.

Provided also, that all the powers relating to existing officers of the Courts, and to the reorganization and new arrangement of offices herein contained, shall also apply to the officers of the Receiver Master.

§ 12. General Orders relating to.

General orders shall be made by the Lord Chancellor with the concurrence of the Land Judges, or either of them, to regulate the practice and procedure connected with the matters the subject of this section.

§ 13. Duties to be discharged by junior Judge.

The duties imposed upon the Land Judges by this section (so long as there shall be two such Judges) shall be discharged by the junior Judge for the time being; and in distributing the other business of the Land Judges between them, regard shall be had to this provision.

Section 75. § 14. Immediate discharge of Receiver Master.

The Lord Lieutenant, with the consent of the Lord Chancellor, may, if he shall think fit, before the commencement of this Act, exercise the powers by this section conferred with respect to the release of the Receiver Master from the further discharge of his duties, and in such case, or in case of vacancy in the office before the commencement of this Act, the several provisions in this section contained shall take effect, and such of the same as relate to the Land Judges shall be applicable and shall apply to the Judges of the Landed Estates Court, and such as relate to the Judges of the Chancery Division shall be applicable and shall apply to the Judges of the Court of Chancery.

Section 76. Salaries and pensions of officers.

76. There shall be paid to every salaried officer appointed in pursuance of this Act such salary out of moneys provided by Parliament as may be determined by the Treasury with the concurrence of the Lord Chancellor.

J. A., 1873, s. 85.

An officer attached to the person of a Judge shall not be entitled to any pension or compensation in respect of his retirement from or the abolition of his office except so far as he may be entitled thereto independently of this Act; but every other officer to be hereafter appointed in pursuance of this part of this Act, and whose whole time shall be devoted to the duties of his office, shall be deemed to be employed in the permanent Civil Service of Her Majesty, and shall be entitled as such to a pension or compensation in the same manner, and upon the same terms and conditions, as the other permanent civil servants of Her Majesty are entitled to pension or compensation.

Section 77. Clerks of Assize and Nisi Prius.

77. Clerks of Assize and Nisi Prius on circuit and at winter assizes may be appointed and paid in the same manner as heretofore. Clerks of Nisi Prius in Dublin may be appointed by the existing Chief Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions, and shall be paid as heretofore; but such right of appointment shall not be continued to their successors, and other provisions shall be made for the discharge of the duties now discharged by such clerks under the provisions of this Act relating to future offices of the High Court.

Section 78. § 1. Solicitors and attorneys transferred.

78. From and after the commencement of this Act, all persons admitted as solicitors, attorneys, or proctors of or by law empowered to practise in any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or the Court of Appeal, shall be called Solicitors of the (*a*) Court of Judicature, and shall be entitled to the

J. A., 1873, s. 87.

(*a*) In English Act "Supreme Court."

Section 78. same privileges and be subject to the same obligations, so far as circumstances will permit, as if this Act had not passed.

§ 2. Apprentices admitted by Lord Chancellor.

And all persons who from time to time, if this Act had not passed, would have been entitled to be admitted as solicitors, attorneys, or proctors of or been by law empowered to practise in any such Courts, shall be entitled to be admitted and to be called Solicitors of the(*a*) Court of Judicature and shall be admitted by the Lord Chancellor(*b*) and shall, so far as circumstances will permit, be entitled as such solicitors to the same privileges and be subject to the same obligations as if this Act had not passed.

§ 3. Jurisdiction over.

Any solicitors, attorneys, or proctors to whom this section applies shall be deemed to be officers of the(*a*) Court of Judicature; and that Court, and the High Court of Justice, and the Court of Appeal respectively, or any Division or Judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys as any one of Her Majesty's superior courts of law or equity might previously to the passing of this Act have exercised in respect of any solicitor or attorney admitted to practise therein.

PART VI.

Jurisdiction of Inferior Courts.(*c*)

Section 79. Rules of law to apply to inferior courts. J. A., 1873, s. 91.

79. The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in Ireland, so far as the matters to which such Rules relate shall be respectively cognizable by such Courts. [And Rules of Court as to pleading, practice, and procedure, empowered to be made by Order in Council as herein-before provided, shall be applicable to Recorders' Local Courts of Record(*d*) in Ireland, or to such one or more of them, and to such extent and in such manner only as the said Order may direct.](*e*)

(*a*) In English Act "Supreme Court."
(*b*) In English Act "By the Master of the Rolls."
(*c*) This title seems to be somewhat inappropriate.
(*d*) *Sic* in Act.
(*e*) Not in English Act.

PART VII.

Miscellaneous Provisions.

Section 80. Transfer of books and papers to Court of Judicature. J. A., 1873. s. 92.

80. All books, documents, papers, and chattels in the possession of any Court, the jurisdiction of which is hereby transferred to the High Court of Justice or to the Court of Appeal, or of any officer or person attached to any such Court, as such officer, or by reason of his being so attached, shall be transferred to the Supreme Court of Judicature, and shall be dealt with by such officer or person in such manner as the High Court of Justice or the Court of Appeal may by order direct; and any person failing to comply with any order made for the purpose of giving effect to this section shall be guilty of a contempt of the Court making such order.

Section 81. Saving as to circuits, &c. J. A., 1873. s. 93.

81. This Act, except as herein is expressly directed, shall not, unless or until other commissions are issued in pursuance thereof, affect the circuits of the Judges or the issue of any Commissions of Assize, Nisi Prius, Oyer and Terminer, Gaol Delivery, or other commissions for the discharge of civil or criminal business on circuit or otherwise, or any patronage vested in any Judges going circuit, or the position, salaries, or duties of any officers transferred to the (*a*)Court of Judicature who are now officers of the (*a*)Courts of Common Law in Ireland, and who perform duties in relation to either the civil or criminal business transacted on circuit.

Section 82. Saving as to Lord Chancellor. J. A., 1873, s. 94.

82. This Act, except so far as herein is expressly directed, shall not affect the office(*b*) of the Lord Chancellor, [nor the rank, salary, or pension attached to such office](*c*) and the officers [in the Lunacy Department, and the officers personally attached to or connected with](*c*) the Lord Chancellor, shall continue attached to him in the same manner as if this Act had not passed; and all duties which any officer of the Court of Chancery may now be required to perform in aid of any duty whatsoever of the Lord Chancellor may in like manner be required to be performed by such officer when transferred to the Court of Judicature, and by his successors. [It shall be in the power of the Lord Chancellor, with the concurrence of the Treasury, to abolish or alter the duties and designation of any offices whether in the Lunacy Department or attached to himself, and to fix the salaries of such as shall be retained, but so that no existing officer holding office

(*a*) In English Act "Supreme."
(*b*) English Act has "or position."
(*c*) Not in English Act.

Section 82. during good behaviour shall receive a less salary than heretofore, or hold office otherwise than he did before.](a)

Section 83.

Provisions as to Great Seal being in commission. J. A., 1873, s. 98.

83. When the Great Seal of Ireland is in commission, the Lords Commissioners shall represent the Lord Chancellor for the purposes of this Act, save that as to the Presidency of the Court of Appeal, and the appointment or approval of officers, or the sanction to any order for the removal of officers, or any other act to which the concurrence or presence of the Lord Chancellor is hereby made necessary, the powers given to the Lord Chancellor by this Act may be exercised by the Senior Lord Commissioner for the time being.

PART VIII.

Court Fees.

Section 84.

Fixing and collection of fees in High Court and Court of Appeal.

84. The Lord Chancellor, with the advice and consent of the other Presidents of the Divisions of the High Court, or any one of them, and with the concurrence of the Treasury, may, either before or after the commencement of this Act, by order, fix the fees and per-centages to be taken in the High Court of Justice or in the Court of Appeal, or any office connected therewith, or by any officer of those Courts, or the Lord Chancellor or other Judge of those Courts, which officer is paid wholly or partly out of public moneys, and may from time to time by order increase, reduce, or abolish all or any of such fees and per-centages, and appoint new fees and per-centages to be taken in the said Courts or offices or any of them, or by any such officer as aforesaid.

All such fees and per-centages shall (save as otherwise directed by the order) be paid into the receipt of Her Majesty's Exchequer and be carried to the Consolidated Fund, and with respect thereto the following rules shall be observed:

(1.) The fees and per-centages shall (except so far as the order may otherwise direct) be taken by stamps, and if not taken by stamps shall be taken, applied, accounted for, and paid over in such manner as may be directed by this order:

(2.) Such stamps shall be impressed or adhesive, as the Treasury may from time to time direct:

(3.) 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 for prescribing the

(a) Not in English Act.

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 adhesive stamps, and for keeping accounts of such stamps : *Section* 84.

(4.) Any document which ought to bear a stamp in pursuance of this Act, or any order made thereunder, shall not be received, filed, used, or admitted in evidence unless and until it is properly stamped within the time prescribed by the rules under this section regulating the use of stamps, but if any such document shall, through mistake or inadvertence, be received, filed, or used without being properly stamped, the Lord Chancellor or the court may, if he or it shall think fit, order that the same be stamped as in such order may be directed ; and on such document being stamped accordingly, the same, and every proceeding relating thereto, shall be as valid as if such document had been properly stamped in the first instance ; provided that no document shall be stamped as aforesaid contrary to the provisions of any other Act of Parliament for the time being in force, nor without payment of any penalty prescribed in force, nor without payment of any penalty prescribed by any such Act :

(5.) The Commissioners of Inland Revenue shall keep such separate accounts of all money received in respect of stamps under this Act, and under any orders made in pursuance thereof, as the Treasury may from time to time direct, and, subject to the deduction of any expenses incurred by those Commissioners in the execution of this section, the money so received shall, under the direction of the Treasury, be carried to and form part of the Consolidated Fund.

(6.) Any person who forges or counterfeits any such stamp, or uses any such stamp knowing the same to be forged or counterfeit, or to have been previously cancelled or used, shall be guilty of forgery, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years.

An order under this section may abolish any existing fees and per-centages which may be taken in the said courts or offices or any of them, or by the said officers or any of them, but subject to the provisions of any order made in pursuance of this section, the existing fees and per-centages shall continue to be taken and accounted for in the existing manner. All orders made in pursuance of this section shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided.

PART IX.

Unclaimed Dividends in Bankruptcy.

Section 85.

Amendment of the Irish Bankrupt and Insolvent Act, 1857, with respect to the unclaimed dividend account.

85. From and after the passing of this Act, sections eighty-four and two hundred and ninety-seven of the Irish Bankrupt and Insolvent Act, 1857(*a*), shall be and the same are hereby repealed, and the following provisions shall thereupon be in force and have effect:

As soon as may be after the passing of this Act, the Governor and Company of the Bank of Ireland shall, upon an order of the Lord Chancellor to be made in that behalf, transfer to the account of the Commissioners for the Reduction of the National Debt at the Bank of England all Government securities standing in the books of the Bank of Ireland at the time of the passing of this Act to the credit of an account called "the Unclaimed Dividend Account" under the Irish Bankruptcy and Insolvent Act, 1857.

As soon as the said Government securities have been so transferred, the Treasury shall by warrant direct the Governor and Company of the Bank of England to cancel such securities in their books.

The cash standing in the books of the Bank of Ireland at the time of the passing of this Act to the credit of an account called "the Unclaimed Dividend Account" under the Irish Bankrupt and Insolvent Act, 1857, or so much of the same as shall be determined by the Treasury, and all dividends and all moneys the produce of any bankrupt, arranging debtors, or insolvent estate, which shall from time to time after the passing of this Act be paid into or transferred to the credit of the "Unclaimed Dividend Account" under the provisions of section two hundred and ninety-five of the Irish Bankrupt and Insolvent Act, 1857, and which have remained unclaimed for a period of not less than five years from the time on which the same have been respectively paid into or transferred to the said account, shall be from time to time paid to the account of the Commissioners for the Reduction of the National Debt in such manner as the Treasury may direct. The Commissioners for the Reduction of the National Debt shall apply all cash transferred to their account in pursuance of this section in reduction of the National Debt in the same manner as the moneys issued to them under the Sinking Fund Act, 1875.(*b*)

Where any Court having jurisdiction in the matter of Bankruptcy is satisfied that any person claiming is

(*a*) 20 & 21 Vict. c. 60. (*b*) 38 & 39 Vict. c. 45.

entitled to any dividend or other payment out of the moneys carried to the account of the said Commissioners under the provisions of this section, such Court may order payment of the same in like manner as it might have done if the same had not been carried to the said last-mentioned account. In case the moneys standing to the credit of the said Unclaimed Dividend Account shall at any time be insufficient to meet the payments to be made out of the same, the Treasury shall issue out of the Consolidated Fund, or out of the growing produce thereof, such sum as may appear to them to be necessary to provide for the said payments. *Section* 85.

All salaries, allowances, damages, costs, and expenses before the passing of this Act charged on and payable out of the said Unclaimed Dividend Account, or the interest and profit arising therefrom, shall, from and after the passing of this Act, be paid out of moneys to be provided by Parliament for such purpose.

PART X.

Final Appeal.

86. All decisions, judgments, decrees, or orders of the Court of Appeal shall be subject to appeal to the House of Lords in the cases and under the conditions in and under which the like decisions, decrees, judgments, or orders of the Court of Appeal in Chancery in Ireland, or of the Court of Exchequer Chamber in Ireland, would have been subject to appeal to the House of Lords *or to the Queen in Council* (*a*) if this Act had not been passed, or as may be directed by any Act of Parliament affecting the appellate jurisdiction of the House of Lords, or any powers therein contained. *Section* 86. Final appeal to the House of Lords.

Except as herein-before provided with respect to error in certain cases on the Crown side of the Queen's Bench Division, error or appeal from any judgment, decree, or order, subsequent to the commencement of this Act, of the High Court of Justice, or any Division or Judge thereof, or of the Courts of Admiralty or Bankruptcy, or any Judge of the same respectively, may be brought only to the Court of Appeal constituted by this Act, and not directly to the House of Lords or Queen in Council, any previous law or usage to the contrary notwithstanding.

Nothing in this Act shall prejudice any right existing at the commencement of this Act to prosecute any pending writ of error or appeal, or to bring error or appeal to the

(*a*) *Sic* in the Act.

Section 86. House of Lords, or to the Queen in Council, from any prior judgment or order of any Court whose jurisdiction is hereby transferred to the High Court of Justice or to the Court of Appeal.

SCHEDULE OF RULES.

Schedule of Rules. The following are the rules referred to in the sixty-first section of this Act:

Form of Action and Summons.

(Form of action in High Court.)

J. A., 1875. Ord. 1, R. 1. (*a*) 1. All actions which have hitherto been commenced by writ of summons and plaint in the Superior Courts of Common Law in Ireland, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, shall be instituted in the High Court of Justice by a proceeding to be called an action.

Ord. 1, R. 3. All other proceedings in and applications to the High Court may, subject to Rules of Court, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if this Act had not passed.

Writ of Summons.

(Actions to be commenced by writ.)

Ord 2, R. 1. 2. Every action in the High Court shall be commenced by a writ of summons which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.

Ord. 2, R. 3. 3. Every writ of summons and the indorsement thereon may be in one of the forms herein-after referred to, and any costs incurred by the use of any more prolix or other forms of writs or of indorsements thereon than the forms herein-after referred to shall be borne by the party using the same unless the court shall otherwise prescribe.

Ord. 2, R. 8. 4. Every writ of summons and also every other writ shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chancellor, or, if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of Ireland.

Ord. 3, R. 1. 5. The indorsement of claim shall be made on every writ of summons before it is issued.

6. In the indorsement it shall not be essential to set

(*a*) Corresponding Order and Rule in England.

forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. The plaintiff may, by leave of the Court or Judge, amend such indorsement so as to extend it to any other cause of action or any additional remedy or relief. If none of the forms hereinafter referred to shall be applicable to the case, such other similarly concise form may be used as the nature of the case may require. *Schedule of Rules.* Ord. 3, R. 2 and 3.

7. Writs of summons shall be prepared by the plaintiff or his solicitor in such manner as shall be directed by rules, and shall be sealed by the proper officer, and shall thereupon be deemed to be issued. Ord. 5, R. 5 and 6.

8. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy of such writ, and all the indorsements thereon, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. Ord. 5, R. 7.

9. The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book to be called the Cause Book, in such manner as shall be directed by rules. Ord. 5, R. 8.

10. Except as otherwise provided by this Act, all writs of summons shall be served in the same manner respectively as process from the Court whose jurisdiction is transferred to the High Court might have been served if this Act had not been passed, and the High Court shall have the same power of directing substitution of service, or that any service already made should be deemed good, or that notice should be substituted for service, as might have been exercised by the said Courts respectively if this Act had not been passed.

11. Service of a writ of summons to recover possession of land may be made in the same manner as a summons and plaint in ejectment might have been served if this Act had not been passed. See Ord. 9, R. 8.

Interpleader.

12. The procedure and practice used before the passing of this Act with respect to interpleader by Courts of Common Law in Ireland shall apply to all the Divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence. Ord. 1, R. 2.

Appearance.

13. The defendant shall be bound to appear to the writ of summons at such time and in such manner as may be directed by rules.

Schedule of Rules.

Ord. 12, R. 6, 7, and 8.

14. It shall not be necessary for the defendant on entering an appearance to any writ of summons to file any defence or answer thereto. He shall enter an appearance by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person.

The solicitor of a defendant appearing by a solicitor shall state in such memorandum his registered residence.

A defendant appearing in person shall state in such memorandum his address, and a place to be called his address for service, which shall be in Ireland.

Ord. 12, R. 9.

15. If the memorandum does not contain such address it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a Judge, on the application of the plaintiff.

Ord. 12, R. 11.

16. Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the Cause Book.

Ord. 12, R. 18.

17. Any person not named as a defendant in a writ of summons for the recovery of land may, by leave of the Court or Judge, appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.

Ord. 12, R. 19.

18. 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.

Parties.

Ord. 16, R. 13.

19. No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or Judge may, at any stage of the proceedings, either upon or without the application of either party, in the manner prescribed by rules, and on such terms as may appear to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out, and that the name or names of any party or 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 action, 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 thereto. All parties whose names are so added as defendants shall be served with a summons or notice in such manner as may be prescribed by rules or by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice. *Schedule of Rules.*

20. When there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested. Ord. 16, R. 9.

Pleading.

21. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall, within such time and in such manner as may be directed by rules, deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall, within such time and in such manner as may be directed as aforesaid, deliver to the plaintiff a statement of his defence, set-off, or counter-claim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same. Ord. 19, R. 2.

22. A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof. Ord. 19, R. 3.

23. Every pleading shall, unless when otherwise provided by rules, contain as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such Ord. 19, R. 24.

Schedule of Rules.

statement being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures, and not in words. Signature of counsel shall not be necessary.

Ord. 19, R. 8.

24. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief; and the same rule shall apply to any counter-claim made or relief claimed by the defendant in his statement of defence. If the plaintiff's claim be for discovery only, the plaintiff's claim shall show it.

Ord. 19, R. 20.

25. It shall not be sufficient for a defendant, unless where otherwise provided by rules, in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff, in his reply to deny generally the facts alleged in a defence by a way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.

Ord. 19, R. 23.

26. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds, or otherwise.

Ord. 26, R.

27. Where in any action it appears to a Judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

Ord. 27, R. 1 and 2.

28. The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively which may be scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties; and all parties shall have also such further powers of amendment as may be prescribed by rules.

Ord. 22, R. 2.

29. A demurrer to any statement may be filed in such manner and form as may be prescribed by rules.

Ord. 30, R. 1.

30. Where any action is brought to recover a debt or damages, any defendant may, at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later

time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence and the claim or cause of action in respect of which such payment shall be made shall be specified therein. *Schedule of Rules.*

31. The parties may, as may be directed by rules, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court. Ord. 34, R. 1.

New Trial Motions.

32. A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless, in the opinion of the Court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only, and a new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question. Ord. 39, R. 3 and 4.

Appeals.

33. 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 such 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. Ord. 58, R. 2.

34. 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 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 seem just, 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 to the Court of Appeal may seem fit. Ord. 58, R. 3.

35. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, together with full discretionary power to receive further evidence upon questions of fact, such evi- Ord. 58, R. 5.

Schedule of Rules.

dence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. 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. The Court of Appeal shall have power 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. The powers aforesaid 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. 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 seem just.

Ord. 58, R. 6.

36. It shall 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 shall, within such time as may be prescribed by rules, 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.

37. The forms of writs and pleadings referred to in these rules are the forms prescribed in the several appendices to "The Supreme Court of Judicature Act, 1875."

Exceptions from the Rules.

Ord. 62.

38. Nothing in these rules shall affect the practice or procedure in any of the following causes or matters:

Criminal proceedings.

Proceedings on the Crown side of the Queen's Bench Division.

Proceedings on the Revenue side of the Exchequer Division.

Proceedings in the Probate and Matrimonial Division.

Proceedings before the Land Judges of the Chancery Division.

RULES

UNDER

THE SUPREME COURT OF JUDICATURE (IRELAND) ACT,

IN ADDITION TO THE RULES IN THE SCHEDULE TO THE SAID ACT CONTAINED.

N.B.—The Statutory Rules relating to Procedure contained in the Schedule to the Judicature Act (*ante*, p. 494,) will be found inserted below, each in its appropriate context and connexion with the order which deals with the same subject, and marked as follows :—

SCHEDULE RULE 1, &c. &c.
Form of Action and Summons.

ORDER 1.

SCHEDULE RULE 1.

Form of Action in High Court.

Order 1.

"All actions which have hitherto been commenced by Writ of Summons and Plaint in the Superior Courts of Common Law in Ireland, and all suits which have hitherto been commenced by Bill or Information in the High Court of Chancery shall be instituted in the High Court of Justice by a proceeding to be called an Action.

All actions and suits, how to be instituted. Ord. 1. R. 1, E.

"All other proceedings in and applications to the High Court may, subject to Rules of Court, be taken and made in the same manner as they would have been taken and made in any Court in any proceeding or application of the like kind could have been taken or made if this Act had not passed."

Other proceedings. Ord. 1, R. 3, E.

On the subject of actions see Chapter xlv., p. 353, *ante*.

SCHEDULE RULE 2.

Writ of Summons.

"Every action in the High Court, shall be commenced by a Writ of Summons which shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action shall be assigned."

Actions to be commenced by writ of summons. Ord. 2. R. 1, E.

On the subject of this Rule see Chapter xlvi., p. 355, *ante*.

Order 1.

Forms of writs.

Ord. 2, R. 2 & 3.

SCHEDULE RULE 3.

"Every Writ of Summons and the indorsement thereon may be in one of the forms hereinafter referred to, and any costs incurred by the use of any more prolix or other forms of Writs or of indorsements thereon than the forms hereinafter referred to, shall be borne by the party using the same, unless the Court shall otherwise prescribe."

SCHEDULE RULE 4.

Date and teste of writs.

Ord. 2, R. 8, E.

"Every Writ of Summons and also every other Writ shall bear date on the day on which the same shall be issued and shall be tested in the name of the Lord Chancellor, or if the office of Lord Chancellor shall be vacant, in the name of the Lord Chief Justice of Ireland."

RULES OF COURT.

Order 1.

Writ of Summons, Form of, &c.

RULE 1.

Form of writ of summons.

1. The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1 in Part I. of Appendix (A) hereto, with such variations as circumstances may require. In any action which the plaintiff proposes to be tried before a Judge and jury, he shall in the writ of summons name the county where he proposes to have the same tried. It shall not be necessary to name any county or place in such writ when the plaintiff proposes the action to be tried by any other mode of trial.

Ord. 2, R. 3, E.

Form of Writ No. 1 (Appendix A), is for service in Ireland only.

For service out of Ireland the proper forms are Nos. 3 & 4.

As to use of forms more prolix, and as to procedure as to the writ of summons generally, see Chapter xlvi. p. 356, *ante*.

Right to trial by jury.

The cases in which a plaintiff has a right to have his action tried (so far as any questions of fact arise in it) by a jury, are those in which heretofore any party to the action might of right have required it, see Ord. xxxv., R. 2, *infra*, and (506) *ante*, p. 392; see Order xxxv., R. 2, *infra*, and *ante*, Chapter liv., p. 392.

Venue.

The J. Act, 1877, sec. 33, requires the plaintiff in such a case shall in the document by which his action is commenced, name the county or place in which he proposes the cause shall be tried; but the Court may direct it to be tried elsewhere. The statute directs that so far as may be reasonably consistent with the convenient and speedy discharge of the business, every issue of fact submitted to a jury should be tried in the county or place in which the cause of action has arisen.

As to amendment of writ, see Chapter xlvi. (444) p. 359, *ante*.

Order 1.

RULE 2.

Bills of Exchange Act.

2. The writ of summons for the commencement of any action upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, may be in the Form and have the notice and indorsements mentioned in No. 2 in Part I., Appendix A. In such actions the procedure under the Bills of Exchange (Ireland) Acts, 24 & 25 Vic., c. 43, and 25 Vic., c. 23, shall apply as if such writ were a writ of summons and plaint, with such notice as is required by said first-mentioned Act.

Ord. 2, R. 6, E.

The purport of the analogous rule in England (Ord. 2, R. 6) seems to continue the old procedure under the Bills of Exchange Act, although Mr. Justice Lush expressed a doubt whether it applied after declaration delivered,(*a*) and perhaps not after the giving or refusing leave to defendant to appear, and judgment consequent on the latter.(*b*)

The Bills of Exchange Act requires an affidavit of personal service in order to have judgment immediately, and service on a partner was deemed not sufficient,(*c*) although Mr. Justice Brett in one case said "I do not see why a personal service on one of two partners should not be good service in such a case."(*d*)

It was truly said, by a special indorsement on the writ under Ord. 11, R. 3, *infra*, for a liquidated demand a plaintiff may obtain an equal advantage by having judgment under Order xiii., R. 1, *infra*, as by a proceeding under the Bills of Exchange Act, except that the plaintiff would have to take the initiative instead of the Defendant.(*e*) After leave to appear, the new procedure has been applied at later stages to actions commenced under the Bills of Exchange Act, thus the name of a new person has been substituted for that of the plaintiff at the plaintiff's instance.(*f*) So after statement of claim delivered, a new defendant has been added on application of the original defendant,(*g*) and in an action pending when the Judicature Act came into force, after leave to defend, it was ordered that the action should be continued generally under the J. Act.(*h*)

It should be observed the language of our Rule is less imperative than that of the English Rule. The latter says the old procedure shall continue to be used. Our Rule says that "in actions commenced by writ of summons in Form No. 2, the

(*a*) Campbell *v.* Jm. Thurn, 20 Sol. Jour. 31.
(*b*) Pollock *v.* Campbell, L. R., 1 Ex. D. 50; 24 W. R. 320; Anon. W. N. 1875, 248, Quain, J.
(*c*) *Ib.*
(*d*) Oger *v.* Bradnum, L. R., 1 C. P. D., at p. 3, 337.
(*e*) Anon. W. N. 1875, 248; 20 Sol. Jour. 141, Quain, J.
(*f*) Mercantile River Plate Bank *v.* Isaac; 20 Sol. Jour. 240, W. N. 1876, 104, Denman, J.
(*g*) Anon. W. N. 1876, 23; 20 Sol. Jour. 242, Lindley, J.
(*h*) Norris *v.* Beazley, L. R., 2 C. P. D., 80; 25 W. R. 320.

Order 1. old procedure shall apply as if the writ were a writ of summons and plaint."

Rule 3. Leave for service out of jurisdiction. Ord 2, R. 4, E.

3. No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a Court or Judge.

As to cases in which service of the writ of summons out of the jurisdiction can be allowed, see Order x., *infra*.

One order may be made combining several objects in relation to this matter, viz.: First for liberty to issue the writ for service out of the jurisdiction: and secondly, that when the writ has been issued, an injunction do issue, and that interrogatories may be served; and further, that plaintiff may be at liberty to serve the writ and the interrogatories out of the jurisdiction.(*i*)

The Court declined to give leave to issue a writ against a foreign sovereign, *ex. gr.*, the Sultan of Turkey, with a view of service on the Turkish Ambassador.(*k*)

The application is usually joined with one for liberty also to serve the writ out of the jurisdiction.(*l*) As to the affidavit see *infra*, Rule 4.

Rule 4. Title of affidavit for. Ord 2, R. 5, E.

4. The application for such leave shall be grounded on an affidavit entitled as between the parties to the intended action, and "In the matter of the Supreme Court of Judicature Act (Ireland), 1877."

This rule embodies the decisions made in England, to the effect that the affidavit should be entitled in the action about to be instituted, and in the matter of the Judicature Act, and that on such an affidavit an assignment of perjury might be made.(*m*)

Rule 5. Form of writ for.

5. A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in Form No. 3 in Part I. of Appendix (A) hereto, with such variations as circumstances may require. Such notice shall be in Form No. 4 in the same part, with such variations as circumstances may require.

Order II.

Indorsement.

Order 2. Indorsement of claim. Ord. 3, R. 1, E.

Schedule Rule 5.

The indorsement of claim shall be made on every writ of summons before it is issued.

(*i*) Young *v.* Brassey, L. R. 1 Ch. D. 277; 24 W. R. 110; 20 Sol. Jour. 91, V. C. H.

(*k*) Stewart *v.* Bank of England, W. N., 1876, 263, M. R.

(*l*) *In re* goods of Chamberlayne, 20 Sol. Jour. 373, Prob.

(*m*) Young *v.* Brassey, L. R., 1 Ch. D. 277, 24 W. R. 110; 20 Sol. Jour. 91, V. C. H.

SCHEDULE RULE 6.

Order 2.

"In the indorsement it shall not be expedient to set forth the precise ground of complaint or the precise remedy or relief to which the plaintiff considers himself entitled. The plaintiff may, by leave of the Court or Judge, amend such indorsement so as to extend it to any other cause of action or any additional remedy or relief. If none of the forms hereinafter referred to shall be applicable to the case, such other similarly concise forms may be used as the nature of the case may require."

Not essential it should set forth precise ground of complaint. Ord. 3, R. 2, E.

Forms. Ord. 3, R. 3.

RULES OF COURT.

RULE 1. Claim for receiver or injunction.

1. If the plaintiff seek a receiver, mandamus, or injunction, as part of his relief, he shall indorse a claim to that effect upon his writ.

We have seen(*a*) that the writ of summons must be indorsed with a statement of the relief or remedy required, although it is not essential that the precise ground of complaint should be set forth, but still the relief to be given must be in harmony with the claim.(*b*)

As to right to a receiver, see Chapter 39, *ante*, p. 296, and to a mandamus or injunction, Chapter 38, *ante*, p. 281.

RULE 2. Character in which plaintiff sues. Ord. 3, R. 4, E.

2. If the plaintiff sues or the defendant or any of the defendants is sued in a representative capacity, the indorsement shall show, in manner appearing by the statement in Appendix (A) hereto, Part II., sec. VI., or by a statement to the like effect, in what capacity the plaintiff or defendant sues or is sued.

It is doubtful whether this rule prevents a plaintiff issuing a writ in his own right, and in his statement of claim afterwards setting forth a cause of action in *autre droit*, as he might have done heretofore. See Ord. 16, R. 5, *infra*.

Where plaintiff sued on behalf of all other parties interested in a suit for administration of assets of a deceased person, it has been considered unnecessary to state this in the writ, though it should be stated in the statement of claim,(*c*) but as some Judges, and two of the Judges who formerly so decided, have doubted this,(*d*) it would be safer to express it in the writ as well.

(*a*) Schedule, Rules 5 & 6 *ante*.

(*b*) Colebourne *v.* Colebourne, L. R., 1 Chan. D. 690; 24 W. R. 235, V. C. H.

(*c*) Eyre *v.* Cox, 24 W. R., 317, M. R.; Cooper *v.* Blissett, L. R., 1 Chan. D. 691; 24 W. R. 235, V. C. H.

(*d*) Worraker *v.* Pryer, L. R., 2 Chan. D. 109; 24 W. R. 269, M. R.; Fryer *v.* Royle, L. R., 5 Chan. 540; 25 W. R. 528, V. C. B.; *In re* Vincent Parham *v.* Vincent, 26 W. R. 94, V. C. H.; Alcock *v.* Peters, 20 Sol. Jour. 451, V. C. M.

Order 2.

RULE 3.

Special indorsement liquidated demand.

Ord. 3, R. 6, E.

3. In all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque, or note, or on a trust, the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered, after giving credit for any payment or set-off.

This provision is similar to, but more extensive in its object, than that of the Com. Law Pro. Act, 1853, s. 11. Its main object is to enable the plaintiff to apply under Order xiii., for judgment in a summary way against one or more of the defendants in case of their non-appearance, and also notwithstanding the appearance of the defendant, unless he can show good cause to the contrary by displacing the plaintiff's affidavit of a good cause of action and of his belief that defendant has no defence—see Ord. xiii., R. 1, *infra.*

It applies only where the plaintiff's claim is for a debt or liquidated demand, *i.e.*, such an one as can be ascertained by calculation, and of course it excludes such as can be ascertained only by the estimation of a jury.(*e*) A penalty imposed by statute may come within the former category.(*f*) It would seem to be confined to claims seeking direct payment of money, and not to be available where the claim is to have a sum of money charged on separate estate of a married woman.(*g*) However, the joinder of a liquidated money claim with another not liquidated will not prevent plaintiff having judgment for the former.(*h*)

Particulars.

The Rule does not require the indorsement to contain any special particulars of the demand,(*i*) but it should sufficiently inform the defendant of the claim he is called on to meet, without reference to a solicitor.(*k*) In action for goods sold, it was held to be enough to say the plaintiff's claim was for so much, for *balance* of account for goods sold.(*l*)

(*e*) See Cullen *v.* Moran, 2 Ir. Jur., N. S. 28 Greene, B.

(*f*) M'Dermott *v.* Sullivan, Ir. Rep., 2 Com. Law, 312 Ex.

(*g*) Butterworth *v.* Tee and Wife, W. N. 1876, 9, 20 Sol. Jour. 178, Quain, J. See Delasaux *v.* Barling, 20 Sol. Jour. 299, M. R.

(*h*) Delasaux *v.* Barling, *ubi supra, per* M. R.

(*i*) *Ib.*

(*k*) See Mordaunt *v.* Ryan, 5 Ir. Jur. 274, C. B. Pigot.

(*l*) Anon. W. N. 1875, 220 20 Sol. Jour. 81, S. C. *nom.* Parson *v.* Smith, 20 Sol. Jour. 93, A. C.

Order 2.

Bill of particulars.

A further bill of particulars will not usually be ordered, and it is presumed under the J. Act. that such will not be necessary. Where it is needed it ought to be given in the first instance and so save the expense of a second document.(*m*) Where not sufficiently stated the court has required it to be explained (*n*)

All just and proper credits should be given at the plaintiff's peril.(*o*)

The plaintiff is not limited by the sum indorsed in case defendant omits to settle the action in the first instance by payment of the sum indorsed.(*p*)

A writ issued before the J. Act was amended by inserting an indorsement to enable plaintiff to have judgment peremptorily under Order xiii.(*q*)

A special indorsement of a writ on a Bill of Exchange in order to obtain judgment under Ord. xiii., R. 1, should contain all particulars of the Bill or note, *a fortiori* where contribution was claimed from defendant in respect of several bills and notes taken up by plaintiff.(*qq*)

Rule 4

Amount, debt, and costs, and stay of proceedings on payment.

Ord. 3 R. 7.

4. Wherever the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs respectively, and shall further state, that upon payment thereof within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. Such statement may be in the Form in Appendix (A) hereto, Part II., sec. III. The defendant may, notwithstanding such payment, have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's solicitor shall pay the costs of taxation.

A fixed sum must be named for the costs claimed—at the peril of the plaintiff's solicitor of costs of a taxation—as defendant may notwithstanding payment have them taxed afterwards and refunded if an excessive amount be indorsed.

Rule 5.

Claim for account.

Ord. 3 R. 8.

5. In all cases of ordinary account, as, for instance, in the case of a partnership or executorship or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken.

(*m*) Anon. W. N. 1875, 202, Lush, J. Anon. 20 Sol. Jour. 102, Quain, J.

(*n*) Anon. W. N. 1875, 220, Lush, J.

(*o*) Mordaunt *v.* Ryan, *ubi supra*.

(*p*) Jaquot *v.* Boura, 5 Mee and W. 156. Bowdidge *v.* Slaney, 2 Bingh. N. C. 142.

(*q*) Denison *v.* Franklyn, 20 Sol. Jour. 198, Lindley, J. Anon. W. N. 1876, 53, Archibald, J.

(*qq*) Walker *v.* Hicks, L. R., 3 Q. B. D. 8, 26 W. R. 113.

Order 2.

An indorsement of this nature entitles a plaintiff to apply for a preliminary order for an account, either before or after appearance, and without waiting for a decree to account, or a judgment to that effect made at the hearing of the cause.(*r*) It seems it does not supersede the administration summons in proper cases.

Order 3.

ORDER III.

Indorsement of Address.

RULE 1.

Address of plaintiff. name of solicitor. Ord. 4, R. 1, E.

1. The solicitor of a plaintiff suing by a solicitor shall indorse upon every writ of summons, and notice in lieu of service of a writ of summons, the address of the plaintiff, and also his own name or firm and registered place of business.

The address of the plaintiff would seem to be his place of residence, mentioned in Rule 2, and would include the city, town, or parish, name of street and number of house. The house in which plaintiff habitually sleeps, and not his place of business, is his residence.(*s*) Temporary absence from home does not prevent the ordinary abode being described as the place of residence.(*t*)

The object of this provision is to prevent sham actions, or actions by absconding plaintiffs,(*u*) and also to enable defendant to settle the claim, and if the latter can show he was really at a loss to discover plaintiff's residence, the omission might justify the setting aside the writ.(*v*)

Wilful misstatement of plaintiff's residence may cause the writ to be set aside,(*w*) and where the object was to evade giving security for costs, plaintiff was made pay costs of motion.(*x*)

Where an insufficient address is given, *e.g.*, Dublin, without name of street, advantage of the irregularity should be taken promptly.(*y*)

RULE 2.

Residence of plaintiff in person. Ord. 4, R. 2, E.

2. A plaintiff suing in person shall indorse upon every writ of summons, and notice in lieu of service of a writ of summons, his place of residence and occupation, and also, if his place of residence shall not be within the municipal boundary of the city of Dublin, another proper place, to be called his address for service, which shall be within such

(*r*) See Bell *v.* Lowe, 20 Sol. Jour. 97, Quain, J.

(*s*) Tom *v.* Nagle, 13 Ir. Com. Law Rep., Appen. 38, Ex.; Allenborough *v.* Thompson, 2 Hurl. and N. 599.

(*t*) See Maguire *v.* Monahan, 6 Ir. Jur., N. S, 251. Ex.

(*u*) See O'Brien *v.* Lemas, 1 Ir. Jur. N. S., 140.

(*v*) See Roche *v.* Wilson, 3 Ir. Com. Law Rep. 252, 6 Ir. Jur. 230; Dempster *v.* Vernon, 6 Ir. Jur., N. S. 366; O'Brien *v.* Lemas, *ubi supra.*

(*w*) Adams *v.* O'Brien, 5 Ir. Jur., 40 Ex.: Curry *v.* Johnson, 2 Ir. Com. Law Rep. 461, Q. B.

(*x*) Tom *v.* Nagle, *supra.*

(*y*) Roche *v.* Wilson, *supra.*

municipal boundary, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. Order 3.

ORDER IV. Order 4.

WRITS OF SUMMONS, ISSUING, FILING, &c.

SCHEDULE RULE 7.

"Writs of summons shall be prepared by the plaintiff or his solicitor in such manner as shall be directed by rules, and shall be sealed by the proper officer, and shall thereupon be deemed to be issued." Writs prepared and sealed. Ord. 5, R. 5 & 6, E.

SCHEDULE RULE 8.

"The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy of such writ, and all the indorsements thereon, and such copy shall be signed for or by the solicitor leaving the same, or by the plaintiff himself, if he sues in person." Signed copy left with officer. Ord. 5, R. 7, E.

SCHEDULE RULE 9.

"The officer receiving such copy shall file the same, and an entry of the filing thereof shall be made in a book called the Cause Book, in such manner as shall be directed by rules." Copy writ filed and entered in cause book. Ord. 5, R. 8, E.

RULES OF COURT.

1. Until the consolidation of the Record and Writ Office in Chancery with the Writ and Seal Office of the Law Courts, writs of summons in actions to be assigned to the Chancery Division shall be issued out of the Record and Writ Office of that division; and writs of summons in actions to be assigned to the Queen's Bench Division, the Common Pleas Division, or the Exchequer Division, shall be issued out of the Writ and Seal Office. RULE 1. Issue of writs.

The consolidation of the two offices of issue for writs as contemplated by the J. Act, 1877, s. 72, § 9, has not been accomplished yet, and until it takes place there will be two offices of issue of writs for the High Court of Justice, and four several cause books, one for each Division, with apparently four independent series of numbers of the causes, and as many staffs of officers. Whether the writs for the three Common Law Divisions will be marked when issued, according to a rotation or some other plan of distribution to be made in pursuance of section 35 of the J. Act, is not expressed by the Rule.

One copy of the writ is to be left with the officer of issue when presenting the writ to be sealed, in obedience to the Schedule Rule 8, *supra*, and another copy with the officer having charge of the pleadings under Rule 2 of this order.

Order 4.

RULE 2. Copy left with officer. Ord. 5, R. 7, E.

2. The plaintiff or his solicitor shall, in actions assigned to the Queen's Bench, Common Pleas, or Exchequer Divisions, leave with the proper officer of the division to which the action is assigned a copy of the writ of summons, and all the indorsements thereon, within two days after such writ shall have been issued, and such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person.

In England the existence of an action in the High Court of Justice may be proved, on an indictment for perjury committed in the action, by production by the officer of the copy of the writ filed with the officer, of origin of the writ, under the Order 5, R. 7, English, and a copy of the pleadings.(*k*) In the complication existing in our present system it may become uncertain whether the proper evidence is to come from the Writ and Seal Office, in which one copy is by Statute lodged, or from the pleadings department of the Division to which the writ becomes attached, where another copy is to be lodged under this rule.

If plaintiff's solicitor omits to leave copy of writ with the officer within two days, or at any greater interval of time (a not improbable event), this rule does not say what shall be the consequence. It will no doubt be an irregularity, and the division will have no notification of the action being assigned to it, and of course cannot give judgment by default in the action. But whether it will be competent for the officer to accept the copy after the proper time without an order does not appear.

RULE 3. Assignment, notice of. Ord. 5, R. 9, E.

3. Notice to the proper officer of the assignment of an action to any division under section 37 of the Supreme Court of Judicature Act (Ireland), 1877, shall be sufficiently given by leaving with the Clerk of Records and Writs of the Chancery Division the copy of the writ of summons as prescribed by the Act, and with the proper officer of any of the other divisions the copy of the writ of summons as prescribed by the preceding Rule.

RULE 4. Filing, see Order 5, R. 8, E.

4. The officer receiving such copy shall file the same, and an entry of filing the same shall be made in the Cause Book of his division.

RULE 5. Cause books. Ord. 5, R. 8, E.

5. In the Chancery Division, the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division respectively, there shall be kept by the proper officer of each division a book, to be called the Cause Book, which shall be kept in the form in Appendix G.

In the Cause Book each action shall be distinguished by the date of the year, and a letter, and a number in consecutive order, which shall be called the record number

(*k*) The Queen *v.* Scott, L. R., 2 Q. B. D., 415; 25 W. R. 697.

of the action, in the manner in which causes are now distinguished in the Cause Books kept by the Clerk of Records and Writs in the Court of Chancery. Order 4.

6. Writs of summons, and the copies thereof to be left under the Act and these Rules, shall be written or printed, or partly written and partly printed, in the manner and on the description of paper hereinafter directed. Rule 6. Writs written or printed paper.

As to proper paper for writs, see Order lvi., R. 2, *infra*. Ord. 5, R. 5, E.

Order V.

Concurrent Writs. Order 5.

1. The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs, each concurrent writ to bear teste of the same day as the original writ, and to be marked with a seal bearing the word "concurrent," and the date of issuing the concurrent writ; and such seal shall be impressed upon the writ by the proper officer: Provided always that such concurrent writ or writs shall only be in force for the period during which the original writ in such action shall be in force. Rule 1. Issued within 12 months. Ord. 6, R. 1, E.

The form and indorsements of the concurrent writs are to be the same as those of the original writ, and they differ only in being sealed with a seal bearing the word "concurrent" on them. The chief use of them is where there are several defendants and it is desired to serve them simultaneously, especially where one defendant resides within, and the other without the jurisdiction (*a*)

Where the Writ of Summons had been renewed and the renewed writ was lost and the time for issue of a concurrent writ had lapsed, there was no power either to issue a duplicate of the renewal or a concurrent writ.(*b*)

The costs of concurrent or duplicate writs will probably not be allowed against defendants unless the taxing officer is satisfied the circumstances justified their issue.(*c*)

2. A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction. Rule 2. For service within and out of jurisdiction. Ord. 6, R. 2, E.

(*a*) See Beddington *v.* Beddington, L. R. 1 Pro. and D. 426, 24 W. R. 348.

(*b*) Davis *v.* Garland, L. R. 1, Q. B. D. 250, 24 W. R. 252.

(*c*) See 101 Gen. Ord. 1854 (Common Law),

Order VI.

Order 6.

Disclosure by Solicitors and Plaintiffs.

Rule 1. Solicitor to avow writ. Ord. 7, R. 1, E.

1. Every solicitor whose name shall be indorsed on any writ of summons shall, on demand in writing made by or onbehalf of any defendant who has been served therewith or has appeared thereto, declare forthwith whether such writ has been issued by him or with his authority or privity; and if such solicitor shall declare that the writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon without leave of the Court or a Judge.

This Rule is similar to that in the Com. Law Pro. Act, 1853, section 13, see note to Ord. iii., R. 1, *ante.*

Rule 2. Disclosure of names of firm. Ord. 7, R. 2, E.

2. When a writ is sued out by partners in the name of their firm, the plaintiffs or their solicitors shall, on demand in writing by or on behalf of any defendant, declare forthwith the names and places of residence of all the persons constituting the firm; and if the plaintiffs or their solicitor 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 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.

As to actions by partners see also Ord. xv., R. 10, *infra.* Comparing these two provisions it would seem that a defendant wishing to know the names of the partners should make a demand in writing to that effect, and if not complied with, apply by summons to a judge for an order under Ord. xv., R. 10, which will probably be that the statement be furnished within a given time, and that all proceedings be stayed in the meantime. This will prevent the two Rules conflicting.

Order VII.

Order 7.

Renewal of Writ.

Rule 1. Renewals within 12 months. Ord. 8, R. 1, E.

1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a Judge for leave to renew the writ; and the Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may

order that the original or concurrent writ of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ. And the writ shall in such case be renewed by being marked with a seal bearing the date of the day, month, and year of such renewal; such seal to be provided and kept for that purpose at the proper office, and to be impressed upon the writ by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in Form No. 5, in Appendix A, Part I.; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

Order 7.

Renewal seal.

Statute of Limitations.

The original Writ of Summons remains in force for the purpose of service for one entire year, including the day of issue, *i e.* if issued on 1st day of January in any year, it expires on 31st day of December of same year. But notwithstanding this, if a writ be served after it is twelve months old and defendant appears to it, he waives the irregularity.(*d*)

Original writ in force.

Under the Com. Law Pro. Act, 1853, sec. 28, a writ might be renewed as of course and without leave within six months except for the purpose of saving the bar of the Statute of Limitations.(*e*) It should then, as now, be renewed within the period when it was still in force, and under the statute Sundays or holidays intervening, or the office being closed on the last day, did not extend the time allowed.(*f*) Under this Rule perhaps if the last day for application should be a holiday the plaintiff might be in time to apply on the following day under Ord. lvii., R. 3, *infra*.

Renewal by order.

Where the original writ has been renewed and afterwards lost, it was held the court had no power to allow a copy or duplicate of the renewal to be sealed as an original.(*g*)

Where the original writ was issued and dated of the 8th January, and amended on the 15th February, and defendant was not served, on application to renew it on 12th February of following year, it was held the twelve months must be computed from the date of the writ and not of the amendment, but it was ordered that plaintiff should be at liberty to renew it against the defendant notwithstanding this, apparently under the extending power given by Ord. 58, Eng. (Ord. lvii., R. 6, *infra*)(*h*).

(*d*) See Coates *v.* Sandy, 2 Scott, N. C. 525, 2 Man. and Gr. 313.

(*e*) See Dickson *v.* Capes, 11 Ir. Com. Law Rep., 334 Ex. Such a writ may still be renewed without an order. Anon. 20 Sol. Jour. 32, Lush. J.

(*f*) See Mullin *v.* Bonjor, 5 Ir. Com. Law. Rep, 475. 1 Ir. Jur. 126, C. P. Fisher *v.* Cox, 16 Law Times, N. S. 397; Evans *v.* Jones, 2 B. and S. 45.

(*g*) Davis *v.* Garland, L. R., 1 Q. B. D. 250, 24 W. R. 252.

(*h*) Eyre *v.* Cox, 25 W. R. 303, W. N. 1877, 38, M. R.

Order 7.

Where the Statute of Limitations had run meanwhile it was held the court could not extend the time for renewal.(*g*)

Rule 2. Evidence of renewal.

2. The production of a writ of summons purporting to be marked with the seal of the Court, showing the same to have been renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.

Order VIII.

Service of Writ of Summons.

Order 8.

Schedule Rule 10.

Service of writs in same manner as process of former courts.

"Except as otherwise provided by this Act, all writs of summons shall be served in the same manner respectively as process from the Court whose jurisdiction is transferred to the High Court might have been served if this Act had not been passed, and the High Court shall have the same power of directing substitution of service or that any service already made should be deemed good, or that notice should be substituted for service, as might have been exercised by the said Courts respectively, if this Act had not been passed."

Schedule Rule 11.

Service for recovery of land.

"Service of a writ of summons to recover possession of land may be made in the same manner as a writ of summons and plaint in ejectment might have been served if this Act had not been passed."

Rules of Court.

Rule 1. Accepting service.

Ord. 9, R. 1, E.

1. No service of a writ shall be required when the defendant, by his solicitor, agrees to accept service, and enters an appearance.

The solicitor who agrees to accept service if he also undertakes in writing to enter an appearance, and fails to do so, renders himself liable to an attachment under Ord. xi., R. 6, *infra*. And in one case where a defendant undertook to accept service the Court allowed judgment to be signed on default without more.(*h*)

As to mode of personal service of the writ, see Chapter xlvii., p. 360, *ante*.

As to affidavit of service to sign judgment for default of appearance, see Ord. xii., R. 2, *infra*.

(*g*) Doyle *v.* Kaufman, L. R., 3 Q. B. D. 7, 26 W. R. 98.
(*h*) Hall *v.* Rhynd, 8 Ir. Com. Law Rep., App. 4, Q. B.

Order 8.

Rule 2. Indorsement of time of service. Ord. 9, R. 13, E

2. The person serving a writ of summons shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default; and every affidavit of service of such writ shall mention the day on which such indorsement was made, and in case of service upon any individual shall state that the deponent was at the time of service acquainted with the person of the party so served.

This is similar to the provision in the Com. Law Pro. Act, 1853, s. 31.

This indorsement seems to be necessary only in the case of service not substituted or deemed good by order of the Court,(*i*) although Sir Geo. Jessel held otherwise.(*k*)

The affidavit of service ought to show that this indorsement was made in due time as required.(*l*) Where the indorsement has been made in due time, but with a wrong date inserted in the memorandum, the Court has allowed it to be amended,(*m*) but it will probably be slow to do so.(*n*)

Where the non-compliance with this rule is occasioned by the wrongful act of the defendant, the Court has allowed a duplicate to be issued and judgment signed.(*o*)

As to deponent's swearing to his acquaintance with the person of the party served, see 9 G. O., 1854 (Com. Law.)

Rule 3. Serving copy order.

3. Whenever an order shall be made by the Court or a Judge to substitute service, or to serve a party personally out of the jurisdiction, a copy of the order directing such mode of service shall be served along with the writ.

Order IX.

Substituted Service.

Order 9.

Affidavit to ground.

Every application to the Court or a Judge for an order for substituted or other service, or for the substitution of notice for service, or that any service already made shall be deemed good service, shall be supported by an affidavit

(*i*) Cruse *v.* Kuttingall, W. N., 1875, 250; 20 Sol. Jour. 141, Huddleston, B.; Dymonds *v.* Croft, L. R., 3 Chan. D. 512, 24 W. R., 842, A. C.

(*k*) Dymonds *v.* Croft, W. N. 1876, 193, 24 W. R. 818; 20 Sol. Jour. 663, M. R.; and see Rogers *v.* Burke, 9 Ir. Com. Law Rep., App. 34, Q. B.

(*l*) See Vandeleur *v.* Smith, 3 Ir. Com. Law Rep., 86 Q. B.; and Studdert *v.* Leary, 7 Ir. L. R. 543, Q. B.

(*m*) Kyne *v.* Murphy, Ir. Rep., 2 Com. Law 35, Con. Ch.

(*n*) Goff *v.* Finlan, 6 Ir. Jur. N. S. 41, Ex.

(*o*) Brunton *v.* Doyle, Ir. Rep., 2 Com. Law, 86 Ex.

Order 9. setting forth the grounds upon which the application is made.

As to substitution of service, see Chapter xlvii., *ante*, p. 361, Com. Law Pro. Act, 1853, s. 34.

The affidavit should show there is a probability of the service already made or proposed to be made coming to the knowledge of the defendant, and that the person proposed to be served has means of communication with him.(*p*)

In England where a defendant absconds and has not been heard of for some time, *ex. gr*, three months, the Courts have substituted notice by advertisement in the *Gazette*, *Times* newspaper, and some one other morning paper, and a letter to defendant's club and former solicitor.(*q*)

As to whether service on one partner for another is good under Bills of Exchange Act, see cases in note.(*r*)

Service on a husband for his wife was good service, both at law and in equity, in ordinary cases, and where they were living together; but not so when living apart.(*s*)

Service on an infant was effected both at law and in equity in the same manner as upon an adult, but in order to take advantage of his non-appearance a guardian *ad litem* should be first appointed. This practice is retained.(*t*)

Idiots and lunatics were also served as ordinary persons, and the process server should demand access to the lunatic at an asylum to make a case for substitution of service.(*u*)

Service on a Corporation aggregate was regulated chiefly by Com. Law Pro. Act, 1853.(*v*) Service on one of the directors is not good either under the Statute or at Common Law. It should (if there be no public officer), either be made on all the directors, or proof given of reasonable efforts to do so.(*w*) A foreign Corporation having a place of business, and trading in Ireland, may be served by its chief officer in Ireland being for this purpose a head officer.(*x*) But a foreign Corporation

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(*p*) See Cook *v.* Dey, L. R., 2 Ch. D. 218, 24 W. R. 362; 20 Sol. Jour. 312, V. C. H. Miller *v.* O'Brien, 1 Ir. Jur., N. S., 109, Perrin, J.

(*q*) See Raphael *v.* Ongley, 20 Sol. Jour. 312, W. R.; Cook *v.* Dey, *supra*; Crane *v.* Jullion, L. R., 2 Ch. D., 220, 24 W. R. 691, V. C. H.; Whitley *v.* Honeywell, 24 W. R., 851; 20 Sol. Jour. 664, Prob. D.; Bank of Whitehaven *v.* Thompson, W. N., 1877, 45; 21 Sol. Jour. 278, V. C. H.

(*r*) Oger *v.* Bradnum, L. R., 1 C. P. D. 334, *Contra;* Anon. W. N., 1875, 248; Pollock *v.* Campbell, L. R., 1 Ex. D. 50.

(*s*) See Ord. 9, R. 3, E.; Whitley *v.* Honeywell, 24 W. R., 851.

(*t*) Ord. xii., R. 1, *infra.*

(*u*) See Maguire *v.* Gardiner, 4. Ir. L. R., 310, C. P.; Anon. 4 Ir. L. R. 275, Q. B.; Dawson *v.* La Capelam, 7 Ex. 667; In Chancery, see Crabtree's Estate, L. R. 10, Chan 203. See English Ord. 9, R. 5.

(*v*) S. 33; see Ferg. C. L. Pro., 51-2.

(*w*) Lawrenson *v.* Dublin Metropolitan Junction R. C., W. N. 1877, 149 A. C.; see English Ord. 9, R. 7.

(*x*) Newby *v.* Oppen, L. R., 7 Q. B. 293; Carron Iron Compy. *v.* Maclaren, 5 H. L. 459.

Order 9.

non-resident within the jurisdiction cannot be so served.(*y*) As to railway companies, see cases in note.(*z*)

After a company has been dissolved the statutable mode of service will be inapplicable,(*a*) but not so where its business has ceased without formal dissolution.(*b*)

A *Gazette* notice is not necessary when service is substituted by an order silent on the subject.(*c*)

On Peers and Members of Parliament ordinary service is sufficient, and *semble* the letters missive in Chancery actions are dispensed with.

Service in ejectment, whether on the title or for non-payment of rent, would seem still to be regulated by the Landlord and Tenant Act, 1860, s. 56, and when possession is vacant by s. 57.(*d*)

On a Colonial Government (*ex. gr.*, New Zealand), see note.(*e*)

Application for substitution of service under the Com. Law Pro. Act should not be made until after the period allowed for appearance had expired, as defendant might come in on the service already attempted.(*f*)

When an order for substituted service is made, it must be strictly complied with.(*g*)

Order X.

Service out of the Jurisdiction.

Order 10.

Rule 1.

1. Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, whether on a defendant to the action or a third party ordered to be served, may be allowed by the Court or a Judge whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or

When allowed to serve out of jurisdiction. Ord. 11 R. 1 E.

(*y*) Westman *v.* Aktie Bolaget Eckmans, L. R., 1 Ex. D., 239; 24 W. R. 405; 20 Sol. Jour. 352, 1; Ingate *v.* Lloyd Austrian Cy., 4 C. B., N. S. 704.

(*z*) M'Namara *v.* Waterford and Limerick Ry. Cy., 1 Ir. Jur., N. S. 125, C. P; Moore *v.* Belfast and Ballymena Ry. Cy., 6 Ir. Com. Law Rep. 441, Q. B.

(*a*) Fayle *v.* Kingstown Waterworks Cy., 14 Ir. Com. Law Rep. App. 10, 7 Ir. Jur., N. S. 397, Q. B.

(*b*) Gaskell *v.* Chambers, 26 Beav. 252.

(*c*) Mape *v.* London and North Western Ry. Cy., L. R., 1 Ex. 563.

(*d*) See also Shaw *v.* Warmington, Ir. Rep., 3 C. L. 99, Con. Cham.; and see Anon. Sol. Jour. 33, Lush, J., as to order before signing judgment by default.

(*e*) Sloman *v.* Governor of New Zealand, L. R., 1 C. P. D. 563, 25 W. R. 86; 20 Sol. Jour. 802, A. C.

(*f*) Carter *v.* Dunne, 7 Ir. Jur., N. S. 45, Ex.; but see Nolan *v.* Fitzgerald, 10 Ir. L. R. 79, C. P.

(*g*) Nolan *v.* Fitzgerald, 2 Ir. Com. Law Rep., 79, C. P.

Order 10. Rule 1.

property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

This Rule defines the class of cases in which service out of the jurisdiction may be allowed by the High Court.

As regards Chancery actions it seems in some degree restrictive of the broad sphere of jurisdiction assumed in Drummond *v.* Drummond,(*h*) to direct service in any suit whatever, and it rather brings us back to the principles embodied in the earlier Statutes, 2 & 3 Wm. IV., c. 33, s. 1, and 4 & 5 Wm. IV., c. 82, s. 1, in which the subject-matter of the suit was local, *ex. gr.*, land or stock, but extending it to other property situate within the jurisdiction. The jurisdiction in Common Law actions in Ireland rested on the Com. Law Pro. Act, 1853, s. 34, and required that "the cause of action arose within the jurisdiction" and did not warrant actual service out of Ireland, but merely substitution of service through the post office, or service on an agent in Ireland.

As regards the "cause of action arising" the result of the authorities was, that as regards contracts it was enough if either the contract was made within the jurisdiction or the breach occurred there.(*i*)

Lands and stock.

The present rule adopts the same principles *in regard to land or stock or other property* situate within the jurisdiction, if the action be wholly or in part in relation to it, or for any act, deed, will, or thing affecting it, service may be had out of the jurisdiction.(*k*)

An action brought in England for slander of title of a vessel in England, the defendant being resident in Ireland, was held not to deal with property in England.(*l*)

Contracts.

As to contracts the present rule adopts the same principle, and if the *contract sought to be enforced*, rescinded, dissolved, annulled, or otherwise affected by the action, or damages or other relief are sought for its breach, be made or entered

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(*h*) Drummond *v.* Drummond, L. R., 2 Eq. 335; 2 Chan. 32.

(*i*) Vaughan *v.* Wilson, L. R., 10 C. P. 47; adopting Jackson *v.* Spittal, L. R., 5 C. P. 542; in Ireland see Kelly *v.* Dixon, Ir. Rep., 6 C. L., 25 Q. B.; Macken *v.* Ellis, Ir. Rep., 8 C. L. 151 Q. B.

(*k*) See Finlay *v.* Barton, Ir. Rep., 1 Eq. 61, M. R.; and see as to Administration Summons, Newland *v.* Arthur, Ir. Rep. 2 Eq. 277 M. R.; as to foreclosure of a Mortgage of lands abroad, see Paget *v.* Ede, L. R., 18 Eq., 118 V. C. B.

(*l*) Casey *v.* Arnott, L. R., 2 C. P. D. 24; 25 W. R. 46; 21 Sol. Jour. 29.

into within the jurisdiction,(*m*) service may be had out of the jurisdiction; so likewise, if the contract was one wherever made, of which there has been a breach within the jurisdiction. Where it is contracted to send money to a plaintiff in Ireland and it is not sent, there is a breach in Ireland,(*n*) although the rule says nothing about the place of performance.(*o*) Of a contract to convey plaintiff and his luggage from Chester to Dublin, the breach alleged was a refusal to provide conveyance at Holyhead from railway to steamboat and a detainer of luggage at Dublin, and it was held there was a breach in Ireland.(*p*)

Torts.

As to Torts where the wrongful act sought to be restrained or removed or to be punished by damages, was or is to be done or is situate in Ireland, service may be had out of the jurisdiction.

Any British subject may now be served abroad for acts alleged to be done within the jurisdiction, *ex. gr.*, for making false representations as to property.(*q*) But the rule does not give power to serve a foreigner resident abroad, in an action although in personam, resulting from collision of ships out of the territorial jurisdiction of the High Court(*r*) or on the High Seas.(*s*)

Several causes.

Several causes of action included in the same writ and some within the jurisdiction and others not, it seems the court can make no order unless the latter are struck out of the summons and indorsement.(*t*)

Service in England and Scotland, and *vice versa* in Ireland.

Under the general terms of the J. Acts and Orders, Irish process may be served in England and Scotland, and *vice versa*, English process in Ireland. C. J. Cockburn expressed it to be a hard rule that compelled a defendant to spend £50 in coming to London to defend an action for £20.(*u*) To allay the dissatisfaction expressed in Ireland (especially by the legal and mercantile classes) in regard to the inconvenience of

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(*m*) Under the Common Law Pro. Act, see Kett *v.* Robinson, 4 Ir. Com. Law R. 186; Frew *v.* Stone, 6 Ir. Jur. 267, C. P; Macken *v.* Ellis, Ir. Rep. 8 C. L. 151, Q. B.

(*n*) Preston *v.* Lamont, L. R. 1, Ex. D. 361, 24 W. R. 928, S. C., W. N. 1876, 24; 20 Sol. Jour. 241, Lindley, J.; Swansea Shipping Co. *v.* Duncan, L. R., 1 Q. B. D. 644, 25 W. R. 233.

(*o*) See Anon. W. N. 1875, 199, Lush, J.

(*p*) Kesbey *v.* Holyhead Ry. Co., 6 Ir. Com. Law R. 393, 2 Ir. Jur. N. S. 330, C. P.; see also Powell *v.* Atlantic Steam Navigation Co., 10 Ir. Com. Law R., App. 47. Ex.; Adams *v.* Davison, 6 Ir. Jur. N. S. 390, Ex.; Watson *v.* Atlantic Steam Navigation, 5 Ir. Jur. N. S. 217, Ex.; Aston *v.* North Western Ry. Co., Ir. Rep., I. C. L. 604; Deane *v.* Sandford, Ir. Rep., 9 C. L. 228, Q. B.; Betham *v.* Fernie, 4 Ir. Com. Law R. 92.

(*q*) Great Australian Mining Co. *v.* Martin, W. N., 1876, 281 V. C. M. S. C., W. N., 1877, 27 A. C.

(*r*) See *In re* Smith, 24 W. R. 903, Prob.

(*s*) Harris *v.* *Franconia*, Owners of, L. R. 2, C. P. D. 173.

(*t*) See Whyte *v.* Hill, 9 Ir. Jur. N. S., 288, Q. B.

(*u*) See Green *v.* Browning, W. N., 1876, 190, 20 Sol. Jour. 604, Q. B. D.

Order 10. Rule 1.

withdrawing litigation concerning causes of action arising chiefly in Ireland, from Dublin to London, the English Judges introduced a rule which has been copied into J. A., 1877, s. 33, to the effect following :—

Service out of jurisdiction.

"Whenever application shall be made for leave to serve any document by which a cause may be commenced, upon a defendant resident out of the jurisdiction of the Supreme Court, whether by serving such defendant personally or by substituting service upon another person for him, the Court or Judge to whom such application shall be made, shall have regard to the amount or value of the claim or property affected, and to the comparative cost and convenience of proceedings in Ireland, or as the place of the defendant's residence ; and no such leave shall be granted without an affidavit stating the particulars necessary for enabling the Court or Judge to exercise a due discretion in the manner aforesaid."(*v*)

It has therefore become a consideration of comparative convenience, how far the High Court will exercise its jurisdiction so as to assist an action brought against a defendant resident in England or Scotland.(*vv*)

Where the action was substantially to set aside a Scotch settlement made by persons in Scotland and requiring the aid of Scotch advocates to enable the Court to decide the question, it was held in England that the balance of convenience was against a trial in England.(*w*) In an action brought in England against a defendant in Ireland for slander of title in stating plaintiff's ship, then in an English harbour, was unseaworthy, an order for service in Ireland was refused.(*x*)

Foreigners living abroad.

The practice in England was, to avoid international difficulties, instead of serving a copy of the writ on foreigners in their own country, to serve only a notice of the writ, in form given in Appendix A, Part 1, No. 4, informing the defendant that plaintiff has(*y*) commenced an action against him, and requiring him to appear, and that in default plaintiff may proceed to judgment in his absence. It is presumed that the notice mentioned in Rule 4, *infra*, is intended to be of this nature.

A foreign corporation served abroad should be served with this notice and not with a copy of the writ.(*z*)

In matters.

Courts of Equity made orders of service in certain matters arising out of their statutable jurisdiction, *ex. gr.* under the Trustee Relief Act,(*a*) under the Acts for making

(*v*) J. A., 1877, s. 33; and see New English Order to like effect, Ord. 11, R. 1, A.

(*vv*) See a case of Brunton *v.* Robertson, Ir. Rep., 10 C. L. 495, Fitzgerald, J.

(*w*) Mackenzie *v.* Shepherd, 21 Sol. Jour. 339, V. C. H.

(*x*) Casey *v.* Arnott, L. R., 2 C. P. D. 24; 25 W. R. 46.

(*y*) See Beddington *v.* Beddington, 24 W. R. 348, W. N. 73; 20 Sol. Jour. 293.

(*z*) See Scott *v.* Royal Wax Candle Co., L. R., 1 Q. B. D. 404, 24 W. R. 668; 20 Sol. Jour. 469, A. C. Acktie *v.* Bolaget Eckmans, L. R. 1 Ex. D. 237; 20 Sol. Jour. 352

(*a*) *In re* Haney's Trusts; L. R. 10 Ch. 275, 23 W. R. 602; L. J. J.

charging orders,(*b*) and under the Companies Act by virtue of this rule,(*c*) and orders by way of substitution of service (*d*)

Objections to an order for service out of the jurisdiction cannot be raised by way of plea or defence to the action, but by appeal from the order of the Judge allowing it.(*e*)

Rule 2. Application to serve a British subject. Ord. 2, R. 3 E.

2. Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

The application to serve out of the jurisdiction may be made at the time of applying for liberty to issue the writ for service out of the jurisdiction, and one order may be made for both (*f*)

As to the affidavit, it is similar to that required in Chancery practice by the 30th General Order, Act 31, 1867.

It should show in distinct terms in what manner the Court has jurisdiction to order the service, and it should be made by some person able to depose to the facts, and stating what the cause of action is.(*g*)

Rule 3. Time for service. Ord. 11, R. 4 E.

3. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

Where defendant was a British subject resident at Lucerne, and had entered a caveat in a Probate action, a fortnight's time was allowed for appearance.(*h*)

Rule 4. Notice in lieu of service. Ord. 11, R. 5 E.

4. Notice in lieu of service shall be given in the manner in which writs of summons are served.

As to what cases a notice is proper, see above Rule 1, *Foreigners*.

(*b*) *In re* Gethin, Mi. Ir. Rep., 9 Eq. 512, V. C., *sed vide Ex parte* Bernard, 6 Ir. Chan. Rep. 133; Wheelhouse *v.* Sharpe, 9 Ir. Law Rep. 154.

(*c*) *In re* British Imperial Corporation, L. R. 5 Chan. D. 749, 25 W. R. 583.

(*d*) Bonelli's Electric Telegraph Co., L. R. 18 Eq. 655, V. C. B.

(*e*) Preston *v.* Lamont, L. R. 1 Ex. D. 361; 24 W. R. 928.

(*f*) See *In re* Goods of Chamberlayne, 20 Sol. Jour. 373 Pro.

(*g*) Anon. W. N. 1875, 199 & 202 Lush J.; see Great Australian Mining Co. *v.* Martin, L. R., 5 Ch. D. 1; 25 W. R. 246, A. C. a conflict of opinion as to sufficiency of affidavit.

(*h*) See *In re* Goods of Chamberlayne, 20 Sol. Jour. 373, Prob.

Order XI.

Appearance.

Schedule Rule 13.

Defendant bound to appear.

"The defendant shall be bound to appear to the writ of summons at such time and in such manner as may be directed by rules."

Schedule Rule 14.

Appearances, how entered. Ord. 12, R. 6(a), E.

"It shall not be necessary for the defendant on entering an appearance to any writ of summons to file any defence or answer thereto. He shall enter an appearance by delivering to the proper officer a memorandum in writing, dated on the day of delivering the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. The solicitor of a defendant appearing by a solicitor shall state, in such memorandum, his registered residence.

Ord. 12, R. 7, E.

Ord. 12, R. 8, E.

"A defendant appearing in person shall state in such memorandum his address, and a place to be called his address for service, which shall be in Ireland."

Schedule Rule 15.

Address, wanting or illusory. Ord. 12, R. 9, E.

"If the memorandum does not contain such address it shall not be received; and if any such address shall be illusory or fictitious, the appearance may be set aside by the Court or a Judge, on the application of the plaintiff."

Schedule Rule 16.

Entry of appearances in cause book. Ord. 12, R. 10, E.

"Upon receipt of a memorandum of appearance, the officer shall forthwith enter the appearance in the cause book."

Schedule Rule 17.

Appearances to summons for recovery of land. Ord. 12, R. 18, E.

"Any person not named as a defendant in a writ of summons for the recovery of land may, by leave of the Court or Judge, appear and defend on filing an affidavit, showing that he is in possession of the land either by himself or his tenant."

Schedule Rule 18.

Appearance as landlord. Ord. 12, R. 19, E.

"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."

Rules of Court.

Order 11.

1. The defendant on entering an appearance shall on the same day give notice of his appearance to the plaintiff's solicitor in actions assigned to the Chancery Division by notice served through the notice office of that division; and in actions assigned to the Queen's Bench, Common Pleas, and Exchequer Divisions, by notice in writing, served as notices are now served in the Courts of Common Law, at his registered residence in Dublin. If the plaintiff sues in person, the notice is to be served at his address for service.

Rule 1. Notice of.

As to appearance generally, see chapter xlviii., p. 363, *ante*.

A defendant is bound to appear within eight days after the service of the writ, inclusive of the day of service, or at such other period as may be mentioned in the writ, by entering a memorandum (see Rule 2) in the proper office, *i.e.*, the Record and Writ Office for the Chancery Division, and the Pleadings Assistant of each of the other Divisions to which the action may be assigned.

As to appearance and defence by an Infant or person *non compos mentis*, see Ord. xvii., *infra*.

2. The memorandum of appearance shall be in the Form No. 6, Appendix (A), Part I., with such variations as the circumstances of the case may require, and shall be delivered to the proper officer of the division to which the action is attached.

Rule 2. Memorandum of. Ord. 12, R. 10, E.

3. Where partners are sued 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.

Rule 3. By partners. Ord. 12, R. 4, E.

4. 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.

Rule 4. By a firm. Ord. 12, R. 12, A.

5. If two or more defendants in the same action shall appear by the same solicitor and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum.

Rule 5. Several by same solicitor. Ord. 12, R. 13, E.

6. A solicitor not entering an appearance in pursuance of his written undertaking so to do on behalf of any defendant shall be liable to an attachment.

Rule 6. Undertaking to appear, breach of.

Order 11.

This is similar to the old rule of practice (2 Ferg. Prac. 1163). The course was to move that the solicitor do show cause why he should not forthwith enter an appearance and pay the costs of the application. (*i*)

RULE 7. Appearance after time limited. Ord. 12, R. 15, E.

7. A defendant may appear at any time before judgment, save as provided by Order XII., R. 8. If he appear at any time after the time limited for appearance he shall, on the same day, give notice thereof to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, and he shall not, unless the Court or a Judge otherwise order, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.

RULE 8. Appearance in ejectment by leave. Ord. 12, R. 20, E.

8. Where a person not named as defendant in any writ of summons for the recovery of land has obtained leave of the Court or Judge to appear and defend, he shall enter an appearance according to the foregoing Rules, entitled in the action against the party or parties named in the writ as defendant or defendants, 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.

See Com. Law Pro. Act, 1853, s. 200, as to application for leave to defend on affidavit that the person is in possession either by himself or his tenant.

RULE 9. Limited defence in ejectment. Ord. 12, R. 21, E.

9. 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 entitled in the cause, and signed by him or his solicitor; such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole.

See Com. Law Pro. Act, 1853, s. 199. Which was confined to ejectments on the title.

RULE 10. Notice, form of. Ord 12, R. 22.

10. The notice mentioned in the last preceding Rule may be in the Form No. 7 in Part I. of Appendix (A) hereto, with such variations as circumstances may require.

(*i*) See case since J. A. The Vivai, L. R., 2 Prob. & D., 29–25. W. R. 453.

Order XII.

Default of Appearance.

Rule 1. By infant or person of unsound mind, appointing guardian. Ord. 13, R. 1. E.

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 may 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.

Instead of plaintiff entering an appearance for defendant in default, where the defendant is an adult and not of unsound mind, on filing an affidavit of service and producing a copy of it and the original writ and a certificate of no appearance, plaintiff may (except in Chancery actions proper) sign judgment by default of some kind and in Chancery actions proper he may proceed as if defendant had appeared, see Rule 10, *infra*.

If defendant be an infant or of unsound mind plaintiff must apply for the appointment of a guardian *ad litem* to appear and defend before he proceeds to judgment.

Judgment may be signed against a foreign Corporation served with notice abroad.(*k*) It may be entered immediately after the proper time for appearance has expired, and this although defendant has filed a petition in bankruptcy, and probably notwithstanding the marriage of a female defendant. Where the defendant is a lunatic so found by inquisition, it would seem, that on service of the Committee of the estate, and default of appearance the plaintiff is entitled to enter judgment by default in the ordinary way.

Whether judgment in default of appearance can be entered in case the writ has not been indorsed with date of service.(*l*)

It is not necessary to file a copy of the writ but to produce it or the original.

(*k*) See Scott *v.* Royal, Wax Candle Cy., L. R., 1 Q. B. D., 404; 24 W. R. 668; Baker *v.* Turner 20 Sol. Jour. 521, V. C. H.

(*l*) Dymond *v.* Croft, L. R., 3, Ch. D. 512, A. C.

Order 12.

RULE 2. Affidavit of service to be filed. Ord. 13, R. 2, E.

2. Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, or under Order XIV., Rule 1, he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be.

It will be the duty of the Master of the Court or the Registrar, before he allows judgment to be entered as in default, to see the affidavit of service is a proper one, and that it appears thereby that due service has been had.(*m*)

RULE 3. Final judgment on specially indorsed writ. Ord. 13, R. 3 E.

3. In case of non-appearance by the defendant where the writ of summons is specially indorsed, under Order II., Rule 3, the plaintiff, upon filing an affidavit specifying the amount actually due, may sign final judgment for such sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs, but it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just.

The Order II. R. 3 enables the plaintiff to indorse his writ of summons specially with the particulars of his claim consisting of a debt or liquidated demand with the ultimate view of having judgment in a summary way by default on non-appearance as to which, see ante, p. 506.(*n*)

RULE 4. Default by one of several defendants Ord. 13, R. 4, E.

4. Where there are several defendants to a writ specially indorsed for a debt or liquidated demand in money, under Order II., Rule 3, and one or more of them appear to the writ, and another or others of them do not appear, the plaintiff may, upon filing a like affidavit as in the next preceding rule prescribed, enter final judgment against such as have not appeared, and may issue execution upon such judgment without prejudice to his right to proceed with his action against such as have appeared.

Under the former practice, if plaintiff issued execution against one or more of the defendants who had not appeared, it was an abandonment of the action against those who had appeared. This is not so now.

RULE 5. Liquidated claim not indorsed, affidavit of particulars. Ord. 13, R. 5 E.

5. Where the defendant fails to appear to the writ of summons and the writ is not specially indorsed, but the plaintiff's claim is for a debt or liquidated demand only, no statement of claim need be delivered, but the plaintiff may file an affidavit of service or notice in lieu of service,

(*m*) See Com. Law Pro. Act, 1853, s. 96–97.
(*n*) And see Com. Law Pro. Act, 1853, s. 96.

as the case may be, and an affidavit stating the particulars of his claim in respect of the causes of action stated in the indorsement upon the writ, and the sum actually due, and may, after the expiration of eight days, enter final judgment for the amount due as stated in such affidavit and costs to be taxed, provided that the amount shall not be more than the sum indorsed upon the writ, besides costs. Order 12.

The affidavit will contain a statement of particulars of claim of the same nature as what might have been specially indorsed on the writ under Ord. II. R. 3.

6. Where the defendant fails to appear to the writ of summons 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, no statement of claim need be delivered, but interlocutory judgment may be entered and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons. But the Court or a Judge may order that, instead of a writ of inquiry, the value and amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried; or by inquiry at chambers in actions assigned to the Chancery Division; or in actions assigned to the Queen's Bench, Common Pleas, or Exchequer Divisions, by the Master of the Division, in the manner prescribed by the Common Law Procedure Amendment Act (Ireland), 1853. Rule 6. For detention of goods or damages—writ of inquiry. Ord. 13, R. 6, E.

See Com. Law Pro. Act, 1853, s. 98, which applies to cases not exactly liquidated, but yet matter of calculation in which the inquiry might be held before the Master of the Court.

Where the action was on a bill of costs untaxed, the practice was to have the amount ascertained by the Master without a jury, on the evidence of some independent professional man, or by reference to the taxing officer.(*o*)

It is not to be assumed from this that in an action for detention of specific chattels, plaintiff is not entitled to judgment for a return of the chattels and a writ of delivery instead of an inquiry of their value.(*p*)

7. In case no appearance shall be entered in an action for the recovery of land, within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to Rule 7. For recovery of possession of land. Ord. 13, R. 7, E.

(*o*) Shortal *v.* Farrell, Ir. Rep., 3 Com. Law, 500 Q. B.; see Conolly *v.* Teeling, 12 Ir. Com. Law Rep., App. 29.

(*p*) See Ivory *v.* Cruickshank, W. N. 1875, 249; 20 Sol. Jour. 140, Quain, J.

Order 12.

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.

If service be by posting on a vacant possession, the plaintiff would seem not entitled to enter judgment without a special order.

RULE 8. Appearance after time limited. Ord. 13, R. 8, E.

8. No person served with a writ of summons in an action for the recovery of land shall be permitted to appear after the time allowed for appearance as in such writ mentioned without leave of the Court or a Judge.

RULE 9. Mesne profits and land. Ord. 13, R. 9, E.

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 Rule 7 mentioned for the land; and may proceed as in the other preceding Rules of this Order as to such other claim so indorsed.

RULE 10. Chancery actions, special, statutably assigned to proceed as if appearance entered. Ord. 13, R. 9, E.

10. In actions assigned by the 36th section of the Act to the Chancery Division, and in all other actions not by the Rules in this Order otherwise specially provided for, in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service the action may proceed as if such party had appeared.

In Chancery causes when a defendant (not being an infant or person of weak or unsound mind, and being resident in Ireland) did not appear, plaintiff might after eight days for appearance expired, and within three weeks after that, apply to the Clerk of Records and Writs to enter an appearance for him.(*q*) Now this is unnecessary, and instead of this, in actions specially assigned to the Chancery Division by section 36 of the J. Act, plaintiff may proceed as if defendant had actually appeared. He may file an affidavit of service but he cannot treat the defendant as if he had dispensed with delivery of a statement of claim, and consequently it seems he must deliver one within proper time, and in default of defence, then set down the cause on motion for judgment in the terms of the statement of claim, and give notice to defendant of the setting down.(*r*) In Chancery causes where bill had been filed and interrogatories delivered before the J. Act Court has allowed the bill to stand as a statement of claim and deemed the defendant to have made default as to defence, and gave leave to plaintiff to serve notice of motion for judgment abroad.(*s*)

(*q*) 28 G. O., 31 Oct. 1867, Chancery.

(*r*) See Menton *v.* Metcalf, W. N. 1877, 142, V. C. H.; Gardiner *v.* Hardy, W. N. 1876, 153 V. C. B.; amended after Dymond *v.* Croft, L. R. 3 Chan. D. 521, 24 W. R. 700.

(*s*) *Ib.*

Order 12.

This rule applies only to the ten classes of actions specially assigned by the J. Act, s. 36, to the Chancery Division; see Chapter xix., p. 164, *ante*.

Where Common Law actions have been brought in the Chancery Division in England on liquidated demands or other actions the subject of the preceding rules of this order, judgment by default may be marked as it would in any other Division in the like case.

Order XIII.

Leave to Defend where Writ specially Indorsed.

Order 13.

Rule 1.

After appearance, summary application for final judgment. Ord. 14, R. 1, E.

1. Where the defendant appears to a writ of summons specially indorsed under Order II., Rule 3, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to show cause before the Court or a Judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the notice of motion. The Court or a Judge may thereupon, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly.

The writ must be indorsed with particulars of claim for a debt or liquidated demand under Order 2, R. 3.

Whether retrospective.

Some conflict of opinion arose in England as to whether this proceeding was open on a writ issued before the Judicature Act came into operation. Baron Huddlestone held that it might,(*t*) Mr. Justice Lindley,(*u*) and Mr. Justice Quain, refused to give it a retrospective operation.(*v*) Lord Chief Justice Cockburn(*w*) regarded the new procedure as superseding all ordinary forms and an infringement of the common law rights of defendants—and if so, it was scarcely allowable to give it a retrospective operation.

Where a writ issued before the J. Act, but was renewed afterwards, this rule was held available, the indorsement being amended by stating dates.(*x*)

(*t*) Anon. W. N., 1875, 260; 20 Sol. Jour. 162.
(*u*) Anon. W. N. 1876, 12; 20 Sol. Jour. 219.
(*v*) Anon. W. N. 1875, 230; 20 Sol. Jour. 90.
(*w*) Runnacles *v.* Mesquita, L. R. 1 Q. B. D., 416, 24 W. R. 533; 20 Sol. Jour. 373.
(*x*) Denison *v.* Franklyn, 20 Sol. Jour., 198 Lindley, J.

Order 13.

Where a date was misplaced in the form of the indorsement, but not so as to mislead, the application was granted.(*w*)

Where the writ was specially indorsed for amount of an award and costs, not taxed, they should be taxed before final judgment.(*x*)

Affidavit of belief.

This affidavit may be made by the plaintiff or some other person who can swear positively to the cause of action.(*x*)

Omission to apply for a summary order for judgment does not estop the plaintiff from asking security for costs, where defendant after defence has become bankrupt.(*y*)

Rule 2. Motion for. Ord. 14, R. 2, E.

2. The application by the plaintiff for leave to enter final judgment under the last preceding Rule shall be made by motion to the Court or a Judge.

No particular time is limited for the purpose. But it should not be delayed beyond a reasonable time after appearance, as the delay might mislead the defendant into incurring unnecessary expense in preparing his defence.

Rule 3. Affidavit to show cause. Ord. 14 R. 3.

3. The defendant may show cause against such application by offering to bring into Court the sum indorsed on the writ, or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if so, to what part, of the plaintiff's claim. And the Court or a Judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents or copies of or extracts therefrom.

The defendant has the alternative of offering to bring into Court the sum indorsed on the writ which is *per se* an undoubted guarantee of *bona fides* so far at least as the belief of the defendant is concerned and good cause against plaintiff's application; or defendant may show cause on grounds stated in an affidavit.

Defence on merits.

The grounds set forth in defendant's affidavit must be such as to satisfy the Court or Judge that defendant has a good defence on the merits, or it must disclose such facts as may be deemed sufficient to entitle him to defend the action. Where no such affidavit is produced, the Court must assume there is no substantial defence.(*z*) A bare general swearing to a good defence on the merits is not enough, for this would but encourage

(*w*) Anon. W. N., 1876, 53.

(*x*) French *v.* Lear, 21 Sol. Jour., 479, Ex. D.

(*x*) See Frederici *v.* Vanderzee, L. R. 2, C. P. D. 70, 25 W. R. 389; a case before the English Order was amended also; Bank of Montreal *v.* Cameron, L. R., 2 Q. B. D., 536; 25 W. R., 593.

(*y*) *Ex p.* Horsford, *In re* Smith, L. R. 6 Chan. D. 215, 25 W. R. 799; 21 Sol. Jour. 731, A. C.

(*z*) Anon. 20 Sol. Jour. 219, Lindley, J.

illusory affidavits,(*a*) nor that defendant had taken proceedings in Bankruptcy and disputed the correctness of the accounts delivered by plaintiff.(*b*)

But on hearing such an application the Court will not pretend to try the action; all that it requires to see is, that there is a *bona fide* defence,(*c*) and having regard to the views expressed by the Lord Chief Justice of England that this procedure infringes the Common Law rights of defendants, the discretion given to the Court is one which should be exercised with caution, and as soon as it is found that there is a *bona fide* contest, the Judge will probably refuse to hear the case further;(*d*) and where defendant states a defence, *prima facie* good, he ought to be allowed to try the matter further on reasonable conditions, such as paying money into Court.(*e*) Thus, where defendant relied on a deed of release which plaintiff insisted was a mere escrow, the question was too difficult for summary decision.(*f*)

But otherwise the Court will examine the case so far as to see there is a *bona fide* defence, and may adjourn it for plaintiff to adduce further evidence of the claim,(*g*) *ex. gr.*, to produce documentary evidence.(*h*) Where a possible defence is suggested but not immediately shown, the Court may give liberty to enter judgment unless defendant pay the amount claimed into Court.(*i*) Where the defence set forth is manifestly untenable, it would be cruelty to defendant to allow the action to be defended.(*k*)

In an action against two solicitors as partners, where one did not dispute the claim and the other alleged that the partnership had been dissolved, but offered no explanation of the defence, judgment was allowed to be signed.(*l*) Where the defence was that the work—a pump—the subject of the action, was insufficient for its purpose, and plaintiff swore the defendant had called and admitted the claim, order was made for judgment, unless the sum claimed was paid into Court.(*m*)

(*a*) Runnacles *v.* Mesquita, L. R., 1 Q. B. D. 416; 24 W. R. 553; 20 Sol. Jour. 373.

(*b*) Anon. W. R. 1876, 23; 20 Sol. Jour. 242, Lindley, J.

(*c*) Andrews *v.* Stewart, W. N. 1876, 230; 20 Sol. Jour. 162, Quain, J.

(*d*) Runnacles *v.* Mesquita, *supra*.

(*e*) Andrews *v.* Stewart, *supra*, *per* Quain, J.

(*f*) Berridge *v.* Roberts, W. N. 1876, 86; 20 Sol. Jour. 320, Denman, J.; and see Anon. W. N. 1876. 64, Archibald, J.; a case of contradictory affidavits under the Bills of Exchange Act.

(*g*) Anon. W. N. 1875, 249; 20 Sol. Jour. 141, Quain, J. Anglo-Italian Bank *v.* Wells, W. N. 1877, 263, V. C. H.

(*h*) Anon. 20 Sol. Jour. 162, Huddlestone, B.

(*i*) Roberts *v.* Guest, W. N. 1876, 10; 20 Sol. Jour. 217, Lindley, J.

(*k*) Anon. W. N. 1876, 100; 20 Sol. Jour. 342, Denman, J.; and see Woolston *v.* Raines, W. N. 1876, 74; 20 Sol. Jour. 320; and see Lord Hanmer *v.* Flight, W. N. 1876, 54; 24 W. R. 346, C. P. D.

(*l*) East Assam Company *v.* Roche, W. N. 1875, 238; 20 Sol. Jour. 100 Quain, J.

(*m*) Phillips *v.* Harris, W. N. 1876, 54; 20 Sol. Jour. 28, Archibald, J.

Order 13.

Where the Court has reason to think the defence is substantial, it will not compel defendant to pay money into Court as a condition to being allowed to defend.(*n*)

The defendant's affidavit is not final, and the Court may allow the plaintiff to file an affidavit in reply.(*o*)

Disclosing facts entitling him to defend.

Besides showing an actual defence, defendant may be sued as a surety on a guarantee, and the amount of the demand may not be within his knowledge, so that he may reasonably call on plaintiff to prove his case(*p*), or the defendant may not be able to dispute the claim, but may have a counterclaim of equal or greater amount arising out of the same transaction or contract.(*q*) Where the counterclaim or set-off was not actually enforceable the Court refused to stay judgment, unless amount of claim was lodged(*r*), so where the object was merely to bring a third party before the Court for indemnity,(*s*) and it was not sufficient reason to stay judgment that defendant was at sea and was served with the writ on the day before he left England.(*t*)

Where the writ is specially indorsed it is unnecessary in order to have judgment to deliver a statement of claim, though defendant has not dispensed with it.(*u*)

When the application for judgment is refused, the order ought expressly give defendant leave to defend within a certain time (eight days generally), although probably this much may be implied from it.(*v*)

Rule 4.

Judgment for part.

Ord. 14, R. 4, L.

4. If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim; or that any part of his claim is admitted to be due; the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Court or a Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim.

Where defendant admits the claim partially, he will usually

(*n*) Runnacles *v.* Mesquita L. R. 1 Q. B. D. 416.

(*o*) Davis *v.* Spence, L. R. 1 C. P. D. 719, 25 W. R. 229.

(*p*) Lloyd's Banking Company *v.* Ogle, L. R. 1 Ex. D. 262, 24 W. R. 678.

(*q*) Anon. 20 Sol. Jour. 101, Quain, J.

(*r*) Roberts *v.* Guest, W. N. 1876, 10; 20 Sol. Jour. 219, Lindley, J.

(*s*) German Bank of London *v.* Schmidt, W. N. 1876; 20 Sol. Jour. 217, Lindley, J.

(*t*) Anon. W. N. 1875, 260, 20 Sol. Jour. 162, Huddleston, B., but see Anon. W. N. 1876, 23; 20 Sol. Jour. 242, Lindley, J.

(*u*) Atkins *v.* Taylor, W. N. 1876, 11, 20 Sol. Jour. 218, Lindley, J.

(*v*) Margate Pier and Harbour Company *v.* Perry, W. N. 1876, 52; 20 Sol. Jour. 279, Archibald, J.; Atkins *v.* Taylor, W. N. 1876, 11, 20 Sol. Jour 218.

be ordered to pay the sum admitted into Court within a limited time, or liberty for plaintiff to enter judgment.(*w*) Order 13.

5. If it appears to the Court or a Judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former. Rule 5. Judgment as to one defendant. Ord. 14, R. 5, E.

6. Leave to defend may be given unconditionally or subject to such terms as to giving security, or otherwise, as the Court or a Judge may think fit. Rule 6. Leave to defend on terms. Ord. 14, R. 6 E.

Order XIV.

Application for Account where Writ indorsed under Order II., Rule 5. Order 14.

1. In default of appearance to a writ of summons indorsed under Order II., Rule 5, and after appearance unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made. Rule 1. Order for an account in default of appearance. Ord. 15, R. 1 E.

In order to take advantage of this rule, the writ of summons should be specially indorsed with a claim for an account.

The rule will be available in ordinary actions for an account, *ex. gr.*, between partners, or against executors or trustees, see Ord. 2, R. 5, *ante*.

The order for an account under this Rule will be equivalent to a decree to account in an administration suit, to enable plaintiff to stay actions in Common Law Divisions.(*x*)

To obtain this summary relief without a hearing of the cause the rules must be strictly observed and no order can be made before defendant has either appeared or made default in appearing in due time.(*y*)

An application for an order for an account under this Rule should be made by Summons at Chambers, see Ord. 53, R 2, (2) *infra*: although in this rule it is directed to be by motion.

2. An application for such order as mentioned in the last preceding Rule shall be made by motion, and be Rule 2. Motion for Ord. 15, R. 2 E.

(*w*) Anon. W. N. 1876, 53; 20 Sol. Jour. 282, Archibald, J.; and see Lord Hanmer *v.* Flight, W. N. 1876, 54; 20 Sol. Jour. 280, ib. 24, W. R. 346, C. P. D.

(*x*) Bell *v.* Lowe, W. N. 1875, 229; 20 Sol. Jour. 97, Quain, J.

(*y*) *In re* Plant, deceased, Haxall *v.* Hodgson, 20 Sol. Jour. 663, M. R.

Order 14. supported by an affidavit 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.

Order XV.

Parties.

Order 15.

Schedule Rule 19.

Actions not defeated by misjoinder. Adding parties and striking out. Ord. 16, R. 13, E.

"No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or Judge may, at any stage of the proceedings, either upon or without the application of either party, in the manner prescribed by rules, and on such terms as may seem to the Court or a Judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out, and that the name or names of any party or 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 action, be added. No person shall be added as a plaintiff suing without a next friend, or as a next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in such manner as may be prescribed by rules or by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice."

Added defendants served with notice.

Schedule Rule 20.

Numerous parties may sue or be sued by one or more. Ord. 16, R. 9, E.

"When there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested."

Rules of Court.

Parties and Notice Parties.

1. *Plaintiffs.*

Rule 1. Joinder of plaintiffs. Ord. 16, R. 1, E.

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 unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct. Order 15.

As to Misjoinder of plaintiffs, see Chapter 50. (460), p. 367, *ante*.

As to joinder of plaintiffs, see (463), p. 368, *ante*.

Alternative reliefs must not be inconsistent one with another, and a plaintiff cannot now, as he could not hitherto bring an action for inconsistent relief, or alternate relief founded on inconsistent allegations.(*z*) Alternative relief.

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 or plaintiffs, the Court or a Judge may, if satisfied that it has been so commenced through a mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just. Rule 2. Action commenced in name of wrong plaintiff. Ord. 16, R. 2, E.

Where an action was commenced in the name of a Bank on a promissory note lodged by the payee who forgot to indorse it, the name of the payee was substituted on payment of costs.(*a*) Joinder of plaintiff.

The name of the Attorney-General as informant has been substituted in an action for an injunction by a private person turning the action into an information and this without prejudice to a notice for an injunction.(*b*)

The Court may, instead of substituting a new plaintiff for another, add his name as co-plaintiff.(*c*)

Amendments of this nature have been made *exparte* without prejudice to defendant's application to expunge the added name.(*d*)

If it appeared that the original plaintiff had no case at all, while the new plaintiff had, it might be difficult to amend without working some injustice to the defendants.(*e*)

(*z*) Evans *v.* Brick, L. R., 4 Chan. D., 432, 25 W. R. 392, M. R; Child *v.* Stenning, L. R., 5 Chan. D. 695, 25 W. R. 519, A. C. See Ede *v.* Vyse, 21 Sol. Jour. 498, V. C. H.

(*a*) Mercantile River Plate Bank *v.* Isaac, W. N., 1876, 104, 20 Sol. Jour. 340, Denman, J.

(*b*) Caldwell *v.* Pagham Harbour Company, L. R., 2 Chan. D., 221, 24 W. R. 690, V. C. H. following Mounsey *v.* Earl of Lonsdale, L. R., 6 Chan. D. 141.

(*c*) Smith *v.* Haseltine, W. N., 1875, 250; 20 Sol. Jour. 14. Huddlestone, B.

(*d*) See Webster *v.* Thorne, 20 Sol. Jour. 351, M. R.

(*e*) See Tildersley *v.* Harper, L. R., 3 Chan. D. 227, V. C. H.

Order 15.

2. *Defendants.*

RULE 3. Joinder of defendants. Ord. 16, R. 3, E.

3. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And 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.

Joinder of causes of actions against defendants.

In Common Law actions if there were several defendants, in order to have judgment against them, they should have been jointly liable to the full extent of the judgment, and plaintiff could not have one judgment against one defendant and a different judgment against another. Even in actions of tort, though plaintiff might have judgment against one defendant and not against another, he could not have judgment against two or more of different qualities or amounts.

In equity it was not necessary that the defendant should be interested in the whole subject-matter of the suit, or connected with every branch of it, or in the same degree, provided the object of the suit was single. Several defendants might have opposite interests in distinct questions arising out of a single matter, or might have been subject to different measures of relief and should nevertheless be brought before the Court in order that the suit might conclude them all.(*c*) In analogy to the Rules of Equity, now all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such one or more of them as may be found liable according to their respective liabilities, subject however to the power conferred by Rule 4 upon the Court or a Judge to prevent any defendant being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest.

RULE 4. Defendant need not be interested in all the relief. Ord. 16, R. 4, E.

4. It shall not be necessary that every defendant to any action shall be interested as to all the relief thereby prayed for, or as to every cause of action included therein; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such action in which he may have no interest.

See case of Child *v.* Stenning.(*d*)

RULE 5. Defendant, joint and several. Ord. 16, R. 5, E.

5. 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.

See Chancery Order 28, 27 March, 1843, as to defendants

(*c*) See Salvidge *v.* Hyde, 5 Madd. 138, *per* Sir John Leach.
(*d*) Child *v.* Stenning, L. R., 5 Ch. D., 695; 25 W. R., 519 A. C.

jointly or severally liable, and cases collected in Plumer *v.* Gregory.(*e*) Order 15.

6. Where in any action, whether founded upon contract or otherwise, 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 in such action the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties to the action. Rule 6. Joinder of defendant in case of doubt. Ord. 16, R. 6, E.

A plaintiff had always (at least in actions of tort) the option of joining any person as a defendant at the peril of costs, *ex. gr.*, where a nuisance is committed or an act of negligence, either by the owner of a house, or a contractor executing work for him, or a sub-contractor, to whom it has been sub-let, and it is doubtful which of them is answerable for the injury done, but it is difficult to see what advantage the permission of the Court will confer on a plaintiff making such a joinder, as he must inevitably bear the costs of any defendant against whom he fails to establish a liability.(*f*) However, the Court will seldom strike out the name of any defendant beforehand.(*g*) Under this rule a plaintiff is entitled to claim alternative relief against one or other of several defendants.(*h*)

3. *Persons in a Representative Capacity or under Disability.*

7. 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 parties beneficially interested in the trust or estate, and shall be considered as representing such parties in the action; but the Court or a Judge may, at any stage of the proceedings, order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto. Rule 7. Trustees to represent beneficiaries. Ord. 16, R. 7, E.

The Chancery (Ire.) Act, 1867, s. 10, is to the like effect.

In an administration suit, where the trustee of the will was sole defendant and the title of the plaintiff who claimed to be beneficially entitled, was doubtful, the person who was interested in disputing plaintiff's title was ordered to be made a defendant.(*i*)

(*e*) Plumer *v.* Gregory, L. R., 18 Eq., 627, V. C. B.

(*f*) See Marsh *v.* Dunlop, 21 Sol. Jour. 75.

(*g*) Anon. W. N., 1875, 205, Lush, J.

(*h*) Honduras Inter-Oceanic Railway Co. *v.* Le Fevre Tucker, L. R., 2 Ex. D. 301, 25 W. R. 310, A. C.; and see Manchester and Sheffield Railway Co., &c., *v.* Brooke, L. R., 2 Ex. D. 243, 25 W. R. 413

(*i*) Day *v.* Ratcliffe, 24 W. R. 844, M. R. See as to adverse interests, M'Dermott *v.* Caldwell, Ir. Rep. 10, Eq. 372, V. C.

Order 15.

RULE 8.

Married women and infants, how to sue and be sued.

Ord. 16, R. 8, E.

8. Married women and infants may respectively sue as plaintiffs by their next friends, in the manner practised in the Court of Chancery before the passing of this Act; and infants may, in like manner, defend any action by their guardians appointed for that purpose. Married women may also, by the leave of the Court, or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require.

The practice, as to suits by married women and infants carried on by their next friends, is borrowed from that of the Court of Chancery.

As to filing the consent in writing of the person named as next friend to a married woman or an infant, see Chan. (Ire.) Act, 1867, s. 62.

As regards actions on behalf of infants, the infant's father being his natural guardian is the proper person to act as his next friend unless disqualified by interest or otherwise, or unwilling to act and his name has been substituted for that of another person who intervened on behalf of the infant without communication with his father.(*n*)

Married women.

As regards married women, in ordinary cases they must sue by a next friend,(*o*) and he must be a person of substance(*p*) but where she cannot procure such she has been allowed to sue without a next friend and to prosecute her suit in forma pauperis.(*q*)

The latter part of this rule seems to recognise this practice and see as to action by a married woman after a divorce *a mensâ et thoro*.(*r*)

A married woman cannot be sued without her husband, except by leave of the court, and even in respect of her separate property, her husband or her trustee should be it seems joined with her.(*s*) As to arrest of a married woman see.(*t*) As to indorsement on writ to charge her separate estate see cases below.(*u*) And as to her answering separately by leave see.(*v*)

(*n*) Woolf *v.* Pemberton, L. R., 6 Chan. D. 19, A. C.

(*o*) See 1 Daniel's Chan. Prac. 111, 4th Ed.

(*p*) See Carnegie *v.* Baird, Ir. Rep. 7, Eq. 406, V C.

(*q*) See 1 Daniel Ch. Pr., *supra*.

(*r*) Power *v.* Cook, Ir. Rep. 4. Com. Law 247, Q. B. D.

(*s*) Ochse *v.* Redfern, 20 Sol. Jour., 560 Q. B. D., but see Nagle *v.* O'Donnell, Ir. Rep. 7 Com. Law 79, C. P. where sued for debt contracted before marriage; and see Riordan *v.* Walsh, Ir. Rep. 7 Com. Law. 153, Ex., a case of an ejectment, and as to petitions, see Dundas' Trusts Ir. Law Times 117, M. R.

(*t*) Moore *v.* Elliott, Ir. Rep. 5 Com. Law 501, Ex.

(*u*) Butterworth *r.* Tee and Wife, W. N., 1876, 9, 20 Sol. Jour. 198, Quain, J. Hancock *v.* De Nieeville, W. N., 1875, 204 and 230, Anon. W. N., 1876, 22.

(*v*) Armstrong *r.* Crawley, Ir. Rep. 9, Eq. 509, V. C.; English *v.* Chute, Ir. Rep. 6, Eq. 338, V. C.

Order 15.
Infants.

Infants can in no case sue without a next friend(*u*) and when a defendant he must appear and defend by his guardian *ad litem* appointed in that behalf by the Court.

If an infant does not appear, the plaintiff before he can proceed to have judgment by default, under Order XII, R. 1, *ante*, must first have a guardian *ad litem* appointed for the infant.

The guardian *ad litem* of an infant defendant is competent to give consent as to taking evidence under Order xxxvi., R. 1, *infra*.(*v*) Where an appearance is entered for an infant by solicitor gratis, a guardian *ad litem* may be appointed for him on his own application, though he has not been served with writ.(*w*)

As to application to appoint next friend, see cases in note.(*x*)

The appointment should be made and name used according to Chancery practice before the bill was filed, though when a mistake occurred as to the age of the infant the bill was amended.(*y*)

In Common Law actions it was sufficient to insert the name when filing the summons and plaint as a pleading.(*z*)

The guardian of a minor appointed by a Judge of the Chancery Division in a minor matter, is not constituted guardian *ad litem* in a suit, but the latter must be appointed by the branch of the Court to which the suit is attached.(*a*)

RULE 9.
Representatives of classes.
Ord. 16, R. 9, A. E.

9. 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 may put upon an instrument, and it shall not be known or be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court shall consider that in order to save expense or for some other reason it will be convenient to have the question or 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 may appoint some one or more person or persons to represent such heir-at-law, next of kin, or class, and the judgment of the Court in the presence of such person or persons shall be binding upon the party or parties or class so represented.

(*u*) See however Hunter *v.* Hunter, Ir. Rep. 3 Com. Law, 40 C. P.

(*v*) Knatchfull *v.* Fowle, L. R., 1 Chan. D. 604, 24 W. R. 629 M.R.; Fryer *v.* Wiseman, 24 W. R. 205, 20 Sol. Jour. 211, V. C. H.

(*w*) Lloyd *v.* Lord Rossmore, Ir Rep. 9, Eq. 488, V. C.

(*x*) Ronayne *v.* Perrin, 10 Ir. Com. Law Rep., App. 36, Q. B; Plunket *v.* Doyle, 6 Ir. Jur. N. S., 381 E. See Ferguson *v.* Wilson, 4 Ir. Jur. 376; Ponsonby *v.* Flynn, 2 Ir. Jur. 246, Q. B.

(*y*) Flight *v.* Bolland, 4 Russ. 298.

(*z*) Grady *v.* Hunt, 3 Ir. Com. Law. R 522, 6 Ir. Jur. 233, C. P.; see Phillips *v.* M'Evoy, 7 Ir. Jur. 111 C. P.

(*a*) Smith *v.* Smith, Ir. Rep. 3 Eq. 19 V. C.

Order 15.

Numerous parties.

The Schedule Rule 20 above, corresponding to the English Order xvi., R. 9, provides that where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend on behalf of all parties so interested.

This adopts somewhat the Chancery procedure in creditors' suits, and has been applied in a Common Law action by one of several underwriters interested in a ship which had been lost, suing on behalf of the others whose names probably the plaintiff did not know.(*b*)

See order for appointment of persons to represent—1, heir-at-law; 2, next of kin at death; 3, several other classes.(*c*)

4. *Partners.*

Rule 10.

Partners to sue and be sued in name of firm.

Ord. 16, R. 10, E.

10. Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; 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 are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct.

See also Order vi., R. 2, *ante*.

An order to furnish the names of the co-partners has been made after judgment against them.(*d*)

This rule was held not to be applicable where plaintiff sued on behalf of himself and all other persons interested in the subject of the action.(*e*) An order for an attachment for neglect to comply with an order to furnish names is not one to be enforced against the solicitor, under Order xxx., R. 21, *infra*.(*f*)

When the names of the partners are declared the action proceeds as if they had been named plaintiffs in the writ, but the proceedings may be continued nevertheless in the name of the firm; see Ord. vi., R. 2, *ante*.

Applications for a statement of the names of the persons who are co-partners in any firm under this rule are to be made by summons at Chambers, Ord. liii., R. 2 (3).

Rule 11.

Suing a firm.

Ord. 16, R. 10, A. E

11. 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.

(*b*) See Leathley *v.* Macandrew, W. N. 1875, 259; 20 Sol. Jour. 160; and see DeHart *v.* Stevenson, L. R., 1 Q. B. D. 313, 24 W. R. 367; and see as to effect of a defence thereto, Leathley *v.* Macandrew, W. N. 1876, 38; 20 Sol. Jour. 259, Lindley, J.

(*c*) *In re* Peppitt's Estate, Chester *v.* Phillips, L. R., 4 Chan. D. 230, 25 W. R. 211, V.C.B.

(*d*) Lynch *v.* Oversall Coal Cy., 20 Sol. Jour. 160, Huddlestone, B.

(*e*) Leathley *v.* MacAndrew, W. N. 1875, 259.

(*f*) Pike *v.* Frank Keene, 24 W. R. 322, W. N. 1876, 36 Ex.D.

Order 15.

5. *Proceedings by one of a Class.*

RULE 12. One of a class. Ord. 16, R. 11, E.

12. Subject to the provisions of the Act and these Rules, the provisions as to parties contained in the 66th section of the Act 30 and 31 Vic., ch. 44, shall be in force in the High Court of Justice.

The rules of the Chan. (Ire.) Act, 1867, s. 66, are incorporated by reference and made of force in actions in the High Court, so far that it will not be competent for any defendant to take objection for want of parties in any of the cases provided for in the section.

6. *If no Personal Representation.*

RULE 13. Where no personal representative. Chan. Act, 1867, s. 110.

13. If in any action or suit before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially, or generally by public advertisements; and the order so made by the Court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court.

This rule is borrowed from the Chan. Ire. Act, 1867, s. 110, with no variation other than the addition of the word "action" to "suit." Where a plaintiff was equitable assignee of a policy of insurance in payment of a debt and sued the insurance company after the death of the assignor, the assured, having no personal representative, and the debt due to plaintiff far exceeding the sum assured, the Court dispensed with one being raised and proceeded in his absence.(*g*)

7. *Amending as to Parties.*

RULE 14. Application to add parties or strike out. Ord. 16, R. 14, E.

14. 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.

(*g*) Crossley *v.* City of Glasgow Assurance Company, L. R., 4 Chan. D., 421; 25 W. R., 264, M. R. See Hobbs *v.* Read W. N. 1875, 95, V. C. H.

Order 15.

See case of a defendant added after order made for consolidation of two actions.(*h*)

RULE 15. New defendant, amending writ and service. Ord. 16, R. 15, E.

15. Where a defendant is added, unless otherwise ordered by the Court or Judge, the plaintiff shall file an amended copy of and sue out a new 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.

Semble are the original defendants to be served with the amended writ. This rule has been considered inapplicable to a consolidated action.(*i*)

RULE 16. Amending claim. Ord. 16, R. 16, E.

16. If a statement of claim has been delivered previously to such defendant being added, the same shall, unless otherwise ordered by the Court or Judge, be amended in such manner as the making such new defendant a party shall render desirable, and a copy of such amended statement of claim shall be delivered to such new defendant at the time when he is served with the writ of summons or notice or afterwards, within four days after his appearance.

8. *As to giving Relief over to a Defendant against other Persons not Parties.*

RULE 17. Notice to third person liable to contribute or indemnify. Ord. 16, R. 17, E.

17. Where a defendant is or claims to be entitled to contribution or indemnity, or any other remedy or relief over against any other person, or where from any other cause it appears to the Court or a Judge that a question in the action should be determined not only as between the plaintiff and defendant, but as between the plaintiff, defendant, and any other person, or between any or either of them, the Court or a Judge may on notice being given to such last-mentioned person, make such order as may be proper for having the question so determined.

The prefix to this class of rules, "*As to giving relief over to a defendant against other persons not parties*," is rather calculated to mislead the reader into supposing that under the rules which follow (17 to 21) any actual relief ever can be attained through the instrumentality of these rules, whereas the utmost which the Courts in England, under identical rules, have felt themselves at liberty to do, is to bind third persons in a future action as to some particular fact or question, being one in a series, forming an important, generally cardinal fact, in ques-

(*h*) *In re* Wortley, Culley *v.* Culley, L. R., 4 Chan. D., 180, 25 W. R., 295, M. R.

(*i*) *Ib.*

Order 15.
Rule 17.

tion in the future action, and that they were not intended to afford relief in the present action beyond binding him to that fact as an established fact. The subject of these very important rules is discussed in Chapter xxv., p. 205, *ante*, and it only remains to note here any cases which have been decided during the time these sheets have been passing through the press.

Notice of application.

Notice of application under this Rule 17, to have a question (or fact) in the action determined, as between the plaintiff, defendant, and a third person, is to be given by the defendant to the plaintiff, and it may be given at any time before or at the trial (see Rule 19), and the Court or Judge if satisfied that such a question in the action should be so determined, may direct notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper, and if application be made at the trial may postpone the trial as he thinks fit.

Mr. J. Quain thought that the words in Rule 17 (E. and Irish), "on notice being given to such last-mentioned person," refer to the notice to be given under Rule 19 by the plaintiff, and which in the preliminary application under sec. 17, the defendant merely asks the judge to direct, and that the preliminary application is one exclusively between the moving defendant and the plaintiff.(*k*)

In Macdonald *v.* Bode (*l*) Mr. Justice Lindley considered that these rules applied to the case of a defendant wishing to raise the question that the plaintiff was suing as a trustee for the benefit of a third party, whom he serves with notice in order to establish against him and the plaintiff a counter-claim.

Rule 18.
Service of notice on third person.
Ord. 16, R. 18, E.

18. Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his statement of defence. Such notice may be in the form or to the effect of the Form No. 1 in Appendix (B) hereto with such variations as circumstances may require, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

(*k*) Pearson *v.* Lane, W. N., 1875, 248; 20 Sol. Jour. 122, Quain, J.
(*l*) Macdonald *v.* Bode, W. N., 1876, 23; 20 Sol Jour. 241, Lindley, J.

Order 15.
RULE 18.

The notice spoken of in this rule and given as No. 1 in Appendix B, is from the defendant to the third person. The notice spoken of in the next Rule (19) is a notice from the plaintiff to the third person. The former notice sets forth the nature of the claim made by the plaintiff, and also the claim which the defendant asserts over against the third person and apprizes him that if he wishes to dispute the plaintiff's claim as against the defendant he should enter an appearance in the action, and in default of his doing so, he will not be entitled in any future proceeding between the defendant and him to dispute the validity of the judgment in the present action, whether obtained by consent or otherwise.

The precise purport of the notice intended by section 17 of both orders it is not safe to determine. Yet it is impossible to avoid conjecturing that Rule 17 English was originally framed with a much wider aspect and a view to actual immediate relief to be given in the action, but on consultation it may have been cut down to its present dimensions, so that its value and meaning outside the notice in Rule 19 are difficult to discern.(*m*)

Service of the notice effected out of the jurisdiction in the manner prescribed by Ord. 11, R. 1 E. (Order x., R. 1, *ante*), will be sufficient.(*n*)

RULE 19.
Order to serve third persons to bind them.
Ord. 16, R. 19, E.

19. When under Rule 17 of this Order it is made to appear to the Court or a Judge at any time before or at the trial that a question in the action should be determined, not only as between the plaintiff and defendant, but as between the plaintiff and the defendant and any other person, or between any or either of them, the Court or a Judge, before or at the time of making the order for having such question determined, shall direct such notice to be given by the plaintiff at such time and to such person and in such manner as may be thought proper, and if made at the trial the Judge may postpone such trial as he may think fit.

Semble is delivery of the pleading to a person already a defendant sufficient notice under this rule.(*o*)

RULE 20.
Appearance to dispute plaintiff's claim.
Ord. 16, R. 20, E.

20. If a person not a party to the action, who is served as mentioned in Rule 18, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, he must enter an appearance in the action within eight days from the service of the notice. In default of so doing, he shall

(*m*) See C. B. Kelly's reading on these Rules in Horwell *v.* London General Omnibus Company, L. R., 2 Ex. D., 365; 25 W. R., at p. 612.

(*n*) Swansea Shipping Cy. *v.* Duncan, L. R., 1 Q. B. D. 644; 25 W. R. 233, A. C.

(*o*) See Evans *v.* Buck, L. R., 4 Chan. D., 432; 25 W. R., 392 M. R.

Order 15.

be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise. Provided always that a person so served and failing to appear within the said period of eight days may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or a Judge shall think fit.

Where service of the notice is had out of the jurisdiction, the order directing service, fixes the time for appearance under Ord. x., R. 3, *ante*, and if it allow more than eight days for appearance, the party served must have the further time to appear accordingly.(*p*)

RULE 21.

Plaintiff may apply for directions.

Ord. 16, R. 21, E.

21. If a person not a party to the action served under these Rules appears pursuant to the notice, the party giving the notice may apply to the Court or a Judge for directions as to the mode of having the question in the action determined; and the Court or Judge, upon the hearing of such application, may, if it shall appear desirable so to do, give the person so served liberty to defend the action upon such terms as shall seem just, and may direct such pleadings to be delivered, or such amendments in any pleadings to be made, and generally may direct such proceedings to be taken, and give such directions as to the Court or a Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the person so served shall be bound or made liable by the decision of the question.

A person served, by entering an appearance does not waive the question of the propriety of the notice given under this order.(*q*)

Generally speaking, the third party if he so desires it will be permitted to defend the action, accepting the statement of claim as it stands, if plaintiff declines to deliver another, the third party being allowed to deliver a statement of defence and counter claim if any to the plaintiff and defendant.(*r*)

If the original defendant disputes the plaintiff's demand, the plaintiff must prosecute his action, but if the original defendant admits his liability, whilst the third party disputes it, the defendant must still remain as a contesting party. If the third party admits the cause of action but disputes the amount, the original defendant may be withdrawn from the contest.(*s*)

(*p*) Swansea Shipping Co. *v.* Duncan, L. R., 1 Q. B. D. 644; 25 W. R. 233.

(*q*) Benecke *v.* Frost, L. R., 1 Q. B. D. 419, 24 W. R. 699.

(*r*) See Tebbs *v.* Lewis, W. N., 1875, 260; 20 Sol. Jour. 161, Huddlestone, B.

(*s*) See Commissioners of Waterford *v.* Veale, W. N. 1876, 23; 20 Sol. Jour. 241, Pollock, B.

Order 15.
RULE 21.

In some cases the third party disputing the liability has been allowed to substitute his own name for that of the plaintiff, first satisfying the plaintiff 's demand, as where the acceptor of a Bill of Exchange being sued by holder, served notice on drawer claiming indemnity from him, on the ground of partial failure of the consideration for which the bill was given, and offering to allow plaintiff to enter judgment if drawer paid that portion of the amount of the bill. The drawer appeared and denied failure of consideration and paid plaintiff amount of his demand in full, on being allowed to substitute his own name as plaintiff, and continue the action against the defendant to recover the sum so paid.(*s*)

Where the action was for not accepting goods sold, and defence was that the goods were bought by defendants as brokers for third persons known to the plaintiff as principals, also that the goods were not according to contract, and notice was served by defendants on their alleged principals claiming indemnity, they appeared and the Court ordered the statement of claim to be first delivered to the new parties, who objected to being made parties on the ground that the contract between them and the defendants for purchase of the goods, was not the same as that between the plaintiffs and defendants, the difference being as to the quality of the articles to be purchased, the Court gave them liberty to appear at the trial to contest the single question as to the quality of the goods, and to be bound so far and no further.(*t*)

ORDER XVI.

Order 16.

Joinder of Causes of Action.

RULE 1.
Joinder of several causes of action, separate trial.
Ord. 17, R. 1, E.

1. Subject to the following Rules, the plaintiff may unite in the same action and in the same statement of claim several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

Joinder of actions.

At common law from recent changes in Ireland, causes of action of whatever kind (except ejectment) might be joined, provided they were by and against the same parties and in the same right, subject however to the power of the court to order separate records to be made up and separate trials to be had where the joinder was likely to prove embarrassing.(*u*)

(*s*) See National Provincial Bank of England *v.* Bradley Bridge Co., W. N., 1876, 63; 20 Sol. Jour. 297.

(*t*) Benecke *v.* Frost, L. R., 1 Q. B. D., 419, 24 W. R. 669.

(*u*) See Cantwell *v.* Cannock, 3 Ir. Com. Law Rep. 78, 6 Ir. Jur. 151, Q. B.

In equity if the plaintiff's bill sought relief in respect of several matters of controversy in their nature separate and distinct, this was a misjoinder of subjects on the same record, although all the plaintiffs and all the defendants might have been parties to the whole of the transactions which formed the subject of the suit. Where a defendant was able to say he was brought on a record with a large portion of which he had no connexion whatever, this was properly called multifariousness,(*v*) as where one of several next-of-kin of an intestate filed a bill for administration of the estate against the administrator, and at the same time sought to set aside a deed as against the other defendants, whereby the plaintiff assigned a portion of his interest in the estate to them (*w*) A more aggravated form of this fault of pleading, was presented where a plaintiff sought to assert two adverse interests in the same suit, one in his character of a creditor of a public company, and the other as a shareholder in the same company, on behalf of himself and all other creditors and shareholders, and the bill was held to be demurrable both for misjoinder and multifariousness.(*x*)

This rule seems (subject to exceptions afterwards named) to leave it optional with the plaintiff to join several claims in one action, but he cannot be compelled to do so, or to damage a claim for one substantial cause of action by joining it with another which might distract the attention of a jury.

Rule 2. Rent with ejectment. Ord. 17, R. 2, E.

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 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.

This follows the Com. Law Pro. (Ire.) Act, 1853, s. 54, and s. 195, as to joinder of mesne rates with an ejectment on the title, and arrears of rent to ejectment for non-payment of rent. This rule extends this by allowing action for damages for breach of any contract under which the premises are held.

Leave of the Court has been given very freely where the action was substantially for recovery of land, to add claims ancillary thereto or consequential thereon, *ex. gr.*, a claim to establish title to real estate under a gift in a will was allowed to be joined with a claim for administration of the real and personal estate of the testator, the object being to determine the construction of a gift over, comprising both real and personal

(*v*) Salvidge *v.* Hyde, 5 Mad. 138.
(*w*) Campbell *v.* Mackey, 1 Myl. & C. 618.
(*x*) Bouck *v.* Bouck, L. R. 2 Eq. 19, M. R.
(*y*) Ward *v.* Sittingbourne and Sheerness Ry. Co., L. R. 9 Chan. 488, and see Hodgens *v.* Hodgens, Ir. Rep. 10 Eq. 4, Chan. Ap. Ct., where these objections are very fully discussed; and see Ledwidge *v.* Lynch, Ir. Rep. 11 Eq. 254, V. C.

Order 16.

estate included in the same limitation,(*y*) and a claim for administration of the personal estate of an intestate and a claim for recovery of his real estate, plaintiff being both heir-at-law and one of the next-of-kin.(*z*) So a claim for recovery of possession of land and one for an injunction to restrain one defendant from receiving the rents, and for a Receiver, and a claim for delivery and cancellation of a deed under which defendant claimed the land.(*a*) Again, a claim for possession of a set of chambers, and to compel defendant to execute a deed of release of the property vested in him.(*b*)

An action for foreclosure is not an action for recovery of land within this Rule 2, and plaintiff may join a claim for administration of the trusts of a mortgage deed to secure debentures with a claim for foreclosure of the mortgage.(*c*)

Rule 3. Assignee in bankruptcy. Ord. 17, R. 3, E.

3. Claims by an assignee or 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.

Rule 4. Husband and wife. Ord. 17, R. 4, E.

4. Claims by or against husband and wife may be joined with claims by or against either of them separately.

See Com. Law Pro. (Irc.) Act, 1853, s. 55.

As to joinder of causes of action against husband and wife, see cases noted below.(*d*) Where a wife is joined with her husband, it should be stated in what right or interest she is joined.(*e*)

Rule 5. Executor. Ord. 17, R. 5, E.

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.

It was not permitted at common law to join claims by or against an executor in his own right with claims arising in his representative capacity, unless the demands in both cases when recovered would be assets.(*f*)

Rule 6. Joint and several claims. Ord. 17, R. 6.

6. Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant.

(*y*) Whetstone *v.* Dewis, L. R. 1 Chan. D. 99, 24 W. R. 93, V. C. H.

(*z*) Kitching *v.* Kitching, W. N. 1876, 225, 24 W. R. 901; 20 Sol. Jour. 724, M. R.

(*a*) Cook *v.* Enchmarch, L. R. 2 Chan. D. 111, 24 W. R. 293, M. R. See Allen *v.* Kennet, 24 W. R. 845; 20 Sol. Jour. 684, M.R.

(*b*) Manesty *v.* Kenealy, 24 W. R. 918; 20 Sol. Jour. 211, V. C. H.

(*c*) Tawell *v.* Slate Co., L. R., 3 Chan. D. 629, M. R.

(*d*) Copinger *v.* Quirk, 4 Ir. Com. Law Rep. 44, 7 Ir. Jur. 330, C.P.; Cuming *v.* Montgomery, Ir. Rep., 6 Com. Law 170, C. P.

(*e*) Cahill *v.* M'Dowall, 13 Ir. Com. Law Rep. 481, 7 Ir. Jur. N. S. 377, C. P.; Sullivan *v.* Mason, 2 Jones, 141.

(*f*) 2 Wms. Exors. 7th Ed., p. 1872; Ashby *v.* Ashby, 7 B. & C. 444.

Order 16.

At common law if there were several plaintiffs, all should be jointly entitled, in order to recover judgment. In equity the plaintiffs should have a common interest in all the matters comprised in the suit. The present Rule 6 is a corollary to Ord. 15, R. 1, enabling persons to be joined as plaintiffs in whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative.

RULE 7. Restricting Ord. 17, R. 7, E.

7. The last three preceding Rules shall be subject to Rule 1 of this Order, and to the Rules hereinafter contained.

RULE 8. Action may be confined. Ord. 17, R. 8, E.

8. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of in one action, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of in one proceeding.

See observations on joinder of actions, as against defendants, in Order xv. R. 3, *ante*, p. 535.

RULE 9. Excluding cause of action when inconvenient. Ord. 17, R. 9, E.

9. If, on the hearing of such application as in the last preceding Rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of in one action, the Court or a Judge may order any of such causes of action to be excluded, and may direct the statement of claim, or, if no statement of claim has been delivered, the copy of the writ of summons, and the indorsement of claim on the writ of summons, to be amended accordingly, and may make such order as to costs as may be just.

ORDER XVII.

Actions by and against Lunatics and Persons of Unsound Mind.

Order 17.

Actions according to Chancery Rules.

In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the 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 in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose.

A suit by a lunatic (so found) is instituted in his name by the committee of his estate, if any, and if none, by his next friend.

Order 17.

Persons of full age but of weak or unsound mind, but not so found by inquisition, sue by their next friend, and the appointment is made similarly to that of an infant, see *ante*, p. 538–9. Where two persons separately filed bills as next friend of a person of unsound mind, the Court consolidated the suits.(*g*)

When sued as defendants they must defend by guardian *ad litem*.

So where in the progress of the suit a party, plaintiff or defendant, becomes of unsound mind.(*h*)

When the lunacy ceases, the person of unsound mind may repudiate the proceedings.(*i*)

Order XVIII.

Pleadings Generally.

Order 18.

Schedule Rules on Pleading.

Ord. 19, R. 2, E. Delivery of statement of claim and defence.

21. Unless the defendant in an action at the time of his appearance shall state that he does not require the delivery of a statement of complaint, the plaintiff shall within such time and in such manner as may be directed by Rules, deliver to the defendant after his appearance a statement of his complaint and of the relief or remedy to which he claims to be entitled. The defendant shall within such time and in such manner as may be directed by rules deliver to the plaintiff a statement of his defence, set-off, or counterclaim (if any), and the plaintiff shall in like manner deliver a statement of his reply (if any) to such defence, set-off, or counterclaim. Such statements shall be as brief as the nature of the case will admit, and the Court in adjusting the costs of the action shall inquire at the instance of any party into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

To be brief.

Set-off or counterclaim. Ord. 19, R. 3, E.

22. A defendant in an action may set-off, or set up, by way of counterclaim against the claim of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the

(*g*) Vane *v.* Vane, W. N., 1876, 90, M. R.

(*h*) See Wolfe *v.* Wolfe, Ir. Rep., 9 Eq. 392, V. C.; see *Exp.* J. White, Ir. Rep. 6 Eq. 82, L. C., where a guardian appointed for a clergyman for the purpose of commuting his annuity.

(*i*) See Beall *v.* Smith, L. R., 9 Chan. 95. See Blyth *v.* Green, W. N. 1876, 214, M. R.

opinion of the Court or Judge such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

Pleading, material facts. Ord. 19, R. 4, E.

23. Every pleading shall, unless when otherwise provided by Rules, contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary.

Relief prayed. Ord. 19, R. 8, E.

24. Every statement of claim shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and may also ask for general relief. And the same rule shall apply to any counterclaim made, or relief claimed by the defendant, in his statement of defence. If the plaintiff's claim be for discovery only, the statement of claim shall show it.

No general traverse. Ord. 19, R. 20, E.

25. It shall not be sufficient for a defendant, unless where otherwise provided by Rules, in his defence to deny generally the facts alleged by the statement of claim, or for a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.

Denial of contract. Ord. 19, R. 23, E.

26. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise.

Issues settled. Ord. 26, E.

27. Where in any action it appears to a judge that the statement of claim or defence or reply does not sufficiently define the issues of fact in dispute between the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

Amendment of pleading. Ord. 27, E.

28. The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively, which may be scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question

Order 18.

in controversy between the parties; and all parties shall have also such further powers of amendment as may be prescribed by rules.

Demurrer.

Demurrer.

29. A demurrer to any statement may be filed in such manner and form as may be prescribed by rules.

Pleading Payment Ord. 30, R. 1, E.

30. Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

Special case. Ord. 34.

31. The parties may, after the writ of summons has been issued, concur in stating the questions of law arising in the action in the form of a special case for the opinion of the Court.

Order XVIII.

Rules of Court.

Rule 1. New Rules of pleading.

1. The following rules of pleading, in addition to those contained in the Act, shall be substituted for those heretofore used in the High Court of Chancery and in the Courts of Common Law.

Upon the subject of the forms and times for pleading, see Chapter li., 371, *ante*, and as to the new rules of pleading generally, see Chapter lii., p. 379.

Rule 2. Printing.

2. Every pleading in the Chancery Division which shall contain more than ten folios of seventy-two words each (any figure being counted as one word) shall be printed, and every other pleading in that division and every pleading in the other divisions may be either printed or written, or partly printed and partly written.

Rule 3. Distinct claims in new paragraphs. Ord. 19, R. 9, E.

3. Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, in separate paragraphs consecutively numbered. And the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off, or counterclaim founded upon separate and distinct facts.

As to counterclaims, see Chapter xxiii., p. 190, *ante.(a)*

(*a*) Harris *v.* Gamble, L. R., 6 Chan. D., 748, V. C. H.

Order 18.

Rule 4.

4. Where any defendant seeks to rely upon any facts as supporting a right of set-off or counter-claim, he shall, in his statement of defence, state specifically that he does so by way of set-off or counter-claim.

Counter-claim, facts in.

A defence by way of set-off or counterclaim should follow one of the forms given in the Appendix C, Nos. 5, 6, and 7, and begin thus "By way of set-off and counterclaim the defendant claims as follows":—The facts intended to support the counterclaim should be specifically stated in it, and by way of repetition if already set forth as another defence.(*b*)

Ord. 19, R. 10, E.

It should be delivered in the same time and manner as an ordinary defence. A defence entitled "Defence and counter-claim" will answer for a set-off.(*c*)

Rule 5.

5. If either party wishes to deny the right of any other party to claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.

Title of executor, &c., denied.

Ord. 19, R. 11, E.

See Com. Law Pro. (Ire.) Act, 1853, s. 68.

Rule 6.

6. No plea or defence shall be pleaded in abatement.

Plea in abatement.

Pleas in abatement were abolished at Common Law by the Com. Law Pro. (Ire.) Act, 1853, s. 84, as regards misjoinder, non-joinder, and misnomer. They were open in some few cases, as where an infant sued by attorney,(*d*) or where a married woman was sued without her husband.

Ord. 19, and 12, E.

Pleas to the jurisdiction have also ceased, but the benefit of them may be had by application to stay proceedings.(*e*)

Rule 7.

7. No new assignment shall hereafter be necessary or used. But everything which has heretofore been alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim.

New assignment.

As to occasion for new assignments formerly, see cases in note.(*f*)

(*b*) Hillman *v.* Mayhew, 24 W. R., 585, C. P. D.; see Child *v.* Stenning, L. R., 5 Chan. D., 695, 25 W. R. 519; Crowe *v.* Barnicott, L. R., 6 Chan. D., 753.

(*c*) Wood *v.* Anglo-Italian Bank, 20 Sol. Jour. 332, C. P D.; Crowe *v.* Barnicott, L. R., 6 Chan. D. 753, 25 W. R. 789 Fry, J.

(*d*) See Hunter *v.* Hunter, Ir Rep., 3 Com. Law, 40 C. P.; Preston *v.* Lamont, L. R., 1 Ex. 361, 24 W. R. 928.

(*e*) See Jenney *v.* Bell, L. R., 2 Chan. D., 547; 24 W. R. 550, V. C. M.

(*f*) Keany *v.* Tottenham, Ir. Rep. 2 Com. Law, 45 Ex. Chan.; Lane *v.* Hone, Ir. Rep., 6 Com. Law, 231 C. P.; Treacy *v.* Cruice, Ir. Rep. 1 Com. Law, 576 Ct. Ex.

Order 18.

The plaintiff is now to avoid the necessity for new assignment by making his claim specific and circumstantial, and amending it if necessary; see Appendix C, Form 18 of defence to an action of trespass, *q. c. fregit.*(*g*)

RULE 8. Defence in ejectment. Ord. 19. Rule 5,

8. 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 he may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned.

It remains to be seen how far this rule applies to ejectments for non-payment of rent, in which by the Com. Law Pro. Act, 1853, s. 198, the defence is required to set forth the substantial ground of the defence, *ex. gr.*, whether the title of the plaintiff as landlord or the fact of the rent being due was in dispute.(*h*)

RULE 9. Not guilty by statute. Ord. 19, R. 16, E.

9. Notwithstanding the provision in the Common Law Procedure Amendment (Ireland) Act, 1853, in that behalf, the defendant, in all cases where, either before or since said Act, a plea of not guilty by statute was authorized, may plead the same, inserting in the margin "By statute," and the Act and section thereof authorizing such plea to the action. Every defence of not guilty by statute shall have the same effect as a plea of not guilty by statute would have had but for such provision. But if the defendant so plead he shall not without leave of a Court or Judge plead any other defence.

This repeals the 69th section of Com. Law Pro. (Ire.), Act, 1853.

As to general denial of allegations or statement of claim, see Chapter lii., p. 388, *ante*.

RULE 10. Allegations not denied admitted. Ord. 19, R. 17, E.

10. Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

This Rule is borrowed from Common Law Pleading.

(*g*) See Hall *v.* Eve, L. R., 4 Chan. D., 341; 25 W. R. 177.
(*h*) See Ferg. C. L. P. 234–5.

The Rule in Equity was the reverse, where a defendant who did not answer when not required so to do was considered to have traversed the entire case.

The admission is of course only for the purposes of the action (*k*)

Upon a defence for husband and wife, raising no case for the husband, judgment was allowed against the husband forthwith (*l*)

A principal object of this Rule is to enable plaintiff to get an order for judgment on admissions in the nature of a decree pro confesso, where there is no express denial or refusal to admit (*m*)

RULE 11.

Each pleading to raise true ground of defence or reply. Ord. 19, R. 18, E.

11. Each party in any pleading, not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, as for instance, fraud, or that any claim has been barred by the Statute of Limitations or has been released.

As instances of pleadings likely to take the opposite party by surprise, may be mentioned such as left it doubtful whether a defendant in an action for work and labour, and materials provided, by a denial that any work or labour or materials was done or provided, *modo et forma*, meant to raise the question that the work although done was under a special contract, with the terms of which plaintiff had not complied. (*n*)

This style of pleading will probably now be inadmissible. Where the claim was on a charter party which on the face of it was in form (through mutual mistake of both parties) between a stranger and the defendant, and the plaintiff meant to rely on the fact that according to the intention and proper effect of it, it was a charter party between plaintiff and defendant, it was held that he should have stated it as it was, in form, and then allege it was intended in another form, and to another effect—and that in such a case—these were the material facts, and if he had done so, the court might have dealt with the charter as if reformed and given relief accordingly. (*o*)

(*k*) See Com. Law Pro. Act, 1853, s. 68, and Jefferey *v.* Lysaght, 6 Ir. Com. Law Rep. 404.

(*l*) Jenkins *v.* Davies, L. R. 1, Chan D. 696, 24 W. R. 690 V. C. B.

(*m*) Anon. 20 Sol. Jour. 468, M. R. See Ord. 39, R. 9, *infra*.

(*n*) See Callan *v.* Marum, Ir. Rep. 5 Com. Law, 313, C. P. Boak *v.* M'Cracken, 6 Ir. Com. Law Rep. 259, C. P. Mosely *v.* M'Mullen 6 Ir. Com. Law Rep. 69, Ex.

(*o*) Breslawer *v.* Barwick, 24, W. R. 901, 20 Sol. Jour. 663, C. P. D.

Order 18.

In ordinary cases, a mere statement of the particulars of the demand, or of the ground of the defence, such as the Statute of Limitations, will be sufficient.(*p*)

The Statute of Limitations must be expressly stated as the defence which the defendant relies on. Where a statement of claim showed that the claim was barred by the Statute of Limitations and defendant demurred to it, the demurrer was overruled, although a defence would only be to the same effect as that raised by the demurrer, because although the remedy be suspended the cause of action might remain,(*q*) but it has been decided otherwise as regards a claim for possession of land where the statute takes away the right as well as the remedy, and this rule does not apply to demurrers.(*r*) So a defence by way of demurrer will not enable the pleader to insist upon the Statute of Frauds.(*s*) In an action alleging delivery and acceptance of goods by defendant, a traverse of the delivery and acceptance will not entitle the pleader to the benefit of the Statute of Frauds.(*t*)

Rule 12. Pleadings to be consistent. Ord. 19, R. 19, E.

12. No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure in Common Law pleading was the vice of deserting in one pleading the ground taken in the last antecedent pleading and resorting to another.(*u*) Now, although a second pleading should add some new facts not in the first, yet they must be in support of it.(*v*)

Rule 13. Joinder of issue. Ord. 19, E. 21, E.

13. Subject to the Rules in the Act contained, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

The plaintiff instead of joining issue generally in his replication may answer or explain any allegations of the defence, and

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(*p*) See Asken *v.* North Eastern Ry. Co., W. N., 1875, 238, 20 Sol. Jour. 120.

(*q*) Wakelee *v.* Davis, 24 W. R., 60, Q. B. D.

(*r*) Dawkins *v.* Lord Penrhyn, L. R., 6 Chan. D. 318; 21 Sol. Jour. 730, A. C.

(*s*) Catling *v.* King, L. R., 5 Chan. D. 660; 25 W. R. 550, A. C.

(*t*) Clarke *v.* Callow, W. N., 1876, 262; 20 Sol. Jour. 744, A. C.

(*u*) See, as an instance, Barry *v.* Grogan, Ir. Rep. 2 Com. Law 390, Q. B.

(*v*) See Breslawer *v.* Barwick, 24 W. R. 901; 20 Sol. Jour. 663, C. P. D.

if he wishes to confess and avoid it seems he must answer.(*w*) But after a general joinder of issue it is doubtful whether he can also reply by way of confession and avoidance to the same defence.(*x*) Order 18.

114. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And so when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given. Rule 14. Denial, direct and substantial. Ord. 19, R. 22, E.

The fault in pleading intended to be reached by this rule was at Common Law described as taking a traverse too widely, traversing more than was material and making the precise sum or particular time or place, parcel of the issue.

As regards a denial with circumstances, where a claim was made at Common Law on a special contract with several conditions, it was open to the defendant either to deny the contract as alleged, or to admit a contract and allege it was different from that stated.(*y*) This option would not seem to be open now, and a defendant must disclose whether he means to insist that there was no contract whatever; or set forth the contract as he understands it to be,(*z*) and if his case be that one or more of its conditions were unfulfilled, he should mention which. In one case where plaintiff alleged an agreement between one H, the defendant's predecessor in title, through his agent and plaintiff's predecessor, and defendant denied the agreement in terms as stated, and then alleged that H was a person of unsound mind, and did not lawfully authorize an agent to make an agreement in his name, it was held that defendant could only enter into evidence to show the unsoundness of mind of H, and not the want of authority of the agent.(*a*)

15. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out Rule 15. Documents, effect of. Ord. 19, R. 23.

(*w*) Hall *v.* Eve, L. R. 4 Chan. D 341; 25 W. R. 177; Crichton *v.* Collery, Ir. Rep. 4 Com. Law, 508, Ex.

(*x*) *Ib.*

(*y*) See Habgood *v.* Paul, 8 Ir. Com. Law Rep. App. 24.

(*z*) See Thorp *v.* Holdsworth, L. R., 3 Chan. D., 637, S.C. *nom.* Anon.; 20 Sol. Jour. 468, *per* Sir Geo. Jessel, M. R.

(*a*) Byrd *v.* Nunn, L. R., 5 Chan. D. 781, Fry, J; affirmed, 26 W. R. 101, W. N. 1877, 243 A. C.

Order 18. the whole or any part thereof unless the precise words of the document or any part thereof are material.

See Com. Law Pro. (Ire.) Act, 1853, s. 73.

RULE 16. Malice and fraud, how alleged. Ord. 19, R. 24.

16. Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

In an action claiming indemnification for losses sustained by reason of the fraudulent misrepresentations of the defendant to induce plaintiff to purchase bonds in a public company, it is sufficient to state generally that the prospectus issued by the defendant as director of the company was to his knowledge false and fraudulent, without specifying particulars or stating the motives which induced them.(*b*) So where certain statements are alleged to be false representations of the existing state of things, is it not necessary to set forth what the actual state of facts was, especially where they were more in the knowledge of the defendant.(*c*)

On the other hand to specify particulars of fraud might be dangerous, if incomplete or insufficient to establish a case for relief.(*d*)

RULE 17. Notice alleged. Ord. 19, R. 25, E.

17. Wherever it is material to allege notice to any person of any fact, matter, or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice be material.

See 2 Daniel's Chan. Pract. 791, 4th Edition. *Semble* if the notice be not direct but constructive, through an agent or solicitor, should it be alleged as such.

RULE 18. Contract arising from letters.

18. Wherever any contract or any relation between any persons does not arise from any express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Ord 19, R. 27, E.

(*b*) Herring *v.* Bischoffsheim, W. N. 1876–77, M. R.

(*c*) Weir *v.* Barnett, W. N. 1875, 258; 20 Sol. Jour. 140, Huddlestone, B.

(*d*) See Hodges *v.* Hodges, L. R., 2 Chan. D. 112; 24 W. R. 293, 20 Sol. Jour. 293.

Order 18.

It was a rule both of Common Law and of Equity pleading, that written documents in order to be relied on as evidence of an agreement need not be set forth or put in issue.(*e*) The danger of relying on a series of letters set forth in pleading is illustrated by the case of Vale of Neath Colliery Co. *v.* Furness,(*f*) where the claim was demurred to as not establishing a contract to satisfy the Statute of Frauds.

The second branch of the Rule, as to stating a contract derived from letters or conversations in the alternative, might be dangerous in actions for specific performance in which the contract to be enforced must be certain and specific, and if it were presented to the Court in two alternative shapes, it might probably involve the dismissal of the action on the ground of the uncertainty of the contract.(*g*)

RULE 19. Presumption of law. Ord. 19, R. 28, E.

19. Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

[E.g.—Consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.]

See Stephen on Pleading, p. 399 and 395, Chapter lii. (490) p. 386, *ante*.

RULE 20. Collision of vessels. Preliminary Act. Ord. 19, R. 30, E.

20. In actions for damage by collision between vessels, unless the Court or a Judge shall otherwise order, each solicitor shall, before any pleading is delivered, file with the proper officer a document to be called a Preliminary Act, which shall be sealed up, and shall not be opened until ordered by the Court or a Judge, and which shall contain a statement of the following particulars:—

(*a.*) The names of the vessels which came into collision and the names of their masters.

(*b.*) The time of the collision.

(*c.*) The place of the collision.

(*d.*) The direction of the wind.

(*e.*) The state of the weather.

(*f.*) The state and force of the tide.

(*g.*) The course and speed of the vessel when the other was first seen.

(*h.*) The lights, if any, carried by her.

(*e*) See Rice *v.* O'Connor, 12 Ir. Chan. Rep. 424, A. C.; Smith *v.* Kay, 7 H. L. C., 756.

(*f*) Vale of Neath Colliery Co. *v.* Furness, 24 W. R., 63, V. C. B.

(*g*) Lindsay *v.* Lynch, 2 Scho. & Lef. 1; Power *v.* College of Physicians, 7 Ir. Chan. Rep 104; Daly *v.* Coghlan, 3 Ir. Jur. 150; Kirwan *v.* Burchall, 10 Ir. Chan. Rep. 63.

Order 18.

(*i.*) The distance and bearing of the other vessel when first seen.

(*k.*) The lights, if any, of the other vessel which were first seen.

(*l.*) Whether any lights of the other vessel, other than those first seen, came into view before the collision.

(*m.*) What measures were taken, and when, to avoid the collision.

(*n.*) The parts of each vessel which first came into contact.

If both solicitors consent, the Court or a Judge may order the preliminary acts to be opened and the evidence to be taken thereon without its being necessary to deliver any pleadings.

RULE 21. Pleadings and documents to be delivered or filed with officer. Ord. 19, R. 16, E.

21. Every pleading or other document required to be delivered to a party, or between parties, shall be delivered to the solicitor of every party who appears by a solicitor, or to the party if he appears in person; but if no appearance has been entered for a party, then such pleading or document shall be delivered by being filed with the proper officer.

Among documents to be delivered where no appearance has been entered, are notices of motion, *ex. gr.* notice of motion for judgment.(*h*)

RULE 22. Pleadings to be marked with date of delivery. Ord. 19, R. 7.

22. Every pleading in an action shall be delivered between parties, and shall be marked on the face with the date of the day on which it is delivered, and with the reference to the Record number of the action, the Division to which and the Judge (if any) to whom the action is assigned, the title of the action, the description of the pleading, and the name and place of business of the solicitor delivering the same, or the name and address of the party delivering the same if he does not act by a solicitor.

RULE 23. Copies of pleadings filed.

23. Copies of all pleadings shall, within two days after the same shall have been so delivered, be left with and filed by the proper officer of the division to which the action is assigned, and an entry of each pleading shall, upon the same being filed, be entered in the Cause Book by the officer filing the same.

(*h*) Dymocks *v.* Croft, L. R., 3 Chan. D. 512, 24 W. R. 700, 842, M. R. See Shepherd *v.* Beane, W. N. 1876, 61; Harris *v.* Gamble, W. N. 1877, 142; Cook *v.* Dey, L. R. 2 Chan. D. 418, 24 W. R. 462; see Whitaker *v.* Thurston, W. N. 1876, 232, M. R.

Order XIX.

Pleading Matters arising pending the Action. Order 19.

Rule 1. Defence arising after action brought. Ord. 20, R. 1, E.

1. Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be pleaded by the plaintiff in his reply, either alone or together with any other ground of reply.

As to whether a defence by way of counterclaim arising after action brought can be pleaded, see Ellis *v.* Munson.(*i*)

If a release or other matter had arisen after action brought, defendant might formerly plead it, not in bar of the action, but of its further continuance; and plaintiff was entitled, when dealing with a sole defendant, to confess the defence and have judgment for his costs up to time of plea pleaded.(*k*) Whether plaintiff can have judgment against one of several defendants, on such a defence, is not expressly stated.

In equity, where it became necessary to rely on facts arising after Bill filed, they might be introduced by way of amendment of the bill, or by way of supplemental statement annexed to it.(*l*)

Rule 2. Pleading after delivery of defence. Ord. 20, R. 2, E.

2. Where any ground of defence arises after the defendant has delivered a statement of defence, or after the time limited for his doing so has expired, the defendant may, and where any ground of defence to any set-off or counter-claim arises after reply, or after the time limited for delivering a reply has expired, the plaintiff may, within eight days after such ground of defence has arisen, and by leave of the Court or a Judge, deliver a further defence or further reply, as the case may be, setting forth the same.

This defence is similar to the plea *p. d. continuance* in substitution of the plea already pleaded, which was virtually withdrawn. It confessed the action as rightly brought, but prayed it should not further be maintained. The present form of the defence requires the leave of the Court. It may be pleaded at Nisi Prius if necessary.(*m*) A defence of bankruptcy after

(*i*) Ellis *v.* Munson, W. R. 1876, 253, A. C.; Original Hartlepool Company *v.* Gibb; L. R., 5 Chan. D. 713, A. C.

(*k*) See Com. Law Pro. Act, 1853, s. 72; 2 Ferg. Prac. 1019.

(*l*) See 142 G. O., 31st Oct., 1867.

(*m*) See Com. Law Pro. Act, 1853, s. 73.

Order 19. action brought, is of this nature, and entitles plaintiff to his costs up to the date of pleading it.(*n*)

Rule 3. Plaintiff may confess and claim costs. Ord. 20, R. 3, E.

3. Whenever any defendant, in his statement of defence, or in any further statement of defence as in the last Rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence, which confession may be in the Form No. 2 in Appendix (B) hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence unless the Court or a Judge shall, either before or after the delivery of such confession, otherwise order.

If the plaintiff confesses the defence, he can bring no further action in respect of the same claim.(*o*)

Order XX.

Order 20.

Statement of Claim.

Rule 1. 1. The delivery of statements of claim shall be regulated as follows:—

Delivery six weeks after appearance unless dispensed.

(*a.*) If the defendant shall not state that he does not require the delivery of a statement of claim, the plaintiff shall, unless otherwise ordered by the Court or a Judge, deliver it within six weeks from the time of the defendant's entering his appearance.

May deliver before.

(*b.*) The plaintiff may, if he think fit, at any time after the issue of the writ of summons, deliver a statement of claim, with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, and although the defendant may have appeared and stated that he does not require the delivery of a statement of claim: Provided that in no case where a defendant has appeared shall a statement be delivered more than six weeks after the appearance has been entered unless otherwise ordered by the Court or a Judge.

At peril of costs. Ord. 21, R. 1, E.

(*c.*) Where a plaintiff delivers a statement of claim without being required to do so, the Court or a Judge may make such order as to the costs occasioned thereby as shall seem just, if it appears that the delivery of a statement of claim was unnecessary or improper.

(*n*) See Foster *v.* Gamgee, L. R., 1 Q. B. D., 666; 24 W. R. 319; Ellis *v.* Munson, W. N. 1876, 253, A. C.

(*o*) Newington *v.* Levey, L. R., 5 C. P. 607, S. C., L. R., 6 C. P. 180.

Order 20.

As to delivery of statement of claim in general, see schedule Rule 21, *ante*, p. 597.

As to default in delivery of, see Ord. xxviii., R. 1, *infra*. When defendant does not appear, delivery of statement of claim is in most actions unnecessary. If the writ be specially indorsed with a liquidated demand under Order ii., R. 3, plaintiff may sign final judgment without any statement of claim under Ord. xii., R. 3 and 4, and even where the writ is not specially indorsed, but the claim is for a debt or liquidated demand, plaintiff may after eight days have judgment on filing an affidavit, stating particulars of his claim in addition to the affidavit of service, Ord. xii., R. 5.

Where the claim is not of a liquidated nature, but for detention of goods and damages in respect of same, plaintiff may have interlocutory judgment in default of appearance, without a statement of claim, Ord. xii, R. 6, so likewise in a claim for possession of land under R. 7, or for mesne rates under R. 9.

But in Chancery actions specially assigned by the 36th sec. of J. Act, and all other actions not mentioned before, the plaintiff must proceed as if the defendant had appeared. That is, he must deliver a statement of claim and follow it up as in ordinary cases, by notice of motion for judgment. Even in an administration action set down as a short cause, V. C. Malins required it, while Sir Geo. Jessel, M. R. and V. C. Hall thought it unnecessary.(*q*)

When the defendant appears and dispenses with delivery of statement of claim, it is of course unnecessary, and even where defendant does not dispense with it, plaintiff may deliver as his statement a notice that his claim appears indorsed on the writ under Rule 2 of this Order.

Rule 2. Specially indorsed writ, notice in lieu of statement of claim. Ord. 21, R. 4 E.

2. Where the writ is specially indorsed, and the defendant has not dispensed with a statement of claim, it shall be sufficient for the plaintiff to deliver as his statement of claim a notice to the effect that his claim is that which appears by the indorsement upon the writ, unless the Court or a Judge shall order him to deliver a further statement. Such notice may be either written or printed or partly written and partly printed, and may be in the Form No. 3 in Appendix (B) hereto, and shall be marked on the face in the same manner as is required in the case of an ordinary statement of claim. And when the plaintiff is ordered to deliver such further statement it shall be delivered within such time as by the order shall be directed, and if no time be so limited then within the time prescribed by Rule 1 of this order.

(*q*) Breton *v.* Mockett, W. N., 1875, 255; Boyes *v.* Cook, W. N. 1876; 28, V. C. M. Taylor *v.* Duckett, W. N., 1875, 193 M. R.; Green *v.* Colby, L. R., 1 Chan. D. 693; 24 W. R. 246, V. C. H.

Order 20.

Delivery of a copy of the indorsement instead of the notice mentioned in this Rule is informal, but it has been amended.(*r*)

Further statement of claim and particulars.

The J. Acts contain no special provision for furnishing particulars of plaintiff's demand, except the above. It was assumed that bills of particulars would not be necessary, and that special indorsements on the statements of claim would furnish full information.(*s*)

But the old power to order better particulars has been exercised after delivery of a statement of claim,(*t*) especially where the action is likely to be settled (*u*) The application should be for further statement of claim, after claim delivered.(*v*)

Of course every court has an inherent jurisdiction independently of rules to compel a plaintiff in any form of action to furnish fuller particulars of his claim when justice requires,(*w*) *ex. gr.*, as to the specific breach of covenant he intends to rely on,(*x*) of the time, and place, and boundaries of *locus in quo* in case of trespass *q. c. fregit*,(*y*) of the names, descriptions, and addresses of the persons before whom words charged to be libel were spoken.(*z*)

As to particulars of defence in libel, see note(*a*), and particulars of counterclaim, see note (*b*).

Order XXI.

Defence.

Order 21.

Rule 1. Time for delivery. Ord. 22, R. 1, E.

1. Where a statement of claim is delivered to a defendant he shall deliver his defence in an action assigned to the Chancery Division within fourteen days, and in an action assigned to the Queen's Bench, Common Pleas, or Exchequer Divisions within eight days, from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended by the Court or a Judge.

(*r*) Anon. W. N., 1876, 24; 20 Sol. Jour. 243, Lush, J.

(*s*) Ross *v.* Gibbs, W. N., 1875, 238; 20 Sol. Jour. 120, Quain, J.

(*t*) Anon. W. N., 1875, 202; 20 Sol. Jour. 57, Lush, J.

(*u*) Barker *v.* Wood, W. N., 1876, 50; 20 Sol. Jour. 282, Archibald, J.

(*v*) Schomberg *v.* Zoebelli, W. N., 1876, 106, 20 Sol. Jour., 341; see Cotton *v.* Horseman, W. N., 1876, 22, where notice only given.

(*w*) Early *v.* Smith, 12 Ir. Com. Law Rep. App. 35 Q. B.

(*x*) Sparkes *v.* Blacquiere, 6 Ir. Com. Law Rep. 126, C. P.

(*y*) Larkin *v.* Lawder, 7 Ir. L. R. 227, C. P.

(*z*) Early *v.* Smith, *supra.* Slater *v.* Slater, 8 Ir. Jur. N. S. 132, C. P. See Cornwall *v.* Hudson, 7 Ir. Jur. N. S. 117, E. Refused in Wingood *v.* Cox. W. N. 1876, 106; 20 Sol. Jour. 341, Denman, J. Rastell *v.* Steward, W. N, 1875, 231, Quain, J.

(*a*) Colonial Assurance Corporation *v.* Prosser, W. N., 1876, 55; 20 Sol. Jour 288.

(*b*) Anon., 20 Sol. Jour. 81, Lush, J.

Order 21.

The rule establishes different times for defence to Chancery actions and to Common Law actions, *i.e.*, fourteen days from delivery of statement of claim in case of Chancery actions, and eight days in Common Law actions. Where the statement of claim is delivered before the time for appearance has fully expired, then the time counts from the latter date. As to extension of time for delivery of defence, see Ord. lvii., Rule 6, *infra*.

Where an order is made giving defendant further time to file a defence he may file a demurrer alone instead, unless the order specifically expresses the contrary,(*c*) as used to be done in the old procedure.(*d*)

As to judgment in default of defence, see Order xxviii., RR. 2–11, *infra*.

RULE 2. Voluntary defence. Ord. 22, R. 2, E.

2. A defendant who has appeared in an action and stated that he does not require the delivery of a statement of claim, and to whom a statement of claim is not delivered, may deliver a defence at any time within eight days after his appearance, unless such time is extended by the Court or a Judge.

This being a voluntary defence no judgment as by default can be entered, if defendant does not choose so to plead.(*e*)

RULE 3. Defence by leave. Ord. 22, R. 3, E.

3. Where leave has been given to a defendant to defend under Order xiii. he shall deliver his defence, if any, within such time as shall be limited by the order giving him leave to defend, or if no time is thereby limited, then within eight days after the order.

Where the writ is specially indorsed under Order xiii., R. 1, and defendant gets leave to defend, the order usually limits the time to do so. If it does not, the time will be eight days from the date of the order. In this case, unless defendant delivers his defence, plaintiff may have judgment for want of a defence under Order 28, R. 2, *infra*, although no statement of claim be delivered.(*f*)

The order when refusing plaintiff's application for judgment under Order xiii., R. 1, should for this purpose for greater safety expressly give defendant leave to defend (*g*)

RULE 4. Needless traverses, costs of. Ord. 22, R. 4, E.

4. Where the Court or a Judge shall be of opinion that any allegations of fact denied or not admitted by the defence ought to have been admitted, the Court may

(*c*) Hodges *v.* Hodges, L. R., 2 Chan. D. 112, 24 W. R. 293; 20 Sol. Jour. 291, M. R.

(*d*) See Binks *v.* Wharton, Ir. Rep. 5 Eq. 119, V. C.

(*e*) See Hooper *v.* Giles, W. N., 1876; 20 Sol. Jour. 217, Lindley, J.

(*f*) Atkins *v.* Taylor, W. N., 1876, 11; 20 Sol. Jour. 218, Lindley, J.

(*g*) See Margate Pier and Harbour Co. *v.* Perry, W. N., 1876, 52; 20 Sol. Jour., 279, Archibald, J.

Order 21.

make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

Rule 5. Counter-claim involving third person, new title of. Ord. 22, R. 5, E.

5. Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other person or persons, he shall add to the title of his defence a further title similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross action, would be defendants to such cross action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff.

As to allowance of counter-claims, see Chapter xxiii., *ante*, p. 192–3.

Where the counter-claim sought certain deductions from the price of iron sold by plaintiff to defendant, and which defendant had to allow to a third party to whom he sold it, owing to its inferior quality, it was considered not necessary to add to the title of the defence the name of such party, inasmuch as no relief was sought against him.(*h*) But where the action was for balance of purchase money on sale of a house, and defence that sale was accomplished by fraudulent misrepresentations of a third person acting as plaintiff's agent, it was deemed proper that he should be joined as a defendant.(*i*) But in neither of these cases did the defendant by his defence seek to raise any question against the third party as contemplated by the above rule which only deals with the title of the pleading.

In the form No. 10, Appendix C, *infra*, the pleading is prefaced, "The Defence and counter-claim of the above-named O. S." (one of the defendants) and it is entitled both as in the original action and in the cross action, *ex. gr.*, between the said O. S., plaintiff and the said R. W. (*original plaintiff*) and J. B. and J. W., the defendants in the cross-claim. Under the title, "Defence and counter-claim," the defendant may rely on a set-off.(*k*)

Rule 6. Service of third person with counter-claim. Ord. 22, R. 6, E.

6. Where any such person as in the last preceding Rule mentioned is not a party to the action, he shall be summoned to appear by being served with a copy of the defence, and such service shall be regulated by the same Rules as are hereinbefore contained with respect to the service of a writ of summons, and every defence so served

(*h*) Anon., 20 Sol. Jour., 81 Lush, J.

(*i*) Bartholmew *v.* Rawlings, W. N., 1876, 50; 20 Sol. Jour. 281, Archibald, J.

(*k*) Newell *v* National Provincial Bank, L. R., 1 C. P. D. 496, 24 W. R. 458.

shall be indorsed in the Form No. 4 in Appendix (B) hereto, or to the like effect. Order 21.

As to service of writ of summons, see Order viii., *ante*. The indorsement notifies to the third party that if he does not appear to the counter-claim within eight days from service thereof, he will be liable to have judgment given against him in his absence, and tells him where an appearance may be entered.

7. Any person not a defendant to the action, who is served with a defence and counter-claim as aforesaid, must appear thereto as if he had been served with a writ of summons to appear in an action. Rule 7. Appearance by third person. Ord. 22, R. 7, E.

8. Any person named in a defence, as a party to a counter-claim thereby made, may deliver a reply within the time within which he might deliver a defence if it were a statement of claim. Rule 8. Reply to counter-claim. Ord. 22, R. 8, E.

9. Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just. Rule 9. Application to exclude. Ord. 22, R. 9, E.

On this rule, see cases collected in Chapter xxiii. (243), *ante*, pp. 196–8.

10. Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case. Rule 10. Judgment for defendant or balance of counter-claim. Ord. 22, R. 10, E.

As to one trial and judgment, see Chapter xxiii., (241), p. 195 *ante*.

Where defendant's counter-claim is not properly answered by the replication, this will not entitle the defendant to have immediate relief as on admissions, but he must wait until the plaintiff's claim is disposed of, as the balance spoken of in this rule is the final balance on the hearing of the cause.(*l*)

(*l*) Rolfe *v.* M'Claren, L. R. 3 Chan. D. 106, 24 W. R. 816.

Order 22.

Order XXII.

Discontinuance.

Rule 1. Notice of, before defence or further proceedings. Ord. 23, R. 1, E.

1. The plaintiff may, at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, a copy of which shall be left with and filed by the proper officer, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the Record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

As to discontinuance of actions at law before verdict or judgment, see 66 G. O. 1854, and in Ejectment, Com. Law Pro. Act (Ire.), 1853, s. 222, and in Error *ib.* s., 180.

As to plaintiff dismissing his bill in Chancery, see 102, G. O., 31st Oct., 1867.

There was no partial discontinuance of an action or dismiss of a bill, except by special order.

The plaintiff now in all actions in the High Court, can elect to discontinue his action or part of it, but only at one stage, before or immediately after defence. It would seem he may discontinue before delivery of statement of claim.(*m*)

After the above stage he must apply to the Court or a Judge for an order to discontinue. Where defendant became bankrupt after verdict, a *stet processus* might be ordered unless the assignees gave security for amount of the verdict and costs.(*n*)

(*m*) See Moylan *v.* Healy, 8 Ir. Com. Law Rep., App. 52.
(*n*) Megaw *v.* De Lizordi, Ir. Rep. 7 Com. Law. 205, Ex.

Order 22.

A plaintiff at law might withdraw the record which he entered for trial at any time before it appeared in the day list. He could also when the record was called on or any time before verdict, elect to be non-suited and proceed to trial again, on payment of costs. Even after verdict against the defendant and before judgment, he might elect to enter a *nolle prosequi* as to whole or part of the action. and as to all or some of the defendant's, although after a verdict against himself he could not do so.

Now the Court must be applied to for liberty to withdraw the record (unless on consent signed by both parties, see Rule 2, *infra*), and where defendant did not appear on the application, the order was to withdraw the record without prejudice to any application of defendant for costs.(*o*)

Whether a plaintiff may now elect to be non-suited, or enter a *nolle prosequi* is not altogether clear, see Ord. xl., R. 6, *infra*.

It is more regular to discontinue the action than to stay proceedings on payment of costs, as it more effectually bars plaintiff from going on with the action subsequently.(*p*)

Withdrawal of defence or counterclaim. It has been thought (but not decided), that this rule does not apply to make it necessary for a defendant to obtain leave to withdraw a counterclaim. However, the defendant, afterwards did in this case apply to the Court and got leave to do so,(*q*) and indeed the latter clause of this rule seems to be without meaning if it is not made obligatory on a defendant to obtain leave to withdraw his counterclaim at any stage.

At Common Law a defendant might at any time before verdict or judgment withdraw his plea or defence without leave. Latterly this was restricted after notice of trial given.(*r*) He might also file a plea of confession relinquishing his former pleas, unless a motion were pending to set them aside.(*s*)

Whether a defendant can now do so, or confess the action in part and defend it for the rest is not clear, and it seems his safer course would be to pay money into Court and plead it, as to so much as he admits.(*t*)

RULE 2. Withdrawing action entered for trial.

2. When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties.

Ord. 23, R. 2, E.

(*o*) See Ferrard *v.* Arbuthnot, 20 Sol. Jour., 27; Field, J.

(*p*) Anon. W. N., 1876, 40; 20 Sol. Jour., 201, Lindley, J.

(*q*) See Plimpton *v.* Spiller, 20 Sol. Jour., 391; M. R., S. C. 412, A. C.

(*r*) See Bergin *v.* White. Ir. Rep. 4 Com. Law, 306, Q. B.

(*s*) See Good *v.* Allen, 6 Ir. Com. Law Rep. 244, Q. B.; and see 46 G. O., 1854, as to stay of execution.

(*t*) See Defries *v.* Stewart, 11 Ir. Com. Law Rep., App. 18, C. P.

Order 22.

RULE 3. Judgment for costs of discontinuance. Ord. 16, June, 1877.

3. A defendant may sign judgment for the costs of an action if it is wholly discontinued, or for the costs occasioned by the matter withdrawn, if the action be not wholly discontinued.

It is doubtful whether the actual payment of the costs is now as heretofore a condition precedent to the operation of the notice of discontinuance,(*u*) although probably a plaintiff would be restrained from proceeding in a fresh action until he had paid them.(*v*)

ORDER XXIII.

Order 23.

Reply and subsequent Pleadings.

RULE 1. Reply, three weeks for. Ord. 24, R. 1, E.

1. A plaintiff shall deliver his reply, if any, within three weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court or a Judge.

If the plaintiff does not deliver a reply within the period allowed, the consequence is that the pleadings are to be deemed closed at the expiration of the time allowed, and the statements of fact in the pleading last delivered are to be deemed admitted.(*w*) Where a defendant pleads a defence traversing the allegations of the plaintiff's claim, and the plaintiff does not deliver a reply in due time, this state of things does not entitle defendant to judgment on admissions under Order 39, Rule 9.(*x*) The pleadings having closed the plaintiff's duty is to give notice of trial within six weeks after issue joined, and in default of his doing so defendant may himself give such notice, or he may move to dismiss the action for want of prosecution under Order XXXV., R. 4.

RULE 2. Further pleading by leave. Ord. 24, R. 2, E.

2. No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall think fit.

Semble can a demurrer to a reply be delivered without leave of the court or a judge.(*y*)

A further pleading delivered without leave may be set aside.(*z*) Where the court is not satisfied there is a *bona fide* question to be raised, leave may not be given.(*a*)

(*u*) See 2 Ferg. Pract. 1020.

(*v*) See Bredin *v.* Corcoran, 12 Ir. Com. Law Rep. App. 9, Ex.

(*w*) See Order XXVIII., R. 12, *infra*.

(*x*) See Litton *v.* Litton, L. R., 3 Chan. D., 793; 24 W. R. 962.

(*y*) See O'Brien *v.* Cecil, 4 Ir. Com. Law Rep. 271, Q. B.; Dunne *v.* Gormley, 8 Ir. Com. Law Rep. App. 2, Q. B.

(*z*) See Mulligan *v.* Chute, 6 Ir. Jur. 319, Ex.

(*a*) See Daly *v.* Nolan, 7 Ir. Jur. 26, C. P.

The application for leave will probably be by motion on notice.(*b*) Order 23.

3. Subject to the last preceding Rule, every pleading subsequent to reply shall be delivered within four days after the delivery of the previous pleading, unless the time shall be extended by the Court or a Judge. Rule 3. Four days for. Ord. 24, R. 3, E.

If a rejoinder or other pleading be permitted and not delivered in due time, the result will be that the pleadings are closed when time has expired, and plaintiff has the onus of giving notice of trial as explained above under Rule 1.

Order XXIV.

Close of Pleadings.

Order 24.

As soon as either party has joined issue upon any pleading of the opposite party simply without adding any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed. After joinder of issue. Ord. 25, E.

Order XXV.

Issues.

Order 25.

The practice heretofore in use under the Common Law Procedure Amendment (Ireland) Act, 1853, as to the serving and settling of issues is hereby abolished; but if any party consider it expedient from the state of the pleadings to have issues settled, he may apply to a Judge in Chamber for the purpose. Settlement of issues, application for. See Ord. 26, E.

See Com. Law Pro. Act, 1853, s. 102, and Chapter li., p. 371, *ante*. The plan of settling issues under the Common Law Procedure Act, had not on the whole worked satisfactorily, and under the new system of pleading based mainly on Chancery procedure, it is expected that the issues in fact will be raised or develop themselves sufficiently without having recourse, either to the elaborate refinements of Common Law Pleading, or the laborious and somewhat haphazard process of settling them before a judge, before either party was fully informed of the strength or weakness of his case upon the evidence forthcoming.

The provision contained in the Schedule Rule No. 28 to this Act,(*c*) enabling the court to permit all alterations or amendments of the pleadings necessary for the purpose of determining the real question or questions in controversy between the parties will work (it is to be hoped) in the same direction.

(*b*) See Murphy *v.* Nugent, 6 Ir Jur. 302, Ex.; Dee *v.* Dee, 7 Ir. Com. Law Rep. 323, Q. B.; Banahan *v.* Wallace, 12 Ir. Com. Law Rep. App. 13, Ex.

(*c*) See page 572 and corresponding Order 27, Rule 1, E.

Order 26.

Order XXVI.

Amendment of Pleadings.

Schedule Rule 28.

Court may order pleading to be amended or struck out.

Ord. 27, R. 1, E.

"The Court or a Judge may at any stage of the proceedings, allow either party to alter his statement of claim or defence or reply, or may order to be struck out or amended any matter in such statements respectively, which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action: and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties; and all parties shall have also such further powers of amendment as may be prescribed by rules."

See Order XVIII. R. 12, *ante*, which seems to imply that a pleading may, by way of amendment, raise a new ground of claim.

Amendment after issue joined and evidence given.

The very wide and almost unlimited powers of amendment conferred by the new practice, has been exercised at a stage of the proceedings at which it was formerly deemed unsafe and unjustifiable, *i.e.*, after issue joined and evidence given, and when a cause came on to be heard, and the result of the evidence was found not to fit the case as stated,(*c*) but where(*d*) the plaintiff had made out a *prima facie* case showing he was entitled to some relief other than that which he might get on his pleadings [*not* other than that which he had prayed, as erroneously stated in one report of the case],(*e*) the Court has now given leave to amend his pleading, so as to put his claim in a shape, such as if he should succeed in proving it, he will be entitled to a decree.

In the case referred to (King *v.* Cooke) a bill against a trustee for an account was at the hearing on replication, amended by stating some one specific act of wilful default, which it was alleged, had been established in proof, and without an averment of which on the pleading, a decree could not be made, as for wilful default,(*f*) and this was allowed on the terms of plaintiff going into no further evidence, and paying all costs of the hearing, and restricting the amendment to charging a specific act of wilful default, with liberty to defendant to answer

(*c*) See Watts *v.* Hyde, 2 Ph. 406, overruling V. C. Knight Bruce, S. C., 2 Coll. 391.

(*d*) King *v.* Cooke, L. R., 1 Chan. D. 57, 24 W. R. 23, V. C. B.

(*e*) S. C., L. R., 1 Chan. D., at p. 60.

(*f*) Sleight *v.* Lawson, 3 Kay & J. 292.

Order 26.

the amended bill, and go into evidence in support of his answer. Again, where the plaintiff's bill sought to enforce a right to a flow of water along a watercourse, and founded his title on a grant, and also on prescription, and failed as to both cases on the hearing, but a *prima facie* case of a different character appeared to be presented by the evidence, viz., that the watercourse had been constructed by the plaintiff himself at considerable expense, while the defendant's predecessor in title stood by and allowed him to proceed, showing acquiescence on the side of defendant, and opening a new ground for equitable relief, the Court allowed plaintiff to amend his bill, raising this new case, defendant having liberty to put in a further answer (and evidence of course) and reserving the costs.(*g*) So where a cause was in the list for hearing with witnesses to set aside a voluntary settlement on the grounds of surprise and fraud, and the solicitor for plaintiff recently learned that the plaintiff at the time of the execution of the settlement, had been suffering from mental incapacity, the Court allowed the cause to stand over, plaintiff to amend his bill as advised, and to file fresh affidavits to let in the case suggested, with liberty to defendant to answer and go into evidence on the new case, and reserving the costs until the hearing.(*h*)

Scandalous statements struck out.

In a defence to an action on a bond setting forth cohabitation between the parties and false representations in unnecessary detail, and which were unfit to appear on the pleading, they were struck out.(*i*) So in a statement of claim, to recover money obtained by defendant from plaintiff by fraud, an allegation that defendant had pursued a similar course in various other cases was struck out as scandalous and irrelevant.(*k*) See also Com. Law Pro. Act (Ireland), 1853, s. 83; and see in Chancery, 147, 148, and 149 G. O. 3 Oct. 1867.

Embarrassing statements struck out.

A statement of claim seeking damages for interference with plaintiff's right of access to a quay, and to carry coals thither, a paragraph to the effect that defendant did not dispute plaintiff's rights and had in his correspondence with plaintiff's solicitor admitted the plaintiff to be entitled, and expressed willingness to make

(*g*) Budding *v.* Murdock, L. R., 1 Chan. D. 42; 24 W. R. 23, M. R. See as to practice formerly, Lord Darnley *v.* London, Chatham, and Dover Railway Company, 1 De Gex, Jo. and Sm. 204.

(*h*) Roe *v.* Davis, L. R., 2 Chan. D. 729; 24 W. R. 606, V. C. B.

(*i*) Duncan *v.* Vereker, W. N. 1876, 64; 20 Sol. Jour. 297, Archibald, J.

(*k*) Blake *v.* Albion Life Assurance Cy., 24 W. R. 677, C. P. D.

Order 26. the necessary arrangements and to give all facilities for the purpose, was struck out as defendant could not know whether to traverse the admission or not.(*l*) See a defence capable of several constructions and leaving it doubtful whether defendant who was sued on a bond as surety for faithful service of another person, relied on his being induced to execute the bond by false pretences, or that the representations made when entering into it constituted a collateral agreement modifying the condition of the bond, or thirdly, some alteration of the employment given to principal and the risk.(*m*)

Where in an action of slander the defence contained a paragraph amounting to a justification, and was followed by two other paragraphs denying the words having been spoken or spoken in the sense imputed, the latter were struck out.(*n*)

So a claim, prolix and obscure, was ordered to be struck out if not amended.(*o*)

Statements which are matters or conclusions of law and not of fact have been struck out.(*p*)

So matters of evidence.(*q*)

So prolix and unnecessary statements.(*r*)

As to defences alleged to be false and tricky, see note.(*s*)

As to inconsistent defences, see note.(*t*)

Where a paragraph had been struck out, and reinserted with slight verbal alterations, the amended paragraph was struck out.(*u*)

The striking out of a pleading, as embarrassing is a

(*l*) Askew *v.* North Eastern Ry. Cy., W. N., 1875, 238; 20 Sol. Jour. 120, Quain, J. See similar instances in former practice, Irish Society *v.* Crommelin, Ir. Rep., 2 Com. Law, 324, C. P.; Riorden *v.* Cooper, Ir. Rep., 8 Com Law, 539, Q. B., where the statement left it doubtful which of two claims plaintiff intended to make.

(*m*) Stewart *v.* Robinson, Ir. Rep., 3 Com. Law, 69, Q. B.

(*n*) Restall *v.* Steward, W. N. 1875, 231; 20 Sol. Jour. 99, Quain, J. Heugh *v.* Chamberlain. 25 W. R. 742, M. R.

(*o*) Moorhouse *v.* Colville, W. N. 1876, 12; 20 Sol. Jour. 219. Lindley, J. Cashen *v.* Cradock, 25 W. R., 4, W. N. 1876, 197, V. C. B.

(*p*) Menhinick *v.* Turner, W. N. 1876, 55; 20 Sol. Jour. 281, Archibald, J.; see Morgan *v.* Molony, Ir. Rep. 7 Com. Law, 240, C. P.

(*q*) See Chapter li. p. 381, *ante*.

(*r*) Marsh *v.* Mayor of Pontefract, W. N. 1876.

(*s*) Leathley *v.* Carey, 8 Ir. Com. Law. Rep., App. 1; Stokes *v.* Hartnett, 10 Ir. Com. Law Rep., App. 20; and *contra* O'Donnell *v.* Reilly, 11 Ir. Com. Law Rep. 329, Ex.; O'Brien *v.* Taggart, 14 Ir. Com. Law Rep. App. 5; Marquis of Drogheda *v.* Hanlon, Ir. Rep., 1 Com. Law, 319.

(*t*) Barnicott *v.* Hann, W. N. 1876, 24; 20 Sol. Jour. 242.

(*u*) Askew *v.* North Eastern Ry. Cy., W. N. 1876, 9; 20 Sol. Jour. 198, Quain, J.

matter so much of discretion that, as a general rule, no appeal will be entertained in respect of it.(*v*) Order 26.

It has been held that the Court will allow a defendant to amend his defence under this rule without requiring an affidavit showing the nature and necessity of the proposed amendments, but on terms of indemnifying the plaintiff against the costs occasioned by the applicant's omission to put in a full defence at once.(*w*)

Rules of Court.

Amendment of Pleadings.

1. The plaintiff may, without any leave, amend his statement of claim once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared. Rule 1. Statement of claim, once without leave. Ord. 27, R. 29.

See Chancery Orders—11 and 12 G. O., 31 Oct. 1867.

If a demurrer be pending to a pleading, no amendment of it can be made without an order; see Ord. xxvii., R. 7, *infra.*

2. A defendant who has set up in his defence any set-off or counter-claim may, without any leave, amend such set-off or counter-claim at any time before the expiration of the time allowed him for pleading to the reply, and before pleading thereto, or in case there be no reply, then at any time before the expiration of twenty-eight days from the filing of his defence. Rule 2. Set-off or counter-claim, once without leave. Ord. 27, R. 3, E.

3. Where any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him of the amended pleading, apply to the Court, or a Judge, to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may seem just. Rule 3. Application to disallow amendment. Ord. 27, R. 5, E.

4. Where any party has amended his pleading under Rule 1 or 2 of this Order, the other party may apply to the Court or a Judge for leave to plead or amend his former pleading within such time and upon such terms as may seem just. Rule 4. Leave to amend by opposite side. Ord. 27, R. 5, E.

(*v*.) Golding *v.* The Wharton Salt Works, L. R., 1 Q. B. D. 374; 24 W. R., 423, A. C.

(*w*) Cargill *v.* Bower, L.R., 4 Chan. D. 78; 25 W. R. 221, V. C. M.

Order 26.

Where plaintiff amends his statement of claim under Rule 1, the defendant cannot without leave deliver a new defence, nor can he even delay the delivery of his defence, if not already delivered, by reason of the amendment without applying to the Court or a Judge for liberty to do so. His proper course is to apply either to disallow the amendment or for liberty to answer it, or to amend his pleading in consequence of it. If he omits to follow any of these courses, he elects to abide by his original defence, and admits the amendments to the statement of claim, except so far as they are displaced by the old defence.(*x*) But he need deliver no further pleading unless he elects to apply for liberty to do so, and plaintiff is bound to take the next step and cannot have judgment for want of a fresh defence.(*y*)

Rule 5. Application in other cases. Ord. 27, R. 6, E.

5. In all cases not provided for by the Act or the preceding Rules of this Order, application for leave to amend any pleading may be made by either party to the Court, or a Judge in Chambers, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just.

As to special orders to amend a bill, see Chancery Orders, 15 and 16 G. O., 31 Oct., 1867. When the pleading is amended by special order, it is presumed the order will prescribe whether the opposite party shall have liberty to answer the amendment or not. See Cargill *v.* Bower, *ante*, p. 575.

Rule 6. Amendment must be made within the time allowed. Ord. 27, R. 7, E.

6. If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time, as aforesaid, or of such fourteen days as the case may be, become ipso facto void, unless the time is extended by the Court or a Judge.

See Chancery Order—17 G. O., 31 Oct., 1867.

Rule 7. Amendment, how made. Ord. 27, R. 8, E.

7. A pleading may be amended by written alterations in the pleading which has been delivered, and in the copy which has been filed, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous, or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amend-

(*x*) Boddy *v.* Wall, W. N., 1877, 245, M. R.; see previous case of Durbing *v.* Lawrence, W. N., 1877, 182, by the same Judge, who declined to follow it in Boddy *v.* Wall.

(*y*) *Ib.*

ment must be made by delivering the pleading as amended, and filing a copy thereof, both of which in actions assigned to the Chancery Division shall be printed, when printing is required, under Order xviii., Rule 2. Order 26.

See Chancery Order—18 G. O., 31 Oct., 1867.

8. Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made, in manner following, viz. : "Amended day of ." RULE 8. Date of order and amendment. Ord. 27, R. 8, E.

See Chancery Order—23 G. O., 31 Oct., 1867.

9. Whenever a pleading is amended, such amended pleading shall be delivered to the opposite party within the time allowed for amending the same, in the same manner as is provided by these Rules with reference to such pleading. RULE 9. Delivery of. Ord. 27, R. 10, E.

See Chancery Order—20 G. O., 31 Act, 1867.

10. The Court, or a Judge, may, at any stage of the proceedings, allow the plaintiff to amend the writ of summons in such manner, and on such terms, as may seem just. RULE 10 Of summons.

See Chapter lxvi., (444) p. 359, *ante*.

ORDER XXVII.

Demurrer.

Order 27.

1. Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action, ground of defence, set-off, counter-claim, reply, or as the case may be, on the ground that the facts alleged therein do not show any cause of action, or ground of defence to a claim or any part thereof, or set-off, or counter-claim, or reply, or as the case may be, to which effect can be given by the Court as against the party demurring. RULE 1. May be taken to any pleading or part of. Ord. 28, R. 1, E.

Where any paragraph in a pleading sets up a distinct cause of action or defence and is objected to, the proper course is to demur to it, and not apply to strike it out.(*a*)

As to demurrers at Common Law, see Com. Law Pro. Act, 1853, s. 80. Special demurrers were abolished by s. 81, as regards formal matters and will be still confined to objections based on the ground that the pleading demurred to does not

(*a*) Watson *v.* Hawkins, 24 W. R. 884, C. P. D.

Order 27.

show any cause of action or defence to which the Court can give effect. If the part of the pleading or paragraph demurred to tends to show the party pleading is entitled to some relief, though not that relief indicated in the part of the prayer to which the facts are assigned, it is nevertheless not demurrable, thus following the analogy of Chancery practice,(*a*) and perhaps so long as the facts stated entitle the pleader to any relief at all, whether expressly prayed for or not, the paragraph will not be open to demur.(*b*)

Where the demurrer was taken to a single paragraph as insufficient in law, standing alone, but when taken together with the next it raised a good defence, the demurrer was overruled.(*c*)

A party may in the same pleading in which he demurs to one or more paragraphs, join issue upon the others, and then upon the argument of the demurrer he will be taken to admit only the facts stated in the paragraphs demurred to.(*d*)

In Chancery where a demurrer to a bill had been overruled and the bill amended, and the defendant answered, not raising the objection again therein, it was held still to be open to him at the hearing.(*dd*)

Rule 2.

Must state to how much it is taken, &c.

Grounds of.

Form of.

Frivolous.

Ord. 28, R. 2, E.

2. A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated. A demurrer may be in the Form 20 in Appendix (C.) hereto. If there is no ground, or only a frivolous ground of demurrer stated, the Court or Judge may set aside such demurrer, with costs.

If the demurrer be taken too wide, *i.e.*, demurring to more of the pleading than is open to demurrer, it would seem probable that the judgment will be given distributively as at law.

If it state two grounds of demurrer and one ground be held good, it would seem the demur must be allowed, as in Chancery pleading.(*e*)

Semble is it sufficient to say that the statement of claim discloses no cause of action as this form would render it impossible to determine whether the demurrer was frivolous or not.(*f*)

The party demurring need not assign all his grounds, provided he states some one ground of objection, inasmuch as he will not be strictly limited to the grounds stated. This was

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(*a*) Watson *v.* Hawkins, 24 W. R. 884, C. P. D.

(*b*) S. C. *per* Lindley, J. at p.

(*c*) Nathan *v.* Batchetor, W. N., 1876, 172, Q. B. D.

(*d*) Watson *v.* Hawkins, *ubi supra* and see Rule 4, *infra*.

(*dd*) Johnasson *v.* Bonhole, L. R., 2 Chan. D. 298, C. A.

(*e*) 1 Daniel's Chancery Practice, p. 539, 4th Ed.

(*f*) Stated to be allowed. Anon. W. N., 1876, 37; 20 Sol. Jour. 260, Lindley, J.

Order 27.

the rule in both Common Law and Equity pleading, to permit additional grounds to be relied on, *ore tenus*, at the bar; but in Equity if the grounds of demurrer expressed were disallowed while the demurrer was allowed on grounds newly assigned on the argument, the demurring party was required to pay the same costs as if the demurrer had been overruled.(*g*) But a demurer *ore tenus* can only be taken where there is a demurrer in fact assigning some one ground at least pleaded, and coextensive with the newly raised demurrer as to the part of the pleading demurred to. If the ground assigned be frivolous, the demurrer may be set aside, as under the Com. Law Pro. Act, 1853, s. 83.

A demurrer on specific grounds, adding "and on other grounds sufficient in law to sustain the demurrer," was held to entitle the pleader to raise an objection on the ground of the Statute of Limitation, and Ord. xviii., R. 11, does not apply in this respect, as regards claims to real property,(*h*) but not so the Statute of Frauds.(*hh*)

The form is given in the Appendix C. A demurrer need not be signed by counsel.(*i*)

RULE 3. Delivery of. Ord. 28, R. 3, E.

3. A copy of the demurrer shall be delivered in the same manner and within the same time as any other pleading in the action after the writ of summons.

The time for delivery of a demurrer is within eight days after delivery of a statement of claim, Ord. xxvii., R. 3; when the demurrer is to a defence within three weeks after the defence, Ord. xxiii., R. 1, and within four days after delivery when to any subsequent pleading, Ord. xxiii.

As to delivery and filing, see Ord. xxi., R. 21 and 23, *ante*.

As to extended time, see(*k*)

RULE 4. Demurrer and defence combined. Ord. 28, R. 4, E.

4. A defendant desiring to demur to part of a statement of claim, and to put in a defence to the other part, shall combine such demurrer and defence in one pleading. And so in every case where a party entitled to put in a further pleading desires to demur to part of the last pleading of the opposite party he shall combine such demurrer and other pleading.

A party may demur to one part of a pleading and join issue on the rest.(*l*)

RULE 5. Pleading and de-

5. If the party demurring desires to be at liberty to plead as well as demur to the same part of a pleading, he may,

(*g*) 47 G. O., 31 Oct., 1867.

(*h*) Dawkins *v.* Lord Penrhyn, W. N., 1877, 140, V. C. M.; S. C. affirmed, W. N., 1877, 188; 21 Sol. Jour. 730, A. C.

(*hh*) Catling *v.* King, L. R., 5 Chan. D. 660; 25 W. R., 550, A. C.

(*i*) See Schedule, Rule No. 23.

(*k*) Hodges *v.* Hodges, L. R., 2 Chan. D. 112; 24 W. R., 293.

(*l*) See Watson *v.* Hawkins, 24 W. R., 884, C. P. D.

Order 27.
Demurrer to same part by leave.
Ord. 38, R. 5, E.

before demurring, apply to the Court or a Judge for an order giving him leave to do so ; and the Court or Judge, if satisfied that there is reasonable ground for the demurrer, may make an Order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other Order and upon such terms as may be just.

In Chancery pleading if a defendant demurred or pleaded to and answered the same portion of the bill his answer overruled his demurrer; but this was altered by 54 G. O., 31 Oct., 1867.

At Common Law a defendant could only plead and demur to the same pleading or part of it by leave, on an affidavit, if required by the Judge, that he was advised and believed the objections raised were valid in law. Com. Law Pro. Act, 1853, s. 59.

The motion for liberty to plead and demur used to be on notice in the Queen's Bench.(*m*) The Court had a discretion to order which issue should be determined first, and it was usually the demurrer (*n*)

A plaintiff was allowed to plead and demur to a defence, by denying certain allegations of malice contained in it, and alleging sufficient notice of a meeting of benchers, and demurring to the defence on the ground that the Society of the Benchers was the proper tribunal in the matter, and that the Court had no jurisdictiom to interfere.(*o*)

Rule 6.
Entry for argument in ten days, in default allowance of.
Ord. 28, R. 6, E.

6. When a demurrer either to the whole or part of a pleading is delivered, either party may enter the demurrer for argument immediately, and the party so entering such demurrer shall on the same day give notice thereof to the other party. If the demurrer shall not be entered and notice thereof given within ten days after delivery, and if the party whose pleading is demurred to does not within such time serve an order for leave to amend, the demurrer shall be held sufficient for the same purposes and with the same result as to costs as if it had been allowed on argument.

A demurrer is entered for argument by delivering to the proper officer a memorandum directing him to enter the demurrer of the plaintiff or defendant, as the case may be, to the defence, &c., of the opposite party. See Form 21, Schedule C, and Rule 13, *infra*.

Paper books for Judges usual at Common Law (see 50 G. O., 1854), but not used in Equity, are not spoken of in these rules, but do not seem to be abolished.

(*m*) M'Lester v. Fagan, 9 Ir. Com. Law Rep., App. 25.
(*n*) Knight v. Lynch, Ir. Com. Law Rep., App. 57.
(*o*) Manisty v. Kenealy, 24 W. R. 918, V. C. H.

Order 27.

Either party may enter the demurrer for argument, but the onus lies on the party whose pleading is demurred to, either to submit to amend his pleading or to take steps to get rid of the demurrer, by setting it down, otherwise the demurrer will be held sufficient, just as if it had been allowed on argument, and the party taking the demurrer, it seems, may apply to the Registrar or Master to draw up an order for judgment under the above rule.(*p*)

When the demurrer is entered and called on for argument, if the party whose pleading is demurred to fails to appear and sustain his pleading the Court will give judgment for the party in support of the demurrer, if he appears and without argument.(*q*)

RULE 7. No amendment pending. Ord. 28, R. 7, E.

7. While a demurrer to the whole or any part of a pleading is pending, such pleading shall not be amended, unless by order of the Court or a Judge; and no such Order shall be made except on payment of the costs of the demurrer.

In Chancery practice a plaintiff whose bill was demurred to might allow the demurrer by side bar order, and by same order get liberty to amend his bill; see 53 G. O., 31 Oct. 1867. Now an application to the Court a Judge seems necessary.

RULE 8. Costs, when allowed. Ord. 28, R. 8, E.

8. Where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer.

Semble this does not include a demurrer to a statement of claim which is provided for by Rule 9, which gives the costs of the action as well as the costs of the demurrer.

The Court has full power if it pleases, while allowing a demurrer to withhold or reserve the costs, or even to give costs against the party demurring, *ex. gr.* where the ground of demurrer has been some accidental slip in pleading, which is practically such as no man of common sense would fail to understand.(*r*)

RULE 9. Costs of action, when to entire claim. Ord. 28, R. 9, E.

9. If a demurrer to the whole of a statement of claim be allowed, the plaintiff, subject to the power of the Court to allow the statement of claim to be amended, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order.

What other consequences flow from the allowance of a demurrer to the whole statement of claim beyond payment of costs of the action are not stated.

(*p*) See Wills *v.* Harris, 20 Sol. Jour. 501, V. C. M.
(*q*) Turner *v.* Samson, W. N., 1876, 163 Q. B. D.
(*r*) See Hodges *v.* Hodges, L. R., 2 Chan. D. 112; 24 W. R. 293; 20 Sol. Jour. 291, M. R.

Order 27.

It is presumed the action will be dismissed, unless the Court sees it to be a case to give leave to amend; see 55 G. O. 31 Oct. 1867, Chancery.

RULE 10. Allowance of demurrer, pleading struck out. Ord. 28, R. 10, E.

10. Where a demurrer to any pleading or part of a pleading is allowed in any case not falling within the last preceding Rule, then (subject to the power of the Court to allow an amendment) the matter demurred to shall as between the parties to the demurrer be deemed to be struck out of the pleadings, and the rights of the parties shall be the same as if it had not been pleaded.

In all cases other than a demurrer to a statement of claim, for which see Rule 9 above, the allowance of a demurrer without amendment involves the previous pleading being dealt with as if struck out and the demurring party will be entitled to apply for judgment, as in default of pleading a defence or replication (as the case may be) demurred to, and the previous pleading of the party who has demurred will be considered as unanswered. As to leave to defendant to amend after demurrer allowed, see.(*s*)

RULE 11. Overruled demurrer, costs of. Ord. 28, R. 11, E.

11. Where a demurrer is overruled the demurring party shall pay to the opposite party the costs occasioned by the demurrer, unless the Court shall otherwise direct.

Where a defendant demurred to a claim for £150 per annum and failed, he was deemed to admit that the sum claimed was the right one as the fair value of the premises and otherwise he should have denied it specifically, but having taken his chance of succeeding on the demurrer and it being overruled, judgment was given for full amount as claimed.(*t*)

RULE 12. Pleading, after demurrer overruled. Ord. 28, R. 12, E.

12. Where a demurrer is overruled the Court may make such order and upon such terms as to the Court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to.

The words "to raise by pleading," would seem to imply that the demurring party cannot demurr *de novo* at least without leave.(*u*) The Chancery practice to allow defendant to answer after a demurrer is followed.(*u*)

RULE 13. Entry for argument. Ord. 28, R. 13, E.

13. A demurrer shall be entered for argument by delivering to the proper officer a memorandum of entry in the Form No. 21 in Appendix (C).

(*s*) Metropolitan Ry. Co. *v.* Defries, L. R., 2 Q. B. D., 387, A. C. Att.-Genl. Mcas., 21 Sol. Jour., 631, Fry, J. Bell *v.* Wilkinson, 22 Sol. Jour., 225, A. C.

(*t*) See Stevins *v.* Maunders, Ir. Rep., 2 Com. Law, 305, Ex.

(*u*) Bell *v.* Wilkinson, W. N., 1878, 2, Q. B. D.

Order XXVIII.

Default of Pleading.

Order 28.

Rule 1.

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a Judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the Court or Judge may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such other Order on such terms as to the Court or Judge shall seem just.

Non-delivery of statement of claim, dismiss.

Ord. 29, R. 1, E.

The time for delivering a statement of claim is six weeks from time of defendant's appearance, Ord. xx., R. 1, *ante*.

The motion to dismiss the action for want of prosecution is analogous to the judgment of non-pros for not filing a declaration under the Com. Law Pro. Act, 1853, s. 38. In Chancery practice, there was no dismiss for want of prosecution before plaintiff failed to file a replication or to set down the cause on bill and answer or on motion for decree within the proper time, 136 G. O, 31st Oct., 1867. If the plaintiff took the necessary step before the motion came on and paid the costs, or if he appeared on the motion and undertook to speed the cause and paid the costs of the motion within a limited time, the Court usually forebore to dismiss the bill. So now if the statement of claim be delivered meanwhile and costs of notice be tendered or paid, it is probable that no order to dismiss will be made. And where the delay in delivering the statement of claim was accounted for by negotiations being in progress, a fortnight's further time was allowed on payment of costs, the Judge (V. C. Hall) however, declining to say whether the old Chancery practice would be always adopted.(*u*) Where the statement of claim on a bill of exchange against indorsee was rendered unnecessary by the demand being settled in another action against acceptor and defendant had given a cheque for amount, afterwards dishonoured, the Court refused to dismiss the action, or to allow it to proceed merely to determine a liability to costs, but stayed it on defendant paying costs of writ.(*v*) As to order to reinstate after action dismissed.(*vv*)

Rule 2.

2. If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence or demurrer, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs.

Non-delivery of defence to liquidated claim.

Ord. 29, R. 2, E.

(*u*) Higginbotham *v.* Aynsley, L. R. 3 Chan. D., 288; 24 W. R., 782, V. C. H.

(*v*) Anon. W. N., 1876, 37; 20 Sol. Jour., 261, Lindley, J.

(*vv*) Whistler *v.* Hancock, W. N., 1878, 6, A.C.

Order 28.

See Com. Law Pro. Act, 1853, s. 96. As to what is a default, see Ord. xxi. R. 1, *ante*.

A defendant is not in default in not delivering a defence where plaintiff has not delivered a statement of claim, even though defendant dispensed with it,(*w*) unless in case of a writ specially indorsed and notice given under Ord. xx. Rule 4, *ante*,(*x*) and default in answering interrogatories is not a default of defence under this rule.(*y*)

The filing of a petition in bankruptcy against a defendant will not prevent a judgment by default being entered.(*z*)

Rule 3. Affidavit of sum due.

3. Before judgment by default shall be entered for any debt or liquidated demand under this Order, an affidavit shall be filed specifying the sum then actually due.

92 G.O., 1854, C.L.

This rule follows the 92 G. O. 1854, Common Law, which required a similar affidavit.

As to form of interlocutory judgment by default against some of the Defendants, see.(*a*)

Rule 4. Judgment against one of several defendants.

Ord. 29, R. 3, E.

4. When in any such action as in Rule 2 mentioned there are several defendants, if one of them make default as mentioned in the last preceding Rule, the plaintiff may enter final judgment against the defendant so making default, and issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.

Formerly if plaintiff signed judgment and issued execution against one of several defendants, he abandoned his action against the rest. If he marked judgment against some and proceeded against the others, he could not enforce his judgment afterwards, unless he succeeded against all.

Rule 5. Interlocutory judgment for damages.

Ord. 29, R. 4.

5. If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be. But the Court or a Judge may order that, instead of a writ of inquiry, the value and the amount of damages, or either of them, shall be ascertained in any way in which any question arising in an action may be tried, or by inquiry at Chambers in actions assigned to the Chancery Division, or in actions

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(*w*) Hooper *v.* Giles, W. N. 1876, 10, 20 Sol. Jour. 217, Lindley, J.
(*x*) Atkins *v.* Taylor, W. N. 1876, 11; Lindley, Justice.
(*y*) Culley *v.* Buttifant, L. R., 1 Chan. D. 84; 24 W. R. 55, V. C. H.
(*z*) Anon. 20 Sol. Jour. 82, Lush, J.
(*a*) Gosset *v.* Campbell, W. N. 1877, 134, V. C. H.

assigned to the Queen's Bench, Common Pleas, or Exchequer Divisions, by the Master of the Division, in the manner prescribed by the Common Law Procedure Amendment Act (Ireland), 1853. Order 28.

As to writs of inquiry to assess damages, see Com. Law Pro. Act, 1853, s. 100: and inquiry directed to the master with a jury of six, s. 99.(*b*) In certain cases of special difficulty the inquiry was sped before a Judge and a good jury.(*c*)

As to jurisdiction of sheriff in case no special order is made, see note,(*d*) and his resort to a legal adviser or assessor.(*e*) As to the proper form of entry of interlocutory judgment, see(*ee*).

RULE 6. One of several defendants. Ord. 29, R. 5, E.

6. When in any such action as in Rule 5 mentioned there are several defendants, if one of them make default as mentioned in Rule 2, the plaintiff may enter an interlocutory judgment against the defendant so making default, and proceed with his action against the others. And in such case, damages against the defendant making default shall be assessed at the same time with the trial of the action or issues therein against the other defendants, unless the Court or a Judge shall otherwise direct.

RULE 7. Judgment final as part and interlocutory to rest. Ord. 29, R. 6, E.

7. If the plaintiff's claim be for a debt or liquidated demand, and also for detention of goods and pecuniary damages, or pecuniary damages only, and the defendant makes default as mentioned in Rule 2, the plaintiff may enter final judgment for the debt or liquidated demand, and also enter interlocutory judgment for the value of the goods and the damages, or the damages only, as the case may be, and proceed as mentioned in Rule 5.

RULE 8. For recovery of land. Ord. 29, R. 7, E.

8. 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.

RULE 9. For mesne profits or damages. Ord. 29, R. 8, E.

9. Where the plaintiff has indorsed a claim for mesne profits, 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, and 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 5 and 6.

(*b*) See Honahan *v.* Ahern, 6 Ir. Com. Law Rep. 141.
(*c*) See Byrne *v.* Martin, Ir. Rep. 4 Com. Law, 88 Q. B.
(*d*) Segrave *v.* Duffy, 10 Ir. Com. Law Rep. App. 27, Ex.
(*e*) Slevin *v.* Manders, Ir. Rep. 2 Com. Law, 659, Ex.
(*ee*) Gosset *v.* Campbell, W. N 1877, 134, V. C. H.

Order 28.

RULE 10. Motion for judgment in other actions.

Ord. 29, R. 10, E.

10. In all other actions than those in the preceding Rules of this Order mentioned, if the defendant makes default in delivering a defence or demurrer, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to.

In Chancery actions properly so called (*i. e.* actions specially assigned to the Chancery Division by the J. A., 1877, s. 36), where defendant makes default in delivering a defence, the case is not to be treated as one for a summary motion for judgment, on admission of facts under Ord. xxxix., R. 9, *infra*, (*f*) nor as it seems is it a case for summary judgment, either final or interlocutory under any of the preceding rules,(*g*) but the cause should be regularly set down for trial to be heard on an affidavit that the defendant has made default, and notice of the setting down the cause must then be served on the defendant (*f*). The usual notice had better be given.(*h*)

The cause will then come on for trial in its regular order, and it seems that thereupon the several allegations in the plaintiff's statement of claim, not being denied, they must be so far taken as admitted as on the old application for a decree *pro confesso*, see Order xviii., R. 10, *infra*, and like it, subject to defendant's appearing and getting leave to defend.

When the cause is set down for trial it will come on in its turn and not on ordinary motion days.(*i*) Of course it may be advanced by leave of the Judge where all parties are represented and consent.(*k*)

The judgment cannot go beyond the exact purport and exigency of the statement of claim.(*l*) Where plaintiff was in a position to set down the action on motion for judgment against three defendants under this rule, and to move on admission of facts against a fourth who had taken defence, but there being a question of construction for which it was desirable all should be before the Court at the same time, it was ordered the action be set down for judgment against the three, and to give notice of motion against the fourth for same day.(*m*)

(*f*) Gillot *v.* Ker, W. N., 1876, 116, 24 W. R. 428, M. R.; Hall *v.* Snelling, 20 Sol. Jour., 312, M. R.; Bowen *v.* Bowen, W. N., 1876, 31 V. C. H.; Roupell *v.* Parsons, W. N., 1876, 61 V. C. H.; *sed contra*, Pearce *v.* Spickett, W. N., 1876, 109 V. C. M.

(*g*) Roupell *v.* Parsons, W. N., 1876, 50, 24 W. R. 269, V. C. H.

(*h*) Hate *v.* Snelling, W. N., 1876–77, *nomine* Hall *v.* Snelling, 20 Sol. Jour., 312, M. R.; Lowndes *v.* Thomas, 20 Sol. Jour., 272, V. C. H.

(*i*) Roupell *v.* Parsons, 24 W. R., 269; W. N., 1876, 61, V. C. H.; Attorney-General *v.* London and N. W. R. Co., coram, M. R. cited there. Hall *v.* Snelling, W. N., 1876, 77, M. R., unless every party consent, see Bowen *v.* Bowen, W. N. 1876, 31; 24 W. R. 246, V. C. H.

(*k*) Bowen *v.* Bowen, 24 W. R., 246; W. N., 1876, 31 V. C. H. See Pearce *v.* Spickett, W. N., 1876, 109, V. C. M. Meakin *v.* Sykes, 24 W. R., 293, M. R.

(*l*) Hall *v.* Snelling, *ubi supra.*

(*m*) Bridson *v.* Budding. 24 W. R., 392; W. N., 1876, 103 V. C. H.

Order 28.

In a later case, a partition action, V. C. Hall required a general affidavit to verify the statement of claim, similar to that required in liquidated actions under Rule 3 of this Order.(*n*)

If the action be one not specially assigned by the J. Act to the Chancery Division and range within the subjects of the Rules, preceding Rule 10, then judgment by default for want of defence will be signed by the Registrar on producing the certificate of appearance from the Clerk of Records and Writs and the statement of claim, unless it appears to have been dispensed with, and also an affidavit or certificate of no defence.

RULE 11. One of several defendants in Chancery actions. Ord. 29, R. 11, E.

11. Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

RULE 12. Default of reply. Ord. 29, R. 12, E.

12. If the plaintiff does not deliver a reply or demurrer, or any party does not deliver any subsequent pleading, or a demurrer, within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and the statements of fact in the pleading last delivered shall be deemed to be admitted.

Where statement of claim has been amended after defence delivered unless defendant chooses to deliver an amended defence, plaintiff should either reply or give notice of trial.(*nn*)

This order does not apply to a plaintiff in default for not answering a bill.(*o*)

When the default alleged is not answering a counterclaim, the facts should be specifically stated in the counterclaim.(*p*)

It has been held that a default on the part of a defendant in delivering a defence or rejoinder is not an admission under Order 39, R. 9.

RULE 13. Default in pleading to issue with third party. Ord. 29, R. 13, E.

13. In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the Court or a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the Court may order

(*n*) Senior *v.* Hereford, W. N., 1876, 291, V. C. H.

(*nn*) See Durling *v.* Lawrence, W. N., 1877, 182, M. R., *contra*, Boddy *v.* Wall, W. N., 1877, 245, M. R.

(*o*) Sutton *v* Huggins, W. N., 1875, 235, M. R.

(*p*) Hillman *v.* Mayhew, 24 W. R , 485, C. P. D.

(*q*) Gellot *v.* Ker, W. N., 1876, 116, 24 W. R. 428, M. R.

Order 28.

judgment to be entered accordingly, or may make such other order as may be necessary to do complete justice between the parties.

Rule 14. Setting aside judgment on terms. Ord. 29, R. 14, E.

14. Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

Order XXIX.

Service of Notices, &c.

Order 29.

Rule 1. Notices, &c., in Chancery Division.

1. In the Chancery Division all notices, orders, summonses, and other documents not requiring personal service shall be served through the Notice Department of the Record and Writ Office unless a Judge shall direct some other mode of service.

Rule 2. Copies left for service.

2. Every person requiring to have a notice or other document in any action or matter which is assigned to the Chancery Division served through the said Notice Department, shall, before the hour of two o'clock in the afternoon, or in the long vacation before the hour of twelve o'clock at noon, and in the other vacations before the hour of one o'clock in the afternoon, leave with the proper officer of that department the notice or other document which he shall require to have so served, together with as many copies thereof as he shall require to have served, and in the case of a notice of motion or summons, two copies thereof for the use of the Court. The notice or other document required to be so served, and also the copies thereof left for the use of the Court, shall have written at foot thereof or indorsed thereon the name and registered residence of each solicitor, and the address for service of each party appearing in person, on whom the same is to be served, and in the case of a solicitor the name of the party for whom he has appeared.

Service through post office.

There shall also be left at the same time envelopes stamped with the proper postage stamps and directed to the several persons to be served, at the several registered residences and addresses for service indorsed on the notice or other document to be served. The clerks of the Notice Department shall compare the several copies so left with the notice or other document to be served and see that they correspond with the same, and correct such copy if necessary. They shall compare and check the addresses of the several envelopes with the names and addresses on the notice or other document to be served, and see that they correspond, and place the copies

for service in their respective envelopes and secure the same. One of the clerks shall deliver into the proper receiver at the General Post Office, before the usual time of closing the evening despatch, the several envelopes with the copies therein. The originals of the several notices and other documents left for service shall be properly filed and preserved, and the same shall be entered in a book to be kept for the purpose in the Notice Department, which shall contain the short title and record number of the action or matter, the date of service, a sufficient reference to the originals filed, and the names of the parties served, and each such entry shall be initialed by the clerk or clerks who shall so post the same on the day of or next following the posting. Order 29. Originals filed.

The comparing of the notices with the copies by the clerks of the Notice Department is a new duty, and seems to be scarcely practicable without a large addition to the official staff and to the time allowed for the discharge of the duty.

3. The certificate of the proper officer of the Notice Department, that a notice or other document was duly transmitted by post, shall be sufficient proof of service. Rule 3. Certificate of service.

4. All pleadings in actions assigned to the Chancery, Queen's Bench, Common Pleas, and Exchequer Divisions, and all notices, orders, summonses, and other documents in actions assigned to the three last-named divisions which may require to be delivered, and do not require personal service, shall be served by delivering the same personally to the solicitor of the party to be served, when he appears by solicitor, or leaving same at the registered residence of such solicitor, with his clerk or servant, or when the party appears in person, by delivering the same to such party personally, or leaving the same for him at his address for service with a servant or other inmate of the house. When no appearance has been entered for a party, then any pleading or other document required to be delivered to him shall be delivered by being filed with the proper officer. Rule 4. Delivery of documents, how effected. Ord. 19, R. 8, E. In default of appearance.

Notice of motion for judgment against a defendant who has not appeared is to be lodged with the officer. (*l*)

5. When a person who is not a party appears in any proceeding, either before the Court or at Chambers, service may be made upon the solicitor by whom he appears, or upon the party so appearing if he appear in person. Rule 5. Service on third persons.

(*l*) Parsons *v.* Harris, 25 W. R. 410, W. N., 1877, 76, V. C. H.; Williams *v.* Cardwell, 25 W. R. 646, W. N. 1877, 140, V. C. M.

Order XXX.

Order 30.

Payment into Court.

Schedule Rule 30.

"Where any action is brought to recover a debt or damages any defendant may at any time after service of the writ and before or at the time of delivering his defence, or by leave of the Court or Judge, at any time, pay into Court a sum of money by way of satisfaction or amends.

Ord. 30, R. 1, E.

"Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein.

"See Com. Law Pro. Act, 1853, s. 74."

The Com. Law Pro. Act, 1853, s. 75, authorizes payment of money into Court in satisfaction of the claim in personal actions, but with some important exceptions, *ex. gr.*, assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation. These exceptions are now removed by Schedule Rule 30.

Lord Campbell's Act, 6 & 7 Vic., c. 96, s. 2, enabled money to be lodged in libel after a sufficient apology.(*a*) Other statutes enabled Justices of the Peace to lodge money in certain actions.

The rule seems to have little if any application to Chancery actions proper, *i.e.*, actions specially assigned to the Chancery Division by the Act.

Under the rule it seems that any one defendant is enabled to lodge money without the concurrence of the others. A defendant may admit part of the action and suffer judgment thereon, without bringing money into Court,(*b*) but the principal object of paying money into Court is to save the further costs of the action.

Under the present rule, payment may be made at any time after service of the writ down to time of pleading, and without any leave or order, and it seems to be the proper course to pursue before defence, instead of applying to stay the action on payment of the amount.(*c*)

After delivery of a defence payment can only be made by leave of the Court or a Judge, and then it will pro-

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(*a*) See Jones *v.* Mackie, L. R 3, Ex. 1.

(*b*) See Tudor *v.* Furlong, Ir. Rep., 3 Com. Law 7, Q. B.; Douglas *v.* Cowden, Ir. Rep., 4 Com. Law 202, C. P. *contra*; Defries *v.* Stewart, 11 Ir. Com. Law Rep. 18, C. P.

(*c*) See Anon. W. N., 1875, 201; 20 Sol. Jour. 56, Lush, J.

bably involve an amendment of the defence, as the payment must be expressly pleaded. Order 30.

The rule requires it to be specified what claim or cause of action it is in respect of which it is intended to be made.(*d*)

A plea of payment was deemed inconsistent with any other defence to the same portion of the cause of action, and would not be permitted,(*e*) and the new rule on the subject has been interpreted in the same manner; thus a plea of payment to an action for a nuisance raising a question of title accompanied by a defence denying the plaintiff's right of action in respect of the same part of the claim was struck out.(*f*)

Order XXX.

Payment into Court in Satisfaction.

Rule 1. Payment, how made. Ord. 30, R. 2, E.

1. If the action shall be pending in the Queen's Bench, Common Pleas, or Exchequer Division, payment into Court in satisfaction shall be made by lodging the money in the Bank of Ireland on behalf of the party who shall make such lodgment, with the privity of the Master of the Division, and to the credit of the action; and such Master, on the certificate of such lodgment being delivered to him, shall give a receipt for the amount; and if the action shall be pending in the Chancery Division, the payment shall be made by lodging the money in the Bank of Ireland on behalf of the party who shall make such lodgment, with the privity of the Accountant-General, to the credit of the action, suit, or matter, and the Accountant-General shall certify such lodgment.

See Com. Law Pro. Act (Ire.) 1853, s. 75.

Lodgment, how made.

The proper officer is here specified to be the Accountant-General of the Chancery Division, and the Master of the Common Law Division. Payment will be by lodgment in the Bank of Ireland with the privity of the proper officer, and to the credit of the action. A docket (called a privity) authorizing the lodgment should first be obtained from the officer.

When the bank certificate of lodgment is produced to the officer he will give a receipt for amount in margin of the defence, or in case of a Chancery Lodgment, a certificate.

Notice of lodgment.

The notice of lodgment before defence filed is intended to save the expense of pleading a defence in case the amount be accepted within four days.

(*d*) See Ryan *v.* Horgan, 13 Ir. Com. Law Rep., App. 34, Q. B.

(*e*) Kelly *v.* Slator, 7 Ir. Com. Law Rep. 55, C. P.; and see Barry *v.* M'Grath, Ir. Rep. 3, Com. Law 576, C. P.

(*f*) Spurr *v.* Hall, L. R. 2, Q. B. D. 615.

Order 30.

RULE 2. Notice of payment to Plaintiff. Ord. 30, R. 2, E.

2. If such payment be made before delivering his defence, the defendant shall thereupon serve upon the plaintiff a notice that he has paid in such money, and in respect of what claim, in the Form No. 5 in Appendix (B) hereto.

RULE 3. Payment to Plaintiff. Ord. 30. R. 3, E.

3. [If by the notice so served, or by a defence delivered by a defendant by whom the money has been so lodged, such defendant shall admit the right of the plaintiff alone to] the money paid into Court as aforesaid, it may, unless otherwise ordered by a Judge, be paid out to the plaintiff or to his solicitor on the written authority of the plaintiff. No affidavit shall be necessary to verify the plaintiff's signature to such written authority unless specially required by the officer of the Court.

The passage in brackets is not contained in English Rule.

Under the Com. Law Pro. Act, 1853, s. 76, plaintiff might apply to draw the money any time before verdict or judgment for defendant, and was entitled to have it handed over to him. The rule 3 does not say, but seems to imply, the plaintiff may, at any time, unless otherwise ordered, draw the money without accepting it in satisfaction, and proceed with his action at the peril of costs. A Judge's order may put a stay on the payment, and the consequence would seem to be that it remains in Court to answer defendant's costs, as it did under sec. 76 of the C. L. P. Act. If the sum afterwards be found enough to satisfy the plaintiff's demand, he may have to pay costs instead of receiving them.(*g*)

RULE 4. Notice of acceptance in satisfaction. Ord. 30, R. 4, E.

4. The plaintiff, if payment into Court in satisfaction is made before delivering a defence, may within four days after receipt of notice of such payment, or if such payment is first stated in a defence delivered then may before reply, accept the same in satisfaction of the causes of action in respect of which it is paid in; in which case he shall give notice to the defendant in the Form No. 6 in Appendix (B) hereto, and shall be at liberty, in case the sum paid in is accepted in satisfaction of the entire cause of action, to tax his costs, and, in case of non-payment within forty-eight hours, to sign judgment for his costs so taxed.

If the plaintiff accepts the money in satisfaction of his demand, he acquires a vested right to his costs up to that time, but if he proceeds with the action he may forfeit it.(*gg*)

(*g*) Langridge *v.* Campbell, L. R. 2, Ex. D. 281, 25 W. R. 351.

(*gg*) Langridge *v.* Campbell, L. R. 2, Ex. D. 281, 25 W. R. 351; and see O'Riordan *v.* O'Riordan, Ir. Rep. 10 Com. Law, 547, C. P., a case of tender of a bank draft wantonly refused.

Order 30.

Acceptance in satisfaction.

The plaintiff's right to sign judgment for his taxed costs, is not so absolute that it may not be displaced by a Judge's order depriving him, for sufficient reasons, of them under order 55, English, corresponding to J. A. 1877, s. 53. As where a defendant had offered to pay £33, which was refused and a writ served for £43, on which defendant lodged £33, and plaintiff then accepted it in satisfaction.(*h*)

Refusal.

If the sum be not accepted in satisfaction, its sufficiency will be tried by the Judge or the jury, and in case it be found for the defendant, he will be entitled to judgment and doubtless get his costs of suit. See Com. Law Pro. Act, 1853, s. 78. He was under the old procedure entitled to all his costs from the commencement of the action.(*i*)

If a greater sum was recovered than that paid into Court it was considered as if struck out of the claim, and the verdict and judgment taken for the balance merely.(*k*)

Order XXXI.

Discovery and Inspection.

Order 31.

1. *Interrogatories.*

Rule 1.

Delivery, time for, without leave.

Ord. 31, R. 1, E.

1. The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose.

One set.

Previous discovery in equity and at common law.

Discovery in Equity, was had latterly by a series of interrogatories disconnected from the bill and delivered seperately, and within eight days after the time limited for defendant's appearance.(*a*) No order or leave was necessary within the prescribed time. At Common Law plaintiff required the leave of the Court to deliver interrogatories to a defendant and *v. v.*, and the application was supported by affidavit of the party or

(*h*) Broadhurst *v.* Willey, W. N. 1876, 21, 20 Sol. Jour. 240, Lindley, J.

(*i*) Farmer *v.* Fottrell, 8 Ir. Com. Law Rep. 228, Ex.; but see Harold *v.* Smith, 5 H. & N. 381.

(*k*) Hughes *v.* Guinness, 4 Ir. Com. Law Rep. 314, 7 Ir. Jur. 298.

(*a*) Chan. (Ire.) Act, 1867, s. 61; 41 & 42 G. O., 31st Oct., 1867.

Order 31. Rule 1.

his attorney, stating his belief that he would derive material benefit in the cause from the discovery sought, and that he had a good cause of action or defence on the merits, and when a defendant, that the discovery was not sought for the purpose of delay.(*b*) He was also required to state the matters as to which the discovery was sought.(*c*) The Court was thus expected more or less to settle the specific questions to be allowed, and to discriminate as to their relevancy and materiality; matters which could as to many interrogatories, only be ascertained by the nature of the answers given to previous questions. The requirement of an affidavit as to a good cause of action or defence, might in certain cases preclude the resort to discovery altogether, as where the party was in doubt as to the very facts upon which the validity of his action or defence depended.

More extensive rights under new procedure.

The New Procedure affords the fullest opportunities of discovery of every kind, but whether more extensive in its range than before seems not quite settled. Within certain limits of time, discovery of facts may be had, as of right and without any order or leave (provided the action has been commenced since 1st January, 1878),(*d*) and inspection of documents obtained on an application almost as of course and on the slightest grounds, and without affidavit,(*e*) unless the Judge for some special reason thinks fit to require one.(*f*)

At discretion of party.

Interrogatories may be administered very much at the discretion of the party, subject of course, to the wholesome correction of their being struck out if improper or premature, or not sufficiently material at the stage of the action selected by the party.

By leave.

Where an order becomes necessary, as against a public company—or after the allotted time—the Judge will look into the proposed interrogatories and may refuse to allow them if he deems them premature or unnecessary, or he may adjourn the application, *ex. gr.*, till after defence is delivered,(*g*) and after issue joined, an affidavit may be required as under the old system.(*h*)

Out of jurisdiction.

To deliver interrogatories out of the jurisdiction an order seems to be necessary, but it may be combined with an order for liberty to issue the writ and to serve it out of the jurisdiction.(*i*)

Only to parties.

Interrogatories can only be addressed to parties in the suit, and if a plaintiff wants information from third persons he must

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(*b*) Com. Law Pro. Act, 1856, s. 56.

(*c*) See Naughten *v.* Midland Great W. R. Co., 8 Ir. Com. Law Rep., App. 55.

(*d*) See Anon. 20 Sol. Jour., 81, Lush, J.

(*e*) See Moslyn *v.* Western Coal and Iron Co., W. N., 1875, 260, Huddlestone, B.

(*f*) See Mattock *v.* Heath, W. N., 1875, 201, Lush, J.

(*g*) Hewetson *v.* Whittington Life Insurance Co., W. N., 1875; 20 Sol. Jour., 179, Lush, J.

(*h*) Anon. 20 Sol. Jour., 32, Lush, J.

(*i*) Young *v.* Brassy, W. N., 1875, 236, V. C. H.

make them defendants.(*k*) If a defendant wants discovery from a co-defendant, he must bring a cross action or a counter-claim.

Interrogatories as to documents in the possession of a party were introduced when a party could not apply for discovery without an affidavit, naming some one document. They are improper now, and will be struck out.(*l*) If discovery is required it should be the subject of an application to a judge under Rule 11, *infra*. Interrogatories as to documents.

As to actions in nature of a bill of discovery in aid of a controversy before another tribunal, *ex. gr.*, an arbitrator, where the arbitration is compulsorily ordered by a judge in an action,(*m*) or where a suit is about to be instituted in India, but the plaintiff must show some chance of success in the suit he proposes to aid by discovery.(*n*) Bills of discovery.

Although it is competent for plaintiff to deliver interrogatories with his statement of claim, yet this course has been disapproved of in England, in ordinary cases, as an attempt to reproduce the bad practice that formerly prevailed in Equity of filing interrogatories together with the bill without knowing or caring what the answer would be.(*nn*) Whereas the line of defence or demurrer may render them useless and a mere wanton abuse of the Rules, in order to increase costs, and they have been struck out with costs when found unnecessary on the defence being delivered, *ex. gr.*, in an action for damages for unskilful management of a horse and carriage by defendant's servant,(*o*) or in an action on a bill of exchange.(*p*) In some cases the judge has adjourned the application to strike out interrogatories delivered before defence till after defence was seen.(*q*) In one case in an action of libel the judge (Baron Pollock) directed interrogatories delivered before defence to be struck out, without looking at them—on the ground that the defence might admit the fact of publication inquired after—and said the Rule was intended not for every simple common law action; but to meet cases Proper time for delivery when before defence.

(*k*) Ainsworth *v.* Starkie, W. N., 1876, 8; 20 Sol. Jour., 162, Quain, J.

(*l*) Pitten *v.* Chattenburg, W. N., 1875, 248; 20 Sol. Jour., 139, Quain, J. Baunicot *v.* Harris, W. N., 1876, 9; 20 Sol. Jour, 217, Lindley, J.

(*m*) British Empire Shipping Co. *v.* Somes, 3 K. & J. 433; Orr *v.* Draper, L. R., 1 Chan. D. 92, 25 W. R. 23, V. C. H.; Ainsworth *v.* Starkie, W. N., 1876-8. 20 Sol. Jour. 162, Quain, J.

(*n*) Reiner *v.* Marquis of Salisbury, 24 W. R. 843, V. C. M.

(*nn*) See Strong *v.* Tappin, W. N., 1876, 22, 20 Sol. Jour. 240, Lindley, J.

(*o*) Drake *v.* Whiteley, W. N., 1876, 55, 20 Sol. Jour. 281, Archibald, J.

(*p*) Fenwick *v.* Johnson, W. N., 1876, 54, 20 Sol. Jour. 286; Cotching *v.* Hancock, W. N. 1876, 55, 20 Sol. Jour. 381; see also Anon., 20 Sol. Jour. 81, Lush. J.; Carter *v. Leeds Daily News*, W. N., 1876, 12; the Biela 24, W. R. 524, W. N., 1876, 63; Prob. & Ad., Strong *v.* Tappin, W. N. 1876, 22, 20 Sol. Jour. 240, Lindley, J.

(*q*) See Anon, 20 Sol. Jour. 70, Lush, J.

Order 31. Rule 1.

very rare, except in chancery actions, where plaintiff from the fraud of the defendant did not know his own case except in a vague general way and had to find it out from the answers of the defendant. On appeal from the judge, to the Q. B. Division, the Divisional Judges were equally divided, the L. C. Justice deeming the decision of the judge at variance with the Rule, though wishing the Rule were altered.(*r*) The Court of Appeal(*s*) held that the judge should not without some examination, say the interrogatories were premature merely because delivered before defence, but might on inquiry strike them out, unless reasonable cause could be shown for requiring information at that early stage—in fact that Rule 1, was modified by Rule 5, enabling court to strike out interrogatories where the matter inquired after is not sufficiently material at that stage of the action. The Rule has been similarly explained in the Chancery Division.(*t*)

Before statement of claim.

The old Rule of equity, that a plaintiff is not entitled to discovery until he has shown that his claim is not demurrable, still prevails both as to discovery of facts and of documents and therefore before delivery of statement of claim the plaintiff's right is not absolute and can only be acquired by a special order(*u*), which will not be granted unless under special circumstances, as it might be used for oppressive purposes to fish out a case (*v*)

When by defendant.

A defendant's time for delivery of interrogatories, *ex debito*, is at the time of delivering his defence, or before the close of the pleadings, after this he must obtain an order.

Before defence.

The old Equity Rule was that a defendant could have no discovery by cross bill from the plaintiff, until he had answered the original bill, and now it is plain that before defence delivered, he cannot serve interrogatories without special order, and for this purpose leave has generally been refused, or the application adjourned as calculated to put parties to expense unnecessarily.(*w*) and such applications have been strongly discouraged.(*x*) A defendant seldom can lose any advantage by first putting in his defence, stating he is ignorant of the facts charged against him, and then serving interrogatories, and if any new ground of defence be discovered, he will get leave to amend.(*y*) Occasionally it may save expense to allow interrogatories to be delivered before, as in the result they may determine defendant not to take any defence. In one case a defendant was allowed after appearance to an

(*r*) Mercier *v.* Cotton, W. N., 1876, 136, Q. B. D.

(*s*) S. C., L. R., 1 Q. B. D., 442, 24 W. R. 566, 20 Sol. Jour. 469.

(*t*) Disney *v.* Longbourne, L. R., 2 Chan. D. 704, 24 W. R. 663, 20 Sol. Jour. 542, M. R.

(*u*) See Cashin *v.* Craddock, L. R. 2 Chan. D. 140, V. C. B.

(*v*) See Anon. W. N., 1876, 53, Archibald, J.

(*w*) See Mercantile Mutual Insurance Co. *v.* Shoesmith. W. N., 1876, 64 ; 20 Sol. Jour. 298.

(*x*) Plum *v.* Normanton Iron and Slate Works, W. N., 1876, 73 ; see 20 Sol. Jour. 298.

(*y*) See Disney *v.* Longbourne, *ubi supra*.

action on a bill of exchange, to deliver interrogatories to establish that plaintiff was suing, as the nominee and for the benefit of a third person, and that there had been a total failure of consideration. If it turned out that plaintiff was a holder for value without notice, there could be no defence, and accordingly the Court extended time to defend till interrogatories were answered.(*z*) In another case, to save costs of an unnecessary appearance and defence, a defendant was allowed to have inspection of documents in the custody of plaintiff before he even had appeared.(*a*)

After close of the pleadings.

The wide words of Rule 1 are supposed to refer to the occasion which frequently arises for serving interrogatories after the pleadings are closed, *e.g.*, where interrogatories have been delivered to one defendant and elicited no information, and it may be desired to serve the same interrogatories on another defendant;(*b*) leave has been refused where delay was not explained.(*c*)

Only one set.

No party can deliver more than one set of interrogatories without special leave.(*d*)

Rule 2.

Inquiry as to propriety of, in adjusting costs.

Ord. 31, R. 2, E.

2. The Court in adjusting the costs of the action shall at the instance of any party inquire or cause inquiry to be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing master or of the Court or Judge that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

Rule 3.

Form of.

Ord. 31, R. 3.

3. Interrogatories may be in the Form No. 7 in Appendix (B.) hereto, with such variations as circumstances may require.

They should be in such a form that the answering party can say "Yes" or "No,"(*e*) and should not be intermixed with matter to embarrass the party in giving a simple answer.(*f*)

The 70th G. O., 1854, Common Law, required interrogatories to be signed by counsel.(*g*)

Rule 4.

Application in case of

4. If any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any

(*z*) Hawley *v.* Reade, W. N., 1876, 64, 20 Sol. Jour. 298; Archibald J.

(*a*) Anon. W. N., 1875, 220, 20 Sol. Jour. 81, Lush, J.

(*b*) See Swire *v.* Redman, 20 Sol. Jour. 584, A. C.

(*c*) Ellis *v.* Ambler, 25 W. R., 557, C. P., *sed vide* London and Provincial Insurance Co., L. R., 5 Chan. D. 775; 25 W. R. 876, Fry, J.

(*d*) See Thompson *v.* Wynne, Ir. Rep., 1 Com. Law 600, Keogh, J.

(*e*) Armitage *v.* Fitzwilliam, W. N., 1876, 56; 20 Sol. Jour. 281, Archibald, J.

(*f*) Anon. W. N., 1876, 39; 20 Sol. Jour. 261, Lindley, J.

(*g*) But see Sinnott *v.* The People's Provident Insurance Co., 9 Ir. Com. Law Rep. 180, Ex.

Order 31.

corporation. Ord. 31, R. 4, E.

other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply to a Judge at chambers for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

In Chancery practice it was usual to make some one of the directors or officers of the defendant company a party defendant for this purpose Under the Com Law Pro. Act, 1856, s. 56, the order allowing interrogatories to be delivered to a body corporate provided for the delivery to some one of the officers.

Interrogatories delivered to a defendant company without an order are irregular and may be struck out.(*h*)

The order may direct that some particular officer be appointed to receive and answer the interrogatories, and a proper discretion should be exercised to select a person likely to know about the matter, and able to answer accordingly.(*i*) The defendant may still name the officer as a defendant for discovery, and enforce it against him by the ordinary process of the Court.(*k*)

A defendant by means of a counterclaim may effect the same object.

Rule 5. Application to strike out interrogatories objectionable. Ord. 31, R. 5, E.

5. Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bona fide* for the purposes of the action, or that the matter inquired after is not sufficiently material at that stage of the action, or on any other ground. And the Judge, if satisfied that any interrogatory is objectionable, may order it to be struck out.

Objections to interrogatories.

A party interrogated and objecting to answer may resort to two modes of resistance—*first*, under this rule, by applying to strike out the interrogatory ; *secondly*, by stating his objection specifically to one or more interrogatories in the affidavit he files under Rule 7 *infra*.

Time for making. When by objection.

Objections under this rule must be made within four days after service of interrogatories by application to strike them out, and generally speaking where they are bad in substance,

(*h*) Carter *v. Leeds Daily News* Co., W. N., 1876, 11 ; 20 Sol. Jour., 218, Archibald, J.

(*i*) See Republic of Costa Rica *v.* Erlanger, 24 W. R. 109, W. N., 1875, 225, V. C. M. S. C., on appeal, L. R., 1 Chan. D. 171, 24 W. R., 151 ; 20 Sol. Jour. 118, A.C.

(*k*) S. C. and Republic of Peru *v.* Weguelin, L. R, 20 Eq. 141, V. C. H.

as being scandalous, irrelevant, not *bona fide* or premature, the proper method of taking the objection will be under this rule.(*l*) But if good enough, *per se*, but the party can resist answering them on other grounds. *ex. gr.*, privilege, then, the objection should be taken by affidavit under Rule 7.(*m*)

For this purpose the old rule in equity is superseded—viz., that if a party answered at all, he should answer fully.(*n*)

Generally speaking, interrogatories will not be struck out merely because they are open to criticism, and it is not the business of the judge to settle interrogatories; they must be plainly objectionable or oppressive(*o*)

As to documents. Interrogatories as to documents in possession of the party are plainly objectionable.(*p*)

Scandalous. As to being scandalous, one for the mere purpose of shaking the character of the opposite party comes within this rule.(*q*)

Irrelevant. As to irrelevancy, they must have some connexion with the pleading and issues raised, and tend to support the case of the party administering them.(*r*)

The Court is not disposed to weigh with great accuracy the immateriality or irrelevance of an interrogatory if it bear upon the case or the issues joined,(*s*) but if intended for delay and to convict plaintiffs as trustees of a breach of trust unconnected with the suit they have been struck out.(*t*)

In an action for negligence against a railway company a discovery of reports of other accidents at other stations was deemed irrelevant, but those as to reports as to the lighting of the particular station where the accident occurred, and alleged to be accessory to the accident, were allowed.(*u*)

Not *bonâ fide*. Interrogatories must be put *bona fide* for the purpose of the action and in support of the case, and not to test the veracity of the party interrogated, or his credit or character, *ex. gr.*, whether the alleged libel was not intended to apply to the plaintiff, and if not *to whom*, and whether written by defendant, and if not by whom.(*v*)

Fishing. Interrogatories not in support of a case stated, but fishing for materials to make up a case are objectionable.(*w*)

(*l*) Voysey *v.* Cox, W. N., 1876, 12, 20 Sol. Jour. 219, Lindley, J. Anon. W. N., 1875, 229, 20 Sol. Jour. 100, Quain, J.

(*m*) *Ibid.*

(*n*) *Ibid.*

(*o*) Winters *v.* Dabbs, W. N., 1876, 21; 20 Sol. Jour. 240, Lindley, J.

(*p*) Bannicot *v* Harris, W. N., 1876–9, Quain, J.

(*q*) Baker *v.* Newton, W. N., 1876–8, 20 Sol. Jour. 177, Quain, J.

(*r*) Gourley *v.* Plimsoll, L. R. 8 C. P. 362. Anon. W. N., 1876, 29; 20 Sol. Jour. 261, Lindley J. Swire *v.* Harris, W. N., 1876, 22.

(*s*) See Chesterfield Colliery Co. *v.* Black, W. N., 1876, 204, V. C. H.

(*t*) Mansfield *v.* Childerhouse, L. R., 4 Chan. D. 82.

(*u*) Anon. W. N., 1876, 53, Archibald, J

(*v.*) Wilton *v.* Brignell, W. N., 1875, 239; 20 Sol. Jour. 121, Quain, J.

(*w*) Morris *v.* Parr, 6 B. & S. 203. Gourley *v.* Plimsoll, L. R., 8 C. P. 362.

Order 31. Rule 5.

Thus to make out a defence of justification for libel charging plaintiff with being the writer of certain anonymous articles defendant may ask plaintiff did he write the articles in question, but not what articles in general he did write.(*y*)

In an action for refusing to accept goods, being patent button-fastening machines, defendant's interrogatory to plaintiff, as to the French law on the subject, and as to whether plaintiff had not himself bought the goods at a cheap price, were struck out.(*z*)

Facts material to party's own case.

In equity a defendant should discover every fact and circumstance within his knowledge, information or belief, material to the plaintiff's case. It is presumed the same rule will prevail now in the High Court.(*a*) So interrogatories may be used to supply evidence of uncontroverted facts, and dispense with calling witnesses unnecessarily,(*b*) as in trespass to a several fishery, whether defendant or any other person authorized by him had fished in the waters.(*c*) So to guide a plaintiff whether he should discontinue the action against some of the defendants as in assault and battery against two constables and an inspector of constabulary, to ascertain whether they acted under the command of the inspector,(*d*) to guide a defendant how much money he should lodge in satisfaction of the action, he may ask what damages the plaintiff suffered.(*e*)

Interrogatories may go to prove the whole cause of action out of defendant's mouth after his denial of it in the defence. (*f*) Thus in ejectment for overholding after expiration of a lease by death of *cestui que vies*, defendant may be asked, as to date of their death, and as to the reputation of the family about it.(*g*) In an action for seduction of defendant's daughter, it may be asked the defendant as to his knowledge of her and committal of the offence.(*h*)

But these instances are subject to this qualification, that if the plaintiff's object be to obtain, or the probable result would be, to give him, the unfair advantage of withholding his principal witnesses from cross-examination, it will be refused unless possibly, on condition of producing the witnesses at the trial.

Pertinent.

Interrogatories as to amount of defendant's property or

(*y*) Buchanan *v.* Taylor, W. N., 1876, 73; 20 Sol. Jour. 298, Archibald, J.

(*z*) Phillips *v.* Barron, W. N., 1876, 54, 20 Sol. Jour. 280, Archibald, J.

(*a*) See English *v.* Tottie, L. R., 1 Q. B. D. 141, Blackburn, J. Edie *v.* Jacobs, 26 W. R., 159, Ex. D.

(*b*) Hodsoll *v.* Taylor, L. R., 9 Q. B. 79, Blackburn, J.

(*c*) Acheson *v.* Henry, Ir. Rep. 5 Com. Law, 496, Ex.

(*d*) O'Connell *v.* Barry, Ir. Rep. 2 Com. Law, 648, Ex.

(*e*) Horne *v.* Hough, L. R. 9 C. P. 135; Wright *v.* Goodlake, 3 H. & C. 540.

(*f*) M'Corquodale *v.* Bell, 24 W. N., 1876, 39; 20 Sol. Jour., 260, Lindley, J. Bartholomew *v.* Rawlings, W. N., 1876, 56, 20 Sol. Jour., 283, Archibald, J. Anon. 20 Sol. Jour., 341, Denman, J.

(*g*) Read *v.* M'Gennett, Ir. Rep. 6 Com. Law, 267, Q. B.

(*h*) Hodsoll *v.* Taylor, L. R. 9 Q. B., 79.

income in an action for breach of promise of marriage have not been disallowed, inasmuch as they are pertinent to the measure of damages, so also as to what settlement defendant made on his present wife,(*i*) and *e converso*, plaintiff may be asked for discovery of his business accounts for preceding years, to estimate the loss he has sustained by an accident for which he sues a railway company.(*k*) But questions as to expectancies of means, or means of relatives are not pertinent.(*l*)

To disprove case of opponent.

Interrogatories have been allowed to test or disprove the case made by the opposite party, *ex. gr.*, on a plea of *plene administravit*,(*m*) although they may strike at the root of the defence.(*n*) In fact each party is entitled to discovery of the facts necessary to support his opponent's case, but not of the evidence by which it is to be proved.(*o*)

Any matter which is only part of the defence, need not be disclosed by defendant till the hearing, if it forms a link in the chain of title, and so as to inspection of documents,(*p*) but aliter if they relate to both parties' title.(*p*)

Tending to criminate.

Interrogatories, the answers to which might tend to criminate the answerer or expose him to some penalty or forfeiture were open to demurrer in Equity, but the provisions of Com. Law Pro. Act, 1856, s. 56, had no such limitation,(*q*) and the system introduced by it was analogous to the manner of examining a witness at a trial.(*r*) So that the interrogatory might be delivered, leaving to the witness the onus of raising the objection in his answer upon oath, and swearing that in his opinion, it would have that tendency.(*s*)

It might have been expected that under the Judicature Act, the rule in Equity should prevail, but although in the first reported case under it, an action for a penalty under the Larceny Act, a question, whether defendant had inserted a certain advertise-

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(*i*) Anon. 20 Sol. Jour., 122, Quain, J.; see Hodsoll *v.* Taylor, L. R. 9, Q. B., 79.

(*k*) Anon. W. N., 1876, 53, Archibald, J.

(*l*) Anon. W. N., 1876, 22; 20 Sol. Jour., 243, Lindley, J.

(*m*) See Peck *v.* Nolan, 14 Ir. Com. Law Rep., App. 32, Ex.; and see Stewart *v.* Smith, L. R. 2, C. P. 293; see Zychlenski *v.* Maltby, 10 C. B., N. S. 838.

(*n*) Rowcliffe *v.* Leigh, W. N., 1877, 24; 21 Sol. Jour., 238, V. C. H.

(*o*) Eade *v.* Jacobs, 26 W. R. 159, Ex. D.

(*p*) M'Mahon *v.* Leonard, 10 Ir. Com. Law Rep. 120, C. P.; Lake *v.* Parley, W. N., 1876, 54, 20 Sol. Jour. 280; see Fenney *v.* Forward, 4 H. & C. 33.

(*q*) Osborn *v.* London Dock Co., 10 Ex. 698.

(*r*) S. C. per B. Alderson, at p. 702, and Bartlett *v.* Lewis, 12 C. B., N. S. 249.

(*s*) *Ib.* per Willes, J. at p. 262; and see Hill *v.* Campbell, L. R. 10, C. P. 235; Fitzgibbon *v.* Greer, Ir. Rep. 9 Com. Law, 294, Q. B., and *contra* Whateley *v.* Crowter, 5 El. & Bl. 709. Stern *v.* Sevastopuld, 14 C. B. N. S. 737, and Edmunds *v.* Greenwood, L. R., 4 C. P. 70.

Order 31. Rule 5.

ment in a newspaper was disallowed,(*t*) yet in a later case it was treated as a matter of discretion, and that while it might be disallowed in the case of a common informer, where a public body intrusted with a public duty sought it, it was allowed.(*u*)

In an action for libel, it was allowed to ask defendant was he the publisher, not was he the editor, or the writer, nor whether he had the original manuscript of it.(*v*)

In an action for slander, defendant who has denied it, may be asked whether he had not made the alleged statement in a certain place.(*w*)

Where a statute provides protection to a party compelled to make discovery under its provisions, the like protection attaches on his answer under the J. Act.(*x*)

An interrogatory to show that defendant alleged to be the assignee or lessee in an action of ejectment on the title by the lessor, had taken an assignment or sub-lease, which would amount to a forfeiture of the lease was held improper.(*y*)

Confidential communications between solicitor and client.

Confidential communications between suitors and their counsel and solicitors, in reference to the matter in litigation are privileged, although neither made nor written in anticipation of the particular action or suit, provided they pass as professional communications and in a professional capacity ;(*z*) so communications made to the solicitor,(*a*) by or to or through an intermediate agent for the solicitor,(*b*) but mere friendly advice given by an eminent lawyer and ex-judge (Lord Westbury), to a friend, was not considered professional or privileged.(*c*)

Other confidential communications.

Private or confidential communications made by or for, or through an ordinary lay agent, possess no such privilege.(*d*) A different rule prevailed at law until lately, but since the J. Act the rule of equity must prevail, and the clauses of the Com. Law Pro. Act are no longer to govern, if they conflict with the rules of equity.(*e*) Now, in all divisions of the High Court,

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(*t*) Anon. W. N., 1875, 219; 20 Sol. Jour., 81, Lush, J.

(*u*) Society of Apothecaries *v.* Nottingham, W. N., 1875, 259; 20 Sol. Jour., 161, Huddlestone, B., and see Bickford *v.* Davey, L. R. 1 Ex. 354.

(*v*) Carter *v.* Leeds "Daily News" Co., W. N., 1876, 12; 20 Sol. Jour. 218, Archibald, J., see also Finlay *v.* Lindsey, 7 Ir. Com. Law Rep. 1, Q. B.

(*w*) Anon. W. N., 1875, 229; 20 Sol. Jour., 100, Quain, J.

(*x*) See Ramsden *v.* Breasly, W. N., 1875, 199; 20 Sol. Jour., 30, Lush, J.

(*y*) Bishop of Cork *v.* Porter, Ir. Rep. 11, Com. Law, 94, Ex.

(*z*) Minet *v.* Morgan, L. R., 8 Chan. 367; Bolton *v.* Corporation of Liverpool, 1 Myl. & K. 88; see Bacon *v.* Bacon, W. N. 1876, 96.

(*a*) Greenough *v.* Gaskell, 1 Myl. & K. 98.

(*b*) M'Corquodale *v.* Bell, L. R. 1 C. P. D. 471; 24 W. R. 399; Ross *v.* Gibbs, L. R. 8 Eq. 522.

(*c*) Smith *v.* Daniel, L. R. 18 Eq. 649.

(*d*) Anderson *v.* Bank of British Columbia, L. R., 2 Chan. D. 644; 24 W. R. 624, *rid.* A. C., 20 Sol. Jour. 132. M. R.

(*e*) S. C. James, L. J., at p. 654, Mellish, L. J., at p. 658; see Bustros *v.* White, L. R. 1 Q. B. D., 423; Sir Geo. Jessel, at p. 425; 24 W. R. 722, 20 Sol. Jour. 585, A. C.

Order 31.

correspondence or oral communications with ordinary agents before or after the dispute has arisen, however confidential they may be, have no privilege, and this includes everything that can throw light on the case.(*f*)

In a recent case the report of the examination of plaintiff by a medical man was privileged on the ground that it was made for the use of the solicitor advising in the case.(*g*)

RULE 6.

6. Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a Judge may allow.

Time to answer by affidavit.

There is no direction given as to printing affidavits in answer exceeding three folios, as given by Ord. 31, R. 7.

Ord. 31, R. 6, E.

RULE 7.

7. Any objection to answering any interrogatory may be taken, and the ground thereof stated in the affidavit.

Objections may be taken by affidavit.

The principal grounds of objection to answer interrogatories have been shortly noted under Rule 5, *ante*.

It has been held in one case that where interrogatories, manifestly improper, have been put, they may be left unanswered without alleging any reason for so doing, or applying to have them disallowed, *ex. gr.*, as to whether defendants were married to each other.(*h*)

Ord 31, R. 7, E.

RULE 8.

8. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court or a Judge on motion or summons.

No exceptions allowed but sufficiency determined on motion.

In deciding on the sufficiency or insufficiency of an affidavit by way of answer, the relevancy and materiality of the statement in question will doubtless be taken in consideration, as it was formerly in Chancery practice (see 70 G. O. 31 Oct. 1867.(*i*) Objection may be taken not merely for insufficiency, but on other grounds also, *ex gr.*, where answer is framed so as to prevent the opposite party making any use of it,(*k*) or is irrelevant, mixing up statements of the answerer's own case and defence, and explanations of it, with his answer to the questions put.(*l*) However, it is probable that the Court in dealing with objections to answers, will not consider itself bound to

Ord. 31, R. 8, E.

(*f*) Bustros *v.* White, *ubi supra*. English *v.* Tothe, L. R., 1 Q. B. D. 141; 24 W. R. 393; Hutchinson *v.* Glover, L. R. 1 Q. B. D. 139; 24 W. R. 185; M'Corquodale *v.* Bell, L. R. 1 C. P. D. 471; 24 W. R. 399.

(*g*) Friend *v.* London and Chatham Railway Company, L. R. 2 Ex. D. 437.

(*h*) Smith *v.* Berry, 25 W. R. 606, V. C. B., per Lord Coleridge, C. J., and Lindley, J., Grove, J. dissenting.

(*i*) But see Reynold *v.* Bloomfield, 8 Ir. Com. Law Rep., App. 14, Q. B., and Chesterfield Colliery Company *v.* Black, W. N. 1876, 204, V. C. H.

(*k*) See Peyton *v.* Harting, L. R. 9 C. P. 9.

(*l*) Anon. W. N. 1876, 39; 20 Sol. Jour. 261, Lindley, J.

Order 31.

deal with them in the critical manner formerly used on exceptions according to its discretion in each particular case, *ex. gr.*, but an answer as to knowledge, omitting information and belief.(*m*)

No time is limited for objections to an answer to interrogatories. In Chancery practice six weeks were allowed for the purpose, a period which would probably be deemed altogether too long under the new system.

Application to determine the sufficiency of an affidavit made under this rule is to be made by Summons at Chambers, Ord. liii , R. 2 (4).

RULE 9. Order to answer, or answer further. Ord. 31, R. 9, E.

9. If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further either by affidavit or by *viva voce* examination, as the Court or a Judge may direct.

The application for an order to answer (or for a further answer in England), is by Summons at Chambers, Ord. liii., R 2 (5) and (6) *infra*, and not by motion. The particular answers objected to as insufficient should be specified.(*n*)

If a *viva voce* examination be directed it will probably be before the Court or a Judge; see Com. Law Pro. Act, 1856, s 60.

As to using answers to interrogatories in evidence, see Rule 22, *infra*.

2. *Production of Documents.*

RULE 10. Order for production of documents. Ord 31, R. 10, E.

10. It shall be lawful for the Court or a Judge at any time during the pendency of any action or proceeding, to order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge shall think right; and the Court or a Judge may deal with such documents, when produced, in such manner as shall appear just.

Quere are applications for production of documents under this rule to be made by Summons at Chambers; see Ord. liii., R. 2 (8).

RULE 11. Order for discovery of documents. Ord. 31, R. 11, E.

11. Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to the action to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question in the action.

(*m*) See Imperial Mercantile Credit Association *v.* Huntingdon, Ir. Rep. 6 Com. Law, 545 C. P.

(*n*) Chesterfield *v.* Boythorpe Colliery Cy. *v.* Black, 24 W. R. 783; 20 Sol. Jour. 642, V. C. H.

This rule is borrowed from Chancery procedure.

See Chan. Act, 1867, s. 71, as regards a plaintiff. A defendant was likewise permitted without filing a cross bill to interrogate the plaintiff in order to enable him, *i.e.*, the defendant, to put in a full and sufficient answer.(*o*)

The Common Law practice obliged the applicant to satisfy the Court by affidavit of the party himself, that his adversary had at least one document in his possession, to the production of which he was entitled, although in Ireland it was sufficient to swear to belief and not absolutely as to the fact.(*p*) The Courts of Law were not tied down to the consideration whether production would be ordered on a bill of discovery in equity.(*q*)

A party is entitled to discovery of documents which formerly could not be reached in England by a landlord, *ex. gr.*, to see his tenant's lease in an action between them,(*r*) though perhaps in Ireland a less narrow rule prevailed.(*s*) It can scarcely be doubted that discovery of documents may be had from a Corporation aggregate, or a public company by means of their officer through the combined effect of Rules 4 and 11, or at least the Court may name an officer to make the affidavit(*t*) so on the owner of a foreign ship who appears to defend an action(*u*)

A party has no right to demand his opponent to procure an affidavit as to documents from a *third person* not a party to the action, and not within the jurisdiction, and not under his control, or to stay proceedings until he procures it, and this although he may derive title under him.(*v*) but the mortgagees of a ship are bound to procure the production of the ship's papers from the mortgagors in an insurance action until they satisfy the Court they have done all in their power to procure them.(*vv*)

A party is not entitled to discovery of documents, except such as he would have a *prima facie* right to inspect, such as private memoranda made by his opponent for his own pleasure or convenience.(*w*)

Time to apply by plaintiff.

The proper time for a plaintiff to apply for an affidavit as to documents (in ordinary cases) is after delivery of his statement of claim;(*x*) before this, special circumstances should be shown.(*y*) So also as regards a defendant applying before

(*o*) See Philips *v.* Pennefather, Ir. Rep., 3 Eq. 12 V. C. on the construction of this section.

(*p*) Irish Society *v.* Crommelin, Ir. Rep., 2 Com. Law, 501 C. P.

(*q*) See Barry *v.* Scully, Ir. Rep. 6 Com. Law, 449 Q. B.

(*r*) Anon. W. N. 1875, 249; 20 Sol. Jour. 141.

(*s*) See Barry *v.* Scully, Ir. Rep. 6 Com. Law, 449 Q. B.

(*t*) See Cooke *v.* Oceanic Steam Cy., W. N. 1875, 220, Lush, J.

(*u*) The "Emma," 24 W. R. 587 Pro.; the action was *in rem.*

(*v*) Frazer *v.* Burrows, L. R. 2 Q. B. D. 624.

(*vv*) West of England Bank *v.* Canton Insurance Cy., L. R., 2 Ex. D. 472.

(*w*) Mattock *v.* Heath, W. N., 1875. 201, Lush, J.

(*x*) Cashin *v.* Craddock, L. R., 2 Chan. D. 140 V. C. B.; Anon. W. N. 1876, 53, Archibald, J.

(*y*) Anon. W. N. 1876, 55, Archibald, J.

Order 31. Rule 11.

delivery of his defence.(*z*) Where a plaintiff in an action for damages, on breach of duty in carrying goods by sea by overloading the ship, was unable to make his statement of claim sufficiently specific without production of documents, although he might have been able to deliver a declaration in the old general form, he was allowed to make application before delivery.(*a*)

Defendant's time to apply.

A defendant's proper time to apply is after delivery of his defence, unless he can show special grounds.(*b*) However, to save costs a defendant was allowed before appearance to inspect documents.(*c*) After delivery of defence, a defendant is entitled to discovery of all documents in the possession of the plaintiff, almost as of course, and without indicating what they are, or tracing any one of them to the possession of the plaintiff.(*d*) Yet it is not so absolutely of course, that it is to be had if the pleading shows the case to be one in which such discovery could not possibly be wanted.(*e*)

So if the application appears not to be *bona fide* but for delay, and to throw the opposite party, a foreigner, out of a trial at the coming sittings.(*f*)

As the applicant cannot know what documents the opposite party has until he sees his affidavit, it would seem that the onus rests on the latter and that *prima facie* no grounds are necessary to support the application.(*g*)

It is probable that if defendant has failed to answer the plaintiff's interrogatories, he cannot obtain an order for discovery of documents until he has himself answered.

At later stages.

After issue joined, in an ejectment action to recover a vicarage house, plaintiff has been allowed to see the agreement on which the alleged agreement between defendant's and plaintiff's predecessor is founded.(*h*)

After an appeal the Court of Appeal may make an order for production of documents to be used on the appeal.(*i*)

All applications for discovery of documents under this rule must be by summons at Chambers. Ord. li., Rule 2 (7.)(*k*) Although the rule dispenses with the filing of any affidavit,

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(*z*) Anon. W. N. 1875, 55.

(*a*) Ley *v.* Marshall, W. N. 1876, 23; 20 Sol. Jour. 241, Lindley, J.

(*b*) Anon. W. N. 1876, 53, Archibald, J.

(*c*) Anon. W. N. 1876, 220; 20 Sol. Jour. 81, Lush, J.

(*d*) Anon. W. N. 1875, 231; 20 Sol. Jour. 102, Quain, J. Anon. W. N. 1876, 22; 20 Sol. Jour. 242, Lindley, J. Anon. W. N. 1876. 24; 20 Sol. Jour. 243, Lindley, J.

(*e*) Anon. W. N. 1876, 53, Archibald, J.

(*f*) See Anon. W. N. 1875, 238; 20 Sol. Jour. 102, Quain, J.

(*g*) Anon. W. N. 1876, 24; 20 Sol. Jour. 24, Lindley, J. See case of Mostyn *v.* Western Coal and Iron C^{y}. W. N. 1875, 26, Huddlestone, J. which seems not a case of discovery of documents (written receipts for rent), but of the fact of rents having been received by a landlord.

(*h*) Anon. W. N., 1876, 11, 20 Sol. Jour. 219, Archibald, J.

(*i*) See *In re* National Funds Assurance Co., W. N., 1876, 192, 24 W. R., 774; 20 Sol. Jour. 584, A. C.

(*k*) See Anon. 20 Sol. Jour. 32, Lush, J.

Order 31.

still the Court may require one, if in its discretion it thinks fit.(*l*) It is not compulsory on a Judge to make an order for discovery of documents without an affidavit, where there is nothing in the nature of the case to suggest that important documents are in the power of the opposite party.(*m*)

Interrogatories on this subject are improper.(*n*)

The usual order made is for the discovery of documents that then are, and that have been in the possession or power of the party interrogated.

RULE 12.

Form of affidavit of documents. Ord. 31, R. 12, E.

12. The affidavit to be made by a party against whom such order as is mentioned in the last preceding Rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form No. 9 in Appendix (B.) hereto, with such variations as circumstances may require.

Form of affidavit.

The form of affidavit is borrowed from Chancery practice, and should be followed at least substantially.

It is exhaustive and complete. An affidavit in the form used in the Common Law Courts though filed in a pending cause was required to be amended according to the new form after the rules came in force.(*n*) One making no mention of books was deemed insufficient,(*o*) and so one omitting to refer to documents which had formerly been in power, &c.,(*p*) or in possession of an agent.(*q*)

The party interrogated is bound to schedule all the documents which are actually in his possession or power relevant to the matters in question, whether privileged from production or not, leaving it to the Court to decide whether they shall be produced or not,(*r*) and they should be specified in detail, and not as "a bundle of documents relating exclusively to my own title."(*s*) but with sufficient clearness to enable them to be identified.(*t*)

According to Chancery practice the affidavit of deponent was accepted as conclusive, so far as, but no further than the question whether the documents mentioned in the schedule are all that he has, relevant to the matters in question.

(*l*) Mattock *v.* Heath, W. N., 1875, 201, 20 Sol. Jour. 54, Lush, J.

(*m*) Johnson *v.* Smith, 25 W. R. 539, 21 Sol. Jour. 499, Ex. D.

(*n*) Pitten *v.* Chattenburg, W. N., 1875, 248, 20 Sol. Jour. 139, Quain, J.

(*o*) Anon. W. N., 1875, 240, 20 Sol. Jour. 122, Quain, J.

(*o*) Anon. W. N., 1876, 39, 20 Sol. Jour. 261, Lindley, J.

(*p*) Anon. W. N., 1876, 38, 20 Sol. Jour. 261, Lindley, J.

(*q* Ledwidge *v.* Mayne, Ir. Rep., 11 Eq. 463.

(*r*) Fortescue *v.* Fortescue, 24 W. R. 945, V. C. H. See Magdalen Hospital *v.* Knotts, 21 Sol. Jour. 610, Fry, J., a case of a defendant in possession in ejectment.

(*s*) *Ib.*

(*t*) Ledwidge *v.* Mayne, Ir. Rep., 11 Eq. 463 V.C.; see Taylor *v.* Oliver, W. N., 1876, 241, V. C. B., as to a sufficient identification.

Order 31.

Documents protected.

RULE 11.

The practice in Equity prevails now over that at common law, that unless the document whose production is sought, is sufficiently protected by the affidavit of the party required to produce it, the judge has no discretion in the matter, but is bound to order its production, but the party may of course be permitted to make a fresh affidavit.(*u*)

The cases on privileged communications have been considered already under Rule 5.

A defendant is entitled to inspect the documents in the possession of the plaintiff though they constitute the evidence on which he relies to establish the contract on which he sues.(*v*) But a defendant in ejectment is still privileged from showing his title deeds and cannot see those of the plaintiff;(*w*) so plaintiff is not bound to produce deeds and muniments of title which he swears do not to the best of his knowledge, information, or belief contain anything impeaching his own case or supporting or material to the case of the defendant.(*x*)

The court is bound to consider whether they do fairly constitute a part of the case of the person claiming the production or might be used to the prejudice of the party holding them for some ulterior purpose.(*y*)

RULE 13.

Production of documents referred to in pleadings and affidavits.

Ord. 31, R. 14, E.

13. Every party to an action or other proceeding shall be entitled at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

Non-compliance.

As to profert and setting out of deeds in pleading, see Com. Law Pro. Act, 1853, s. 63, and as to production and inspection and copy of any deed or document relied on in pleading, see s. 64. This Rule extends the right to documents referred to in affidavits as well as in pleadings.

Where a party justified under a deed, the opposite party

(*u*) Bustros *v.* White, L. R., 1 Q. B. D. 423, 24 W. R. 721, 20 Sol. Jour. 585, A. C.

(*v*) Benjamen *v.* Sanley, Ir. Rep. 6, Com. Law 16 C. P.

(*w*) Anon., 20 Sol. Jour. 198; Anon. W. N., 1876, 23, 20 Sol. Jour. 242, Lindley, J. Anon., W. N., 1876, 40, 20 Sol. Jour. 261.

(*x*) Minet *v.* Morgan, L. R. 8 Chan. 361; see Bagnall *v.* Carlton, W. N. 1876, 215 V. C. M.

(*y*) Houghton *v.* London and Co., Assoc. Co., 17 C. B. N. S. 80; Elmer *v.* Creasy, L. R. 9 Chan. 69.

was entitled to an inspection and copy of it though not a party to it or interested in it.(*z*)

Inspection of deed of mortgage in an action of ejectment by the mortgagee against the mortgagor was refused to executors of mortgagor on plaintiffs giving particulars of amount due, for principal, interest, and costs, and of subsequent incumbrancers,(*a*) and as to production of lease in an action brought on a covenant contained in it, see.(*b*)

RULE 14. Form of notice. Ord. 31, R. 14, E.

14. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in the Form No. 10 in Appendix (B.) hereto.

RULE 15. Offer of inspection. Ord. 31, R. 15, E.

15. The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 12, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same, a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, and stating which (if any) of the documents, he objects to produce, and on what ground. Such notice may be in the Form No. 11 in Appendix (B.) hereto, with such variations as circumstances may require.

RULE 16. Enforcing inspection. Ord. 31, R. 16, E.

16. If the party served with notice under Rule 14 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection.

RULE 17. Application, when by affidavit. Ord. 31, R. 17, E.

17. Every application for an order for inspection of documents shall be to a Judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party.

The application should be by summons at Chambers, Ord. 53, R. 2 (8).

(*z*) Penarth Harbour and Ry. Co. *v.* Cardiff Waterworks Co., 7 C. B. N. S. 816.

(*a*) Anon. W. N., 1876, 23, 20 Sol. Jour. 242, Lindley, J.

(*b*) Lake *v.* Pooley, W. N., 1876, 54, 20 Sol. Jour. 280.

Order 31.

Partial inspection.

When inspection of books is allowed, the party may be permitted to seal up all those parts of the books which he pledges his oath do not concern the matter in hand.(*c*)

An order has been made for inspection and perusal of documents by counsel of applicants.(*d*)

There is no power to order a party to the action to produce documents not in his possession or control, or to stay his action until a third person produce the documents, though he may be the former owner of the subject-matter of the action.(*d d*)

Rule 18.

Issue or question decided preliminary to order for discovery or inspection.

Ord. 31, R. 18, E.

18. If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

The right to discovery or inspection may depend on the fact of partnership, agency or trust, and if the question be disposed of the right would fail, and it is essential in many cases, to the protection of the party interrogated from unjust and injurious disclosures to settle the preliminary question first. Thus, where the action was on contract to give plaintiff a commission on a certain loan, and defendants denied the contract altogether, and the discovery sought was whether defendants had used or acted on information given by plaintiff, which was the consideration for the commission, an issue was directed to try whether there was any such contract between the parties.(*e*)

Rule 19.

Failure enforced by attachment.

Ord. 31, R. 19, E.

19. If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

(*c*) Bull *v.* Clarke, 15 C. B., N. S. 851.

(*d*) Blair *v.* Massey, Ir. Rep. 5, Eq. 623.

(*d d*) Frazer *v.* Burrows, W. N., 1877, 76 Ex. D.

(*e*) Wood *v.* Anglo-Italian Bank, 20 Sol. Jour., 332, C. P. D., and see Flower *v.* Lloyd, 20 Sol. Jour., 584, 703, S. C.; 21 Sol. Jour., 708; see Rowcliffe *v.* Leigh, 25 W. R. 783, 21 Sol. Jour., 630, A. C.

Order 31.

Dismiss of action.

Under the Com. Law Pro. Act if a plaintiff failed to answer interrogatories, his proceedings were stayed.(*f*) In Equity his bill might be dismissed.(*g*) Where there was a bill and cross-bill, and plaintiff in the former failed to give discovery, his proceedings were stayed.(*h*) It is not imperative on the Court to dismiss the action, and where the action was that of husband and wife, for the wife's benefit, and the husband had absconded and made default as to discovery, dismissal was refused ;(*i*) and the provision has been deemed so highly penal that it should be enforced only in the last resort, and never where the party really intends to answer.(*k*)

See Com. Law Pro. Act, 1856, s. 56.

The plaintiff may instead of demanding an attachment apply to strike out the defence, leaving defendant in the same position as if he had not pleaded,(*l*) but even this will not be done except in the last resort.(*m*)

Where the omission was occasioned by a change of solicitors further time was granted.(*n*)

After several orders made ineffectually, a peremptory order was made that unless answer given within twenty-four hours the defence should be struck out.(*o*)

Default in answering interrogatories is not *per se* ground for entering judgment as in default of a defence, but the defence must be struck out first.(*p*)

Rule 20.

Service on solicitor. Ord. 31, R. 20.

20. Service of an order for discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

An order to deliver statement of names of the partners of a defendant under Ord. xvi., R. 1, *ante*, or to file a sworn account of moneys received by a defendant for sale of goods under Ord. xv., R. 1, does not come within the scope of this rule.(*q*)

And this sort of service is not sufficient to found an attachment for non-compliance with an order to furnish the names of co-partners, or to furnish an account.(*r*)

(*f*) Reynolds *v.* Bloomfield, 8 Ir. Com. Law Rep. App. 14, Q. B.
(*g*) Republic of Liberia *v.* Roze, L. R. 9 Chan. 569.
(*h*) S. C., L. R. 1 Chan. D. 171; 24 W. R. 151, A. C.
(*i*) Hartley *v.* Owen, W. N. 1876, 193, V. C. H.
(*k*) Anon. W. N. 1875, 202; 20 Sol. Jour. 57, Lush, J.
(*l*) Fisher *v.* Hughes, 25 W. R. 528, V. C. H.
(*m*) Twycroft *v.* Grant, W. N. 1875, 201; 20 Sol. Jour. 54, Lush, J.
(*n*) Anon. W. N. 1875, 204, Lush, J.
(*o*) Twycroft *v.* Grant, W. N. 1875, 229; 20 Sol Jour. 97, Quain, J.
(*p*) Culley *v.* Buttefant, L. R. 1 Chan. D. 84, 24 W. R. 55.
(*q*) See Pike *v.* Frank Keene, W. N. 1876, 36, 24 W. R. 322; 20 Sol. Jour., 251 Ex.
(*r*) Ib.

Order 31.

The service of the order on the solicitor need not be a personal service, at his office is sufficient.(*q*)

Rule 21. Liability of solicitor not apprising client. Ord. 31, R. 21, E.

21. A solicitor upon whom an order against any party for discovery or inspection is served under the last Rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

Rule 22. Using answers to interrogatories. Ord. 31, R. 22, E.

22. Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

Formerly a party examining his opponent was not bound to give his testimony in evidence, but if he used any part he was bound to give all.(*r*) Now he may put in one answer without the rest, subject to the Judge's examination of the entire. It would seem he cannot put in part of an answer without the rest of the same answer, and the person questioned is not bound to split up his answer to suit the convenience of his interrogator.(*s*)

Order XXXII.

Admissions.

Order 32.

Rule 1. Notice admitting claim, &c., Ord. 32, R. 1, E.

1. Any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the statement of claim, defence, or reply of any other party.

Voluntary admissions.

Although each party has a right to call on the other to admit documents, there is no such right to call for admission of facts at the peril of costs, further than that by the rules of pleading (see Order xxi., R. 4), a party may be made to bear the extra costs occasioned by unnecessary denials or not admitting facts.

By infants.

How far admissions of facts made on behalf of an infant by his guardian or *prochein amie* would be binding on the infant is more than doubtful having regard to the old Chancery rule and to the terms of Order xviii., R. 10, *ante*.(*t*)

Rule 2. Requisition to admit documents. Ord. 32, R. 2, E.

2. Either party may call upon the other party to admit any document, saving all just exceptions; and in case of

(*q*) Clark *v.* Beamont, 20 Sol. Jour. 882, Huddlestone, J.
(*r*) Martin *v.* Hemming, 10 Ex. 478.
(*s*) See Anon. W. N. 1876, 39; 20 Sol. Jour. 261.
(*t*) See however Fryer *v.* Wiseman, 24 W. R. 205; 20 Sol. Jour. 211, as to consent to mode of taking evidence.

refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable: and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice, is, in the opinion of the taxing officer, a saving of expense. Order 32.

See Chancery Orders 164 G. O. 27 March, 1843; 54 G. O. 31 January, 1868.

Under this rule it will doubtless be competent to require admission of a copy of a document to be such as under Com. Law Pro. Act, 1853, s. 118.

Where the notice is to admit a copy, the party refusing to admit does not become liable to costs of proving the original at the trial, and it is doubtful how far a party can be reasonably called on to admit that a copy is more than a copy, or to accept it in lieu of production of the original.(*u*)

3. A notice to admit documents may be in the Form No. 12 in Appendix (B.) hereto. Rule 3. Form of notice. Ord. 32, R. 3, E.

4. An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions. Rule 4. Affidavit of signature. Ord. 32, R. 4, E.

See Com. Law Pro. Act (Ireland), 1853, s. 119.

Order XXXIII.

Inquiries and Accounts. Order 33.

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. May be directed at any stage. Ord. 32, E.

The object of this order is to save the expense and delay of a previous hearing, so that when the accounts have been taken, the action may be once and for ever brought on by way of motion for judgment instead of a second hearing for further consideration.(*v*) Accounts.

(*u*) Rochfort *v.* Sedley, 12 Ir. Com. Law Rep., Appen. 4.

(*v*) Turquand *v.* Wilson, L. R., 1 Chan. D. 85; 24 W. R., 56, V. C. H.

Order 33.

To obtain such an order plaintiff must make out a *prima facie* case to some claim, legal or equitable, either by proof or admissions,(*w*) the admission by defendant of "a moral if not legal obligation," to pay certain percentages on certain receipts is not enough.(*x*) An admission by merely not denying certain allegations in the claim is not sufficient to entitle a party to an account under this order.(*y*)

The account directed may involve cross accounts suggested by the defence of all dealings and moneys received or paid by plaintiff or defendant.(*z*)

There can be no account directed for a defendant arising out of his counterclaim before the principal claim is dealt with.(*a*)

Inquiries.

In an action for partition and sale of property by part owner of one-eighth, other defendants appearing being entitled to three-sixteenths, and others claiming five-eighths, the defendants who appeared admitting the deeds and facts set forth in the statement of claim, inquiry was directed as to who the persons were who were interested in the property, and their shares, and the hearing of the action was adjourned meanwhile.(*b*)

Order XXXIV.

Order 34.

Questions of Law.

Rule 1. Special cases, form of. Ord. 34, R. 1, E.

1. Every special case for the opinion of the Court 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.

The right to bring a special case at law was conferred by the 3 & 4 Vic., c. 105, s. 50, extended by the Com. Law Pro. Act, 1853, s. 92.

It might be stated by consent any time after writ issued and before judgment, and parties might agree that error might or might not be brought on the judgment, sections 93, 94, 95.

(*w*) See a case of this nature Rumsey *v.* Reade, L. R., 1 Chan. D. 643; 24 W. R., 245, 20 Sol. Jour. 25 V. C. B.

(*x*) See Sickles *v.* Norris, W. N., 1876, 44; 20 Sol. Jour. 297, Archibald J.

(*y*) Rolfe *v.* Maclaren, W. N., 1876; 142 V. C. H.

(*z*) Ib.

(*a*) Turquand *v.* Wilson, *ubi supra.*

(*b*) Gilbert *v.* Smith, L. R., 2 Chan. D. 686; A. C., see Bennett *v.* Moore, L. R., 1 Chan. D. 692 V. C. H.

In Chancery the right was conferred by the Chan. (Ire.) Act, 1867, s. 111. Order 34.

As to reference to documents see s. 118.

2. If it appear to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action 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 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. Rule 2. Court may direct a special case. Ord. 34, R. 2, E.

This rule seems intended for cases where the Court or the Judge sees its way to a final determination of the action, provided some one question of law which must in any event be determined, be set at rest, *ex. gr.*, in a patent case where the sufficiency of the specification is impugned.(*c*) But the facts out of which the question arises must be admitted or proved,(*d*) and the question must arise out of facts stated in the pleadings, and not suggested or supplied *aliunde*, or put hypothetically, even by consent of parties.(*e*)

The Court has a discretion of ordering a special case to be stated before statement of claim delivered, where it sees there is a question of law to be decided before any evidence is taken.(*f*)

3. Every special case shall be printed by the plaintiff, and signed by the several parties or their solicitors, and shall be filed by the plaintiff. Printed copies for the use of the Judges shall be delivered by the plaintiff. Rule 3. Printing case. Ord. 34, R. 3, E.

It has been held in England that a special case does not require the signature of counsel;(*g*) but see 119 G. O. 31, Oct., 1867, Chancery.

4. The committee of the estate of any lunatic interested or claiming to be interested in any such question as aforesaid may, after having been authorized in that behalf by Rule 4. Lunatic's committee may concur.

(*c*) Republic of Bolivia *v.* National Bolivian Navigation Co., 24 W. R. 361, *per* Sir Geo. Jessel, M. R., at p. 362.

(*d*) *Ib.*, and see Metropolitan Board of Works *v.* New River Co., W. N., 1876, 194 Q. B. D.

(*e*) *Ib.* Anon. W. N. 1875, 200, Lush, J.

(*f*) Metropolitan Board of Works *v.* New River Co., L. R., 1 Q. B. D. 727, S. C., on appeal, L R., 2 Q. B. D. 67, 25 W. R., 175, and see Pooley *v.* Driver, L. R., 5 Chan. D. 458, M. R.

(*g*) Hare *v.* Hare, W. N., 1876, 44 M. R.

Order 34.

the Lord Chancellor, concur in such case in his own name and in the name and on the behalf of the lunatic.

See Chan. (Ire.) Act, 1867, s. 112.

Rule 5. Husband and wife, by husband.

5. A husband interested or claiming to be interested in right of his wife in any such question as aforesaid may concur in such case in his own name and in the name of his wife where the wife has no claim to any interest distinct from her husband, and a married woman having or claiming any interest in any such question as aforesaid distinct from her husband may in her own right concur in such case, provided that her husband also concurs therein.

See Chan. (Ire.) Act, 1867, s. 113.

Rule 6. Infant by guardian.

6. The guardian of any infant interested or claiming to be interested in any such question as aforesaid may concur in such case in the name and on the behalf of the infant, unless such guardian has an interest in such question adverse to the interest of the infant therein.

See Chan. (Ire.) Act, 1867, s. 114.

Rule 7. Special guardian of infant or lunatic.

7. It shall be lawful for the Court, by order to be made in the matter of any lunatic not found such by inquisition, or in the matter of any infant, upon the application of any person on the behalf of such lunatic, or upon the application of such infant, by motion or petition, to appoint any person shown by affidavit to be a fit person, and to have no interest adverse to the interest of the lunatic or infant, to be the special guardian of such lunatic or infant for the purpose of concurring in such case in the name and on behalf of the lunatic or infant, and any such person so appointed may lawfully so concur: Provided always, that it shall be lawful for the Court to require notice of such application to be given to such person, if any, as the Court shall think fit.

See Chan. (Ire.) Act, 1867, s. 115.

Rule 8. Discharging orders, irregularly made.

8. In any case in which any such order as aforesaid shall have been made by the Court in the matter of any infant without notice to the guardian of the infant, it shall be lawful for the said Court, if it shall think fit so to do, to discharge such order, upon the application of such guardian, by motion or petition; and the Court, if it shall think fit, may thereupon appoint some other fit person to be the special guardian of such infant for the purpose of such special case, and may also give such

directions as may be necessary for substituting in such special case either the name of the guardian so applying, or of the special guardian so appointed, in lieu of the name of the special guardian so displaced: Provided always that the discharge of any order appointing a special guardian shall not invalidate anything which shall in the meantime have been done by such special guardian, unless the Court shall, upon notice to all parties, specially so direct. Order 34.

See Chan. (Ire.) Act, 1867, s. 116.

9. No special case in an action to which a married woman, infant, or person of unsound mind 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 interests of such married woman, infant, or person of unsound mind, are true. Rule 9. Leave to set down in case of disability.

See Chan (Ire.) Act, 1867, s. 119.

10. Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry, in the Form No. 13 in Appendix (B.) hereto, and also if any married woman, infant, or person of unsound mind be a party to the action, producing a copy of the order giving leave to enter the same for argument. Rule 10. Entry for argument. Ord. 34, R. 5, E.

Order XXXV.

Trials.

Place of Trial.

Judicature Act, 1877, *s.* 33 (*part of*). Order35.

"Subject to Rules of court the plaintiff shall in the document by which each cause shall be commenced, name the county or place in which he proposes that the cause shall be tried or proceeding take place, but the court or a judge, may in their or his discretion direct the same to be tried in any other county or place, and so far as shall be reasonably consistent with the convenient and speedy discharge of the business, every issue and question of fact to be submitted to a jury shall be tried in the county or place where the cause of action shall have arisen. Any order of a judge as to the place of trial of any such issue or question may be discharged or varied by a Divisional Court." Place of trial to be named by Plaintiff. Ord. 36, R. 1, E.

Order 35.

But by Order i, Rule 1, *ante*, it is rendered unnecessary in the writ to specify any county or place unless where the trial is to be by jury.

Venue.

The English Order xxxvi, Rule 1, declares that where no place of trial is named the place of trial shall be the county of Middlesex.

As to writs of inquiry the Com. Law Pro. Act, 1853, s. 100, directs they shall be directed to the Sheriff of the proper county, *i.e.*, the county mentioned in the venue but *semble* if the writ mention no place

The plaintiff has the right of fixing the place of trial subject to the provision for its being changed to the county in which the cause of action has arisen. It is therefore so far, less absolute than it is in England, and the English cases on the subject seem inapplicable.

There is therefore no local venue, and an action for recovery of land may be tried in any county, and whether the lands be in the same county or in different counties,(*a*) but if the lands be situated out of Ireland it would seem no action, for recovery of them will not lie.(*b*)

Trial by Jury.

J. A., 1877, *s.* 48, § 2.

Right to trial by jury of questions of fact.

"Provided that nothing in this Act, or in any Rule made under its provisions shall take away or prejudice the right of any party to any action to have questions of fact tried by a jury, in such cases as he might heretofore of right have so required," &c., &c.

The English Order xxxvi., gives the plaintiff the right to select any one out of five modes of trial, one of these being by judge and jury. If he omits to exercise the right or names any other mode than by judge and jury, the defendant is at liberty to intimate his desire to have questions of fact tried by judge and jury, and his right in that respect is absolute, unless in those cases which before the J. Act, could without any consent of parties have been tried without a jury, of course consisting mainly of chancery actions proper, see Rules 3 and 26.

The effect of the above enactment coupled with Rules 2 and 4 of the following order seems to be somewhat

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(*a*) See Gray *v.* Lawder, Ir. Rep. 8, Com. Law 193; see the Grocers' Co. *v.* Coll, 9 Ir. Com. Law Rep., App. 8.

(*b*) See Whitaker *v.* Forbes, L. R. 10, C. P. 583, S. C. on appeal L. R. 1, C. P. D. 51, 24 W. R. 241 and see Chatfield *v.* Bertchtold, L. R. 7, Chan. 192.

similar. Questions of fact are still to be tried by Judge and Jury in all cases in which either party might heretofore of right have required such a mode of trial, and if the plaintiff neglects to give notice of trial accordingly, the defendant has the option of himself giving such a notice, or of making an application to dismiss the action for want of prosecution. The cause can be tried in no other way unless by consent and leave of the Court. Order 35.

An action for damages merely, can scarcely be tried otherwise than by a jury.(*bb*)

In England the Court or a Judge may without consent in any cause requiring any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made before a jury, order any question or issue of fact, or question of account therein to be tried before a special referee.(*c*)

In Ireland the power is more restricted. The Com. Law Pro. Act, 1856, s. 6, enables the Court or a Judge, on application of either party, and it appearing the matter in dispute consists wholly or in part of matters of account, which cannot be conveniently tried in the ordinary way, either to decide the matter summarily or to refer it to an arbitrator selected by the parties or to the Master of the Court, or in country to the Chairman of the County.

Under the Com. Law Pro. Act, 1856, s. 4, the parties may by consent leave any issue of fact to the decision of the Court, provided the Court thinks fit to allow it.

As to trials and evidence generally, see Chapter liv., p. 391, *ante*. Exceptions to charge of Judge, *ib.* p. 396, and J. A. 1877, s. 48, § 3.(*d*)

The law as to juries is unaltered; see J. A. 1877, s. 66.

(*bb*) See Row *v.* Jacob, 20 Sol. Jour. 704, V. C. H.

(*c*) J. Act, 1873, s. 57; see Garling *v.* Royds, W. N. 1876, 291; 25 W. R. 123, V. C. H., where there was a very voluminous correspondence to be dealt with; see Head *v.* Ryde, 21 Sol. Jour. 297, V. C. H. a partnership action in which the fact of partnership was denied; Back *v.* Hay, 25 W. R. 392; W. N. 1877, 55, V. C. M., an action to rescind a contract on the ground of fraud, tried without a jury; Burrell *v.* Cartwright, 21 Sol. Jour. 238, V. C. M., action for a mandatory injunction depending on amount of damages incurred, sent to a jury; West *v.* White, L. R., 4 Chan. D. 631; 25 W. R. 342, V. C. B., action to restrain a nuisance, sent to a jury of the county; Sykes *v.* Firth, W. N. 1877, 38, V. C. M., action for specific performance, no right to a jury.

(*d*) See Richardson *v.* Corcoran, 7 Ir. Com. Law Rep. 121, Q. B., as to electing between an exception and a new trial motion.

Order 35.

Order XXXV.

Rules of Court.

Trial.

Rule 1.

How actions are to be tried.

Ord. 36, R. 2, E.

1. Subject to the provisions of the Act, actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and jury with or without assessors.

The English Order 36, R. 2, allows a trial before an official or special referee with or without assessors, but it does not permit the combination of assessors with a Judge and jury as the above rule does, and in general it gives the plaintiff the election of choosing the mode of trial, subject to change. Under the Irish Order, the plaintiff has absolutely no choice. If the case be proper for a jury he must give notice accordingly, and if it be not he must apply to a Judge to direct the mode of trial; see Rules 2 and 3.

Rule 2.

Notice of trial by jury by plaintiff. By defendant.

Ord. 36, Rs. 3 & 4, E.

2. In cases where heretofore any party to an action might of right have required any question of fact to be tried by a jury, the plaintiff may with his reply, or at any time after the close of the pleadings, give notice of trial by a Judge and jury, and shall be entitled to have the same so tried. If the plaintiff shall not within six weeks after the close of the pleadings, or such extended time as a Judge shall allow, give, in such cases, notice of trial before a Judge and jury, the defendant may give such notice. When no county or place of trial has been named in the writ of summons the defendant shall, in such notice, name the county where he proposes that the action shall be tried, and shall, subject to the provisions of the Act, be entitled to have same tried accordingly, unless the Court or a Judge shall direct the same to be tried in any other county.

Venue.

Rule 3.

Directions as to trial in other cases.

3. In all cases not within the next preceding Rule, the plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of an application to a Judge to direct the mode, and, if necessary, the place of trial; and if the plaintiff shall not give such notice within six weeks after the close of the pleadings, or such extended time as the Court or a Judge shall allow, the defendant may, before notice given by the plaintiff, give such notice. Upon such application the Judge may direct the action to be tried in such mode, and, if before a Judge and jury, in such county, and also give such directions as to the evidence upon the trial as he shall think fit.

Order 35.

The mode of trial is so much a matter of discretion for the Judge that a Court of Appeal will be slow to interfere with it, unless it is plain that the discretion has been exercised wrongly.(*d*)

RULE 4.

Notice to dismiss action.

Ord. 36. R. 4(A), June, 1876.

4. The defendant, instead of giving notice of trial, or giving notice to have the mode of trial directed by a Judge, may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or Judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as to the Court or Judge may seem just.

This is similar to the 84 G. O., 31 Oct., 1867, Chancery, and bears some analogy to the judgment, as in case of a nonpros at common law. The Com. Law Pro. Act (Ire.), 1853, s. 106, substituted an application for an order to proceed to trial at next assizes or sittings, on pain of dismissal of the action with costs.

The rule may induce a plaintiff to give notice of trial without intending to act on it, a course much disapproved of.(*e*)

As to failure to proceed with issues in Chancery practice, see (*f*).

RULE 5.

Judge may order questions to be tried in different modes.

Ord. 36, R. 6, E.

5. Subject to the provisions of the Act and of the preceding Rules, the Court or a Judge may, in any action at any time, or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.

In an action for damages to plaintiff's vessel while in the defendant's dock, the Court ordered the question of liability, arising in the action, to be tried separately from the question of damage, which would involve a variety of items of a complicated character and examination of accounts, which might become useless, or be referred to a referee.(*g*)

RULE 6.

Trial by judge and jury.

Ord. 36, R. 7, E.

6. Every trial of any question or issue of fact by a jury shall be held before a single Judge, unless such trial be specially ordered to be held before two or more Judges.

As to trials at bar—see 77 and 78 G. O., 1854, Common Law.

(*d*) Lascelles *v.* Butt, 24 W. R. 639; W. N. 1876, 166; 20 Sol. Jour. 541, A. C.

(*e*) See Anon., 20 Sol. Jour., 81, Lush, J.

(*f*) Underwood *v.* Darracott, Ir. Rep., 8 Eq., 345, M. R.

(*g*) Liverpool Brazil Steam Navigation Cy. *v.* London and St. Katherine's Steam Navigation Cy., W. N., 1875, 203; 20 Sol. Jour., 55, Lush, J.

Order 35.

RULE 7. Notice of trial, forms of. Ord. 36, R. 8, E.

7. Notice of trial before a Judge and jury shall state whether it is for the trial of the action or of issues therein; and in actions in the Queen's Bench, Common Pleas, and Exchequer Divisions, the place and day for which it is to be entered for trial. It may be in the Form No. 14 in Appendix (B.), with such variations as circumstances may require.

RULE 8. Where damages to be assessed on demurrer.

8. Where a demurrer shall have been filed after notice of trial served, such notice shall be deemed to be a notice as well to try the issue in fact, as to inquire of the damages to be assessed on the demurrer.

As to notice of trial *tam triandum quam inquirendum*, see 83 G. O., 1854, Common Law.

RULE 9. Length of notice of trial. Ord. 36, R. 9, E.

9. Ten days notice of trial shall be given, unless the party to whom it is given has consented to take short notice of trial; and shall be sufficient in all cases, unless otherwise ordered by the Court or a Judge. Short notice of trial shall be four days notice.

The word trial probably will include "inquiry." See Com. Law Pro. Act (Ire.), 1853, s. 103.

RULE 10. Notice before entry for trial. Ord. 36, R. 10, E.

10. Notice of trial shall be given before entering the action for trial.

This seems to dispense with notice of entry of the action for trial.

RULE 11. Notice, how long in force. Ord. 36, R. 10(A)

11. Unless within six days after notice of trial is given, the action shall be entered for trial by one party or the other, the notice of trial shall be no longer in force. This rule is not to apply in any case in which notice of trial has been already given, or to trials not in Dublin.

This rule is like that in the Chancery Rule 94 G. O., 31 Oct., 1867, as regards motions for decree, which, if not set down with the Registrar within seven days after notice has been served, cannot afterwards be set down without an order, or consent in writing of the defendant.

RULE 12. Notice for Dublin continuous. Ord. 36, R. 11, E.

12. Notice of trial for the county or the county of the city of Dublin shall not be or operate as for any particular sittings; but shall be deemed to be for any day after the expiration of the notice on which the action may come on for trial in its order upon the list.

This rule seems to do away with the necessity for continued renewals of notice for future sittings.

Order 35.

RULE 13. Notice for assizes. Ord. 36, R. 12.

13. Notice of trial elsewhere than in the county of Dublin or the county of the city of Dublin shall be deemed to be for the first day of the then next assizes at the place for which notice of trial is given.

Notice for one assizes may not be sufficient for a future assizes if the case becomes a *remanet*.

RULE 14. No countermand of notice of trial. Ord. 36, R. 13, E.

14. No notice of trial shall be countermanded, except by consent, or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs, or otherwise, as may be just.

RULE 15. Entry for trial by opposite party in Dublin. Ord. 36, R. 14, E.

15. If the party giving notice of trial for the county or the county of the city of Dublin omits to enter the action for trial on the day or day after giving notice of trial, the party to whom notice has been given may, unless the notice has been countermanded under the last Rule, within four days enter the action for trial.

RULE 16. Like at assizes. Ord. 36, R. 15, E.

16. If notice of trial is given for elsewhere than in the county of Dublin or the county of the city of Dublin, either party may enter the action for trial. If both parties enter the action for trial, it shall be tried in the order of the plaintiff's entry.

RULE 17. General lists for Dublin. Ord. 36, R. 16, E.

17. The list or lists of actions for trial at the sittings in the county of Dublin or the county of the city of Dublin, respectively shall be prepared, and the actions shall be allotted for trial, without reference to the Division of the High Court to which such actions may be attached.

RULE 18. Copy pleadings to be lodged. Ord. 36, R. 17, E.

18. The party entering the action for trial shall deliver to the officer two copies of the whole of the pleadings in the action, one of which shall be for the use of the Judge.

This rule applies in England to Chancery actions as well as others and whether set down for hearing or for trial.

RULE 19. Non-appearance of defendant. Ord. 36, R. 18, E.

19. If, when an action is called on for trial, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.

In Chancery practice the plaintiff got such decree as upon the pleadings and evidence he was entitled to. The decree is absolute, yet since the J. Act, when occasioned by negligence on the part of the clerk of the solicitor the case has been restored to the list on payment of costs.(*h*) A similar rule prevailed at

(*h*) Birch *v.* Williams, 24 W. R., 700, V. C. M. ; see *contra* Flower *v.* Gedye, 23 Beav., 449.

Order 35. Common Law except in ejectments, where if defendant did not appear to confess lease, entry and ouster, plaintiff was non-suited. This was cured by Com. Law Pro. Act, 1856, s. 205.

RULE 20. Non-appearance of plaintiff. Ord. 36, R. 19, E.

20. If, when an action is called on for trial, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action, but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him.

In Chancery practice, the bill was dismissed and this unless otherwise ordered was equivalent to a dismiss on the merits (102 G. O. 31st Oct., 1867). Where issues were to be tried and the party having the affirmative failed to proceed and appear, the issues were taken against him *pro confesso.*(*i*)

At Common Law, the cause was struck out of the list or plaintiff was non-suited, and defendant on an affidavit of the facts might enter a side bar order to stay proceedings till the costs of the day were paid.(*k*)

Now the defendant is entitled to have the action dismissed, and if he has no counterclaim no question should be put to the jury,(*l*) and no verdict should be taken for defendant.(*m*) It seems the judgment of dismissal is final and conclusive on the merits so as to prevent the plaintiff bringing any further action.(*n*)

RULE 21. Judgment by default set aside. Ord. 36, R. 20, E.

21. Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Dublin.

See Michell *v.* Wilson.(*o*)

RULE 22. Adjournment of trial. Ord. 36, R. 24, E.

22. The Judge may, if he think it expedient for the interests of justice, postpone or adjourn the trial, for such time, and upon such terms, if any, as he shall think fit.

See Com. Law Pro. Act, 1856, s. 22, which conferred the power of adjournment which always belonged to the Chancery Judges.

The exercise is now more essential as the plaintiff has no longer the power to withdraw the case from trial.

(*i*) Underwood *v.* Darracott, Ir. Rep. 8 Eq. 345.
(*k*) See Calvert *v.* Power, Ir. Rep. 9 Com. Law 97, Ex.
(*l*) Sullivan *v.* National Shipping Company, 20 Sol. Jour. 642. Huddlestone, J.
(*m*) Lane *v.* Eve, W. N., 1876, 86; 20 Sol. Jour. 320.
(*n*) *Ib.*
(*o*) Michell *v.* Wilson, 25 W. R., 380.

Where from defect of parties a trial is adjourned and witnesses in attendance, it was allowed on terms of Plaintiff paying full costs and not the costs of the day in a Chancery action.(*o*) Order 35.

23. Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge. Rule 23. Judge may direct judgment to be entered. Ord. 36. R. 22(A).

The Judge has no power to order judgment to be entered save at the trial or immediately after it and before he leaves the Assize Court. The motion should be made at the trial or to a Divisional Court.(*p*)

24. Upon every trial at the assizes, or at the Dublin sittings of the Queen's Bench, Common Pleas, or Exchequer Division, the Registrar shall enter all such findings of fact as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge, in a book to be kept for the purpose. Rule 24. Findings to be entered by registrar. Ord. 36, R. 23, E.

This entry will be equivalent to a Postea and applications to amend or correct errors will doubtless be made to the Judge who presided at the trial.

25. If the Judge shall direct that any judgment be entered for any party absolutely, the certificate of the Registrar to that effect shall be a sufficient authority to the proper officer to enter judgment accordingly. The certificate may be in the Form No. 15 in Appendix (B.) hereto. Rule 25. Judgment immediate on certificate. Ord. 36, R. 24.

If the judge makes an order for judgment without more the party may have execution forthwith.

26. If the Judge shall direct that any judgment be entered for any party subject to leave to move, judgment shall be entered accordingly upon the production of the Registrar's certificate. Rule 26. Liberty to move. Ord. 36, R. 25, E.

27. In cases ordered to be tried before a Judge the Court or a Judge may, if it shall appear either before or at the trial that any issue of fact can be more conveniently tried before a jury, direct that such issue shall be tried by a Judge with a jury. Rule 27. Judge may order trial before a jury. Ord. 36, R. 27, E.

(*o*) Lydale *v.* Martinson, 21 Sol. Jour 631.
(*p*) Tyne Alkali Company *v.* Lawson, W. N., 1877, 18, Ex. D.

Order 35.

This was always competent to a judge in Chancery.(*p*) In England under Rules which do not exist in Ireland it was doubted whether the Chancery judge was not under necessity to remit the case for trial to another judge at the assizes, or at sittings in London.(*q*)

RULE 28. Trial with assessors. Ord. 36, R. 28, E.

28. Trials with assessors shall take place in such manner and upon such terms as the Court or a Judge shall direct.

The Chan. (Ire.) Act, 1857, s. 162, enabled the court to obtain the assistance of accountants, merchants, engineers, actuaries and other scientific persons in such way as the court might deem fit, and to act on their certificate. The present Rule seems to contemplate something more and to introduce an assistant to the judge in the shape of an assessor, with this view the J. A., 1877, s. 59, authorizes the court to call in one or more assessors specially qualified, and to try and hear the cause or matter wholly or partially with him and to fix his remuneration.(*r*) In scientific matters it is too often found almost impossible to find a qualified person who has not formed an opinion *a priori*.(*s*)

RULE 29. Trial before commissioners. Ord. 36, R. 29, E.

29. In any cause the Court or a Judge of the division to which the cause is assigned may, at any time or from time to time, order the trial and determination of any question or issue of fact, or partly of fact and partly of law, by any commissioner or commissioners appointed in pursuance of the 32nd section of the Act, or at the sittings to be held in Dublin, and such question or issue shall be tried and determined accordingly.

Under the analogous provision in England, the judges of the Chancery Division have ordered trials at the assizes. After much dispute the English Rules provide that in such a case any order directing the trial at an assize, &c., shall state on the face of it, the reason for which it is expedient that the action, question, or issue should be so tried, and should not be tried in the Chancery Division.(*t*) Where a Chancery action is tried at the assizes before a judge of another division, application for a new trial should probably be made to a Divisional Court and not to the Chancery Judge.(*tt*)

(*p*) See Clarke *v.* Cockburn, W. N., 1876, 130, 20 Sol. Jour. 431, V. C. H.

(*q*) S. C.

(*r*) See Baltic Co. Limited *v.* Simpson, 24 W. R. 390, 20 Sol. Jour. 331, M. R.

(*s*) See Patterson *v.* Gas-light and Coke Co., 20 Sol. Jour. 430.

(*t*) See Wood *v.* Hamblet, L. R. 6, Chan. D. 113, M. R.; Warner *v.* Murdock, L. R., 4 Chan. D., 750; M. R. 25 W. R. 207, A. C.; Clarke *v.* Cookson, L. R. 2, Chan. D. 746.

(*tt*) Hunt *v.* City of London Real Property Co., L. R. 3, Q. B. D. 19, A. C.

Order XXXVI.

Order 36.

Evidence generally.

Rule 1, Evidence on trial by jury *viva voce.*

1. In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any action before a Judge and jury, or at any assessment of damages, shall be examined *viva voce* and in open court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a chief clerk, master, commissioner, or examiner.

Affidavit as to particular fact. Ord. 37, R. 1, E.

See as to evidence generally, Chapter LIV., p. 396, ante.

In England it seems not competent to order all the facts to be proved by affidavit, or that the affidavits of all witnesses in the cause be read at the trial.(*u*) The experience of the Judges of the Chancery Division in England has not been favourable to the resort to viva voce examination of witnesses in ordinary Chancery actions,(*v*) and it will not be allowable in Ireland, unless by consent.

A consent that the evidence be taken by affidavit at the trial or hearing must be a formal consent in writing, and not one to be gathered from a correspondence.(*w*) It may be entered into on behalf of an infant by his guardian.(*x*)

Rule 2. Trials with assessors.

2. In trials before a Judge or Judges, or before a Judge sitting with assessors, evidence shall be taken in such manner as the Court or a Judge shall direct.

Rule 3. Affidavit evidence, not when cross-examination is desired. Ord. 37, R. 1, E.

3. Where it appears to the Court or Judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Rule 4. Evidence on motion. Ord. 37, R. 2, E.

4. Upon any motion, petition, or summons, evidence may be given by affidavit; but the Court or a Judge

(*u*) See Attorney-General *v.* Pagham Harbour Co., W. N., 1876, 94; 20 Sol. Jour., 331, V. C. H. This was a Chancery action.

(*v*) See Patterson *v.* Wooler, W. N., 1876, 110, V. C. B.

(*w*) New Westminster Brewery Co. *v.* Hannah, L. R., 1 Chan. D. 278; 20 Sol. Jour. 132, V. C. H.

(*x*) Knatchbull *v.* Fowle, L. R., 1 Chan. D., 604; 24 W. R., 629, M. R.; Fryer *v.* Wiseman, 24 W. R., 205; W. N., 1876, 3; 20 Sol. Jour. 211, V. C. H.

Order 36

may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

Evidence subsequent to the hearing ex gr. on further consideration may be taken, it is presumed by affidavit or deposition. See Chan. (Ire.) Act, 1867, s. 107, and 163 G. O., 31 Oct., 1867, Chancery.

As to cross-examination, the Chan. (Ire.) Act, 1867, s. 93, gave a right to cross-examine, either before the Court, or in certain cases before the Examiner, a deponent making an affidavit for a motion, now it should seem to require an order, which is not a matter of course.(*y*) Where the deponent is a party to the cause, whom there are other means of reaching, the proper course in England is to serve notice on him to attend the inquiry at the proper time.(*z*)

An affidavit will not be used even in interlocutory applications as to the fact of a conversation where deponent has been required to be produced.(*a*)

Rule 5. Affidavits confined to facts known, not hearsay or belief. Ord. 37, R. 3, E.

5. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same.

Affidavits echoing the statement of claim, and as to matters of which deponent had no personal knowledge, were not allowed to be read at the hearing, nor probably the costs of them in taxation.(*aa*)

See 147 G. O., 1854, Common Law, as to prolixity and scandal.

Rule 6. Order for examination or deposition Ord. 37, R. 4, E.

6. The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the court, or any other person or persons, and at any place, of any witness or person, and may order any deposition so taken to be filed in the court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

(*y*) See Skete *v.* Bishop Stortford Local Board, 20 Sol. Jour., 663, M. R. It is usually before the Examiner. See Civil Service Co-operative Society, 21 Sol. Jour., 129, V. C. H.

(*z*) See Storer *v.* Simmonds, W. N., 1876, 40; 20 Sol. Jour., 260, Lindley, J.; and see Bates *v.* Eley, 24 W. R., 424, V. C. B.

(*a*) Blackburn Union *v.* Brooks, L. R., 7 Chan., D. 68, Fry, J.

(*aa*) Anon. W. N., 1876, 59 M. R.

Order 36.

The Chan. (Ire.) Act, 1867, s. 91, gave either side the right to issue a subpœna to require the attendance of any witness before an examiner in order to use his deposition on a motion or petition or other proceeding. The Com. Law Pro. Act, 1856, s. 53, required a motion and order, and this latter practice it seems is to prevail in the High Court.

In suits to perpetuate testimony it may be useful, and see Chan. (Ire.) Act, 1867, s. 98.

Latterly it has been allowed in England to examine witnesses in Chambers on summons.(*b*)

As to examining witnesses in Ireland unable to attend, see Chan. (Ire.) Act, 1867, s. 103, and at Common Law, 3 & 4 Vic., c. 105, s. 69.

As to examining witnesses in England, see 55 Geo. III., c. 157, enabling Courts to appoint commissioners for examination of witnesses; (*c*) see 3 & 4 Vic., c. 105, s. 66, as to examining witnesses in India and the Colonies, &c.

The Court of Chancery exercised power to issue commissions to places not within the Queen's dominions.

On an allegation that a witness was ill and not able to attend the trial, a special examiner was appointed to take his depositions, but same not to be used at the trial, unless it was proved the witness was unable to attend or out of the country.(*cc*)

Order XXXVII.

Evidence by Affidavit.

Order 37.

Rule 1. Plaintiff's affidavits, when filed. Ord. 38, R. 1, E.

1. Within fourteen days after an order directing evidence by affidavit, or within such time as the parties may agree upon, or a Judge in chambers may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof.

Whether this rule points to affidavits to be filed specially for the purpose of the hearing, or to include those already filed for interlocutory motions, which in England cannot be used without special leave *semble*; (*d*) see 162 G. O. 31 Oct. 1867, Chancery, as to affidavits filed before issue joined, requiring special notice of using.

Rule 2. Defendants. Ord. 38, R. 2, E.

2. The defendant within fourteen days after delivery of such list, or within such time as the parties may agree upon, or a Judge in chambers may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof.

(*b*) *In re* Springall *v.* Goldsack's Contract, W. N. 1875, 225; Anon. 20 Sol. Jour. 92 M. R.

(*c*) See Walker *v.* Bennett, Ir. Rep., 5 Com. Law, 366 Ex., where a plaintiff was so examined.

(*cc*) Bell *v.* Hazlerigg, 21 Sol. Jour. 610, Fry, J.

(*d*) Anon. 20 Sol. Jour. 251, *per* Sir Geo. Jessel, M. R.; see Waring *v.* Lacey, 20 Sol. Jour. 311 M. R.

Order 37.
RULE 3.
In reply.
Ord. 38, R. 3, E.

3. Within seven days after the expiration of the said fourteen days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof.

See 95 G. O., 31 Oct. 1867, Chancery.

After the reply no further evidence can be used without leave of the Court.

It has been held that affidavits in reply may bring forward additional evidence in support of the original case, and are not restricted to points raised by defendant's evidence.(*dd*)

RULE 4.
Notice to cross-examine deponent.
Ord. 38, R. 4, E.

4. When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination before the Court at the trial, such notice to be served at any time before the expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the Court or a Judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production.

Non-production of deponent.

Expenses.

As to notice to produce deponent for cross-examination, see 158 G. O., 31 Oct., 1867. Chan. (Ire.) Act, 1867, s. 93.

As to payment of expenses of witnesses in the first instance, a different (and apparently more just rule) prevailed under Chan. (Ire.) Act, 1867, s. 93. Where a witness is called on to attend unnecessarily, the party requiring it will be liable to bear the expense, though he may be successful in the suit.(*e*)

The party on whose behalf the affidavit is filed is supposed to have the dominion over the witness, and therefore bound to produce him(*f*) and with this view he is enabled by rule 5 to sue out a *subpœna ad test*, to enforce his attendance.

An application to take off the file an affidavit of a deponent not produced is not in accordance with the practice, and all that the party requiring his production can ask, is that the affidavit be not read.(*ff*)

(*dd*) Peacock *v.* Harper, 26 W. R. 109 V. C. H.
(*e*) Guilfoyle *v.* Hutchinson, Ir. Rep. 8 Eq. 298, V. C.
(*f*) Richards *v.* Goddard, L. R., 17 Eq. 240.
(*ff*) Meyrick *v.* James, W. N. 1877, 120 M. R.

Order 37.

5. The party to whom such notice as is mentioned in the last preceding Rule is given, shall be entitled to compel the attendance of the deponent for cross-examination in the same way as he might compel the attendance of a witness to be examined. RULE 5. Subpœna ad test. Ord. 38, R. 5, E.

6. When evidence in any action is under this order taken by affidavit, such evidence shall be printed, and the notice of trial shall be given at the same time or times after the close of the evidence as in other cases is by these Rules provided after the close of the pleadings. RULE 6. Printing affidavits. Ord. 38, R. 6, E.

The evidence must be closed before notice of trial is given, and therefore affidavits filed afterwards cannot be used without leave.(*g*)

7. It shall not be necessary to prefix interrogatories to any affidavit to be made in any action, suit, or matter. RULE 7. Prefix of interrogatories.

This repeals so much of the Chan. (Ire.) Act, 1867, s. 104, as required affidavits to be used at the hearing to be by way of answer to interrogatories prefixed.

ORDER XXXVIII.

New Trials.

SCHEDULE RULE 32. Order 38.

"A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only; and a new trial may be ordered on any question in an action, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question." Ord. 39, Rs. 3 & 4, E.

As to setting aside a verdict as being against the weight of evidence, see Dutch *v.* Power,(*h*) and see Com. Law Pro. Act (Ire.), 1856, s. 50.

As to misdirection, the Court had formerly no discretion to refuse to set aside the verdict, although clearly of opinion that it could not in any way have influenced the verdict and no substantial wrong had resulted.(*i*) Misdirection.

(*g*) See Waring *v.* Lacey, 20 Sol. Jour. 311, M. R.

(*h*) Dutch *v.* Power, Ir. Rep. 1 Com. Law, 193, Q. B.; Wallis *v.* Great Southern & Western Ry. Co., Ir. Rep. 4 Com. Law, 81.

(*i*) Parker *v.* Cathcart, 17 Ir. Com. Law Rep., 778, C. P.; see Earp *v.* Faulkner, W. N., 1876, 181, A. C.

Order 38.

As to non-direction when it amounted to misdirection, see note.(*k*)

As to directing a new trial as to part where there were two defendants in an action of tort and a verdict against one, and in favour of the other, the unsuccessful defendant moved to set aside the verdict, it was held that notice should be given to the other defendant, and that thereupon there was power to make the order as well against the co-defendant as the plaintiff.(*l*)

Illegal evidence.

As to setting aside a verdict on the ground of admission of illegal evidence, when insisted upon after objection, and received where the Court thought that weight might have been given to it by the jury.(*l l*)

Exception.

Where exceptions have been taken the party may enforce his right, either by motion to the High Court (*i. e.*, to a Divisional Court), or by motion to the Court of Appeal grounded upon the exception entered on or annexed to the record, see J. A., 1877, s. 48, § 3, and *ante*, p. 396.(*m*)

RULES OF COURT.

RULE 1. Motion on certificate of counsel. Ord. 39, R. 1(*a*), E.

1. Applications for new trials shall be by motion, grounded on the certificate of counsel in manner now in use in Courts of Common Law, for an order calling on the opposite party to show cause at the expiration of eight days from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within the times following, unless the Court or a Judge shall enlarge the time :—

Within four days.

An application to a Divisional Court for a new trial, if the trial has taken place in Dublin, shall be made within four days after the trial, or on the first subsequent day on which a Divisional Court to which the application may be made shall actually sit to hear motions. If the trial has taken place elsewhere than in Dublin, the motion shall be made within the first four days of the next following sittings."

If the party has also to move for liberty to enter judgment within a given time, the two motions may come on for argument together.(*n*) So where the party has the option of moving for a new trial or to have the verdict entered for him.(*o*)

(*k*) Williamson *v.* M'Combe, Ir. Rep. 5 Com. Law, 296.

(*l*) Purnell *v.* Great Western Ry. Co., L. R., 1 Q. B. D. 636; 24 W. R., 909, A. C.

(*ll*) Hodson *v.* Midland Great Western Ry. Co., Ir. Rep. 11 Com. Law, 109, Ex.

(*m*) See Linsday *v.* Condy, W. N., 1875, 216.

(*n*) Scarth *v.* General Steam Navigation Co., 20 Sol. Jour., 47, Q. B.

(*o*) Allgood *v.* Gibson, 20 Sol. Jour., 802.

Order 38.

The four days were held to be running days, provided the last be one on which a Divisional Court is sitting, and further it is stated that the Divisional Court has no power to extend the time when it has actually expired,(*p*) but see Ord. lvii., R. 6, *infra*. The Court of Appeal certainly can enlarge or extend the time for moving.(*q*)

As to costs of abortive trials, they are now absolutely in the discretion of the Court, but in Ireland hitherto they have almost invariably followed the ultimate result. (*r*) In England this rule has been sometimes regarded as of doubtful propriety.(*s*)

As to application for new trial of actions remitted to a county court.(*t*)

Rule 2. Service of copy of order. Ord. 39, R. 2, E.

2. A copy of such order shall be served on the opposite party within four days from the time of the same being made.

Rule 3. Stay of proceedings. Ord. 39, R. 3, E.

3. An order to show cause shall be a stay of proceedings in the action, unless the Court shall order that it shall not be so as to the whole or any part of the action.

Order XXXIX.

Order 39.

Motion for Judgment.

Rule 1. Obtained by motion. Ord. 40, R. 1, E.

1. Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

This does not apply to a case where verdict was taken before the J. Act for plaintiff subject to an award of a referee, and no directions given as to signing judgment, and plaintiff may sign judgment under the old system without moving for it.(*u*)

(*p*) Purnell *v.* Great Western Ry., 24 W. R., 909, A. C.; and see Robinson *v.* Bannister, W. N., 1876, 250, A. C.

(*q*) *Ib.*

(*r*) See 2 Ferg. Prac., 999. Byrne *v.* Elliott, 6 Ir. Com. Law Rep., 381; and see Pilson *v.* Johnson, 6 Ir. Com. Law Rep., 505, C. P.

(*s*) Bostock *v.* North Staffordshire Ry. Co., 18 Q. B., 777, *per* Erle, J.; but see Creen *v.* Wright, L. R. 2, C. P. D. 354, A. C.

(*t*) See White *v.* Mainwaring, 25 W. R. 253 Q. B. D. London *v.* Roffey, L. R. 3 Q. B. D. 6.

(*u*) Lloyd *v.* Lewis, W. N. 1876, 269; 25 W. R. 102, A. C. See Scutt *v.* Freeman, L. R. 2, Q. B. D. 177, as to case remitted to a county court.

Order 39.

Generally speaking, and under the rules of this order, judgment can be had only on a specific order in that behalf made by the Court or a Judge. See chap. lv., p. 399, *ante*.

Application may be made to the Judge at the trial (when there is a jury), and he may direct it to be entered absolutely and forthwith, as a Chancery Judge might have done at the close of the hearing, and on the certificate of his Registrar it will be entered forthwith. See Ord. xxxv., R. 25.

If the Judge be mistaken, or supposed to be so, application may be made to the Court to direct a different judgment to be entered.

Where defendant has not appeared, notice of the motion for judgment may be served by delivery to the officer under Ord. xviii., R. 21.

Chancery motions for judgment are not (in England) allowed to be brought on as ordinary motions, but must be set down in the Cause Book,(*r*) and when the cause is not marked short, it will come on into the General Paper in its regular turn.

All motions to set aside a judgment entered by direction of a Judge on the finding of a jury, as erroneously entered, must be made to a Divisional Court.

Where defendant does not enter an appearance, the notice of motion may be delivered by lodging it with the officer under Ord. xviii., R. 21.(*rr*)

RULE 2.
Leave to move setting down for judgment.

2. Where at the trial of an action the Judge has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the Judge in reserving leave, or if no time has been limited, within ten days after the trial. The notice of motion shall state the grounds of the motion, and the relief sought, and that the motion is pursuant to leave reserved.

Grounds of motion.
Ord. 40, R. 2, E.

Where the party wishes both to move pursuant to leave, and also to apply for a new trial, the former motion has been put to bottom of the new trial paper to come on together with the motion for new trial.(*s*)

RULE 3.
When no direction plaintiff to set down in ten days.
Ord. 40, R. 3, E.

3. Where at the trial of an action the Judge abstains from directing any judgment to be entered, the plaintiff may set down the action on motion for judgment. If he does not so set it down and give notice thereof to the other parties within ten days after the trial, any defend

(*q*) Dymock *v.* Croft, L. R. 3 Chan. D. 512; 24 W. R. 700, M. R.
(*r*) See Notice from Chancery Registrar's Office, December, 1876.
(*rr*) Williams *v.* Cardwell, 25 W. R. 646; W. N., 1877, 140, V. C. M.
(*s*) Lindsay *v.* Cundy, W. N., 1875, 216.

ant may set down the action on motion for judgment, and give notice thereof to the other parties. Order 39.

This motion should be for a rule absolute and not to show cause as heretofore.

4. Where, at or after the trial of an action by a jury, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them. Rule 4. Judgment entered pursuant to order. Motion to set aside. Ord. 40, R. 4, E.

Where, at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the finding as entered, the judgment so directed is wrong.

Formerly unless leave was reserved by the judge at the trial, the party aggrieved could not move to enter a different verdict or judgment; all he could do was to move for a trial *de novo*.

5. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down the action on motion for judgment, and give notice thereof to the other parties. Rule 5. Motion for judgment on issues. Ord. 40, R. 7, E.

6. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or a Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions Rule 6. After partial trial. Ord. 40, R. 8, E.

Order 39.

which may appear desirable as to postponing the trial of the other questions of fact.

See on the subject of this Rule note.(*s*)

Formerly there could be no more than one judgment in the action, there could not be separate judgments on issues of fact, or more than one taxation of costs, but this is no longer so.(*t*)

RULE 7. No motion after a year. Ord. 40, R. 9, E.

7. No action shall, except by leave of the Court or a Judge, be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled so to do.

RULE 8. Further consideration, trial or account. Ord. 40, R. 10. E

8. Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit.

See Chan. (Ire.) Act, 1867, s. 69.(*u*)

RULE 9. Application for relief on admission of fact in the pleadings. Ord. 40, R. 11, E.

9. Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing Rules of this Order shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

In moving for interlocutory relief on admissions in pleading the cause need not be set down. It may be for want of an appearance or defence, as to some defendants and on admissions as to others(*v*) or by a defendant where plaintiff in his reply to his counterclaim joined issues generally without denying the facts alleged in detail.(*w*) But mere default in delivering a

(*s*) Republic of Bolivia *v.* National Bolivia Navigation Co., W. N. 1876–77, 24 W. R. 361, 20 Sol. Jour. 311.

(*t*) Grant *v.* Banque, Franco-Egyptienne, W.N., 1876, 74, Archibald, J.

(*u*) See Bennett *v.* Moore, W. R., 690, V. C. H.

(*v*) See Bridson *v.* Smith, 24 W. R., 392, W. N., 1876, 103; 20 Sol. Jour. 351, V. C. H.

(*w*) Parsons *v.* Harris, L. R., 6 Chan. D. 694; 25 W. R., 410, V. C. H.

Order 39.

defence is not an admission of facts in a Chancery action proper, but the cause must be set down on motion for judgment under Ord. xxviii., R. 10, *supra*.(*x*) Where a defence purported to be that of husband and wife, but in fact stated nothing as regards the husband judgment was given against him under this rule,(*y*) and see as to an order of inquiry as to parties entitled in a partition action on the admission of one defendant of the allegations of the claim as to title.(*z*) Where defendant pleaded a counterclaim and plaintiff joined issue upon it generally instead of dealing specifically with its allegations, the defendant was held entitled to no more than to set off the amount against the plaintiff 's claim and recover the balance.(*a*) Court will not treat a defence which may be bad on demurrer as amounting to an admission under this rule.(*b*)

Order XL.

Entry of Judgment.

Order 40.

RULE 1. Entry. Ord. 41, R. 1, E.

1. Every judgment shall be entered by the proper officer in the book to be kept for the purpose. The forms in Appendix (D) hereto may be used, with such variations as circumstances may require.

RULE 2. Date, when pronounced in Court. Ord. 41, R. 2, E.

2. Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, and the judgment shall take effect from that date.

RULE 3. Production of documents. Ord. 41, R. 3.

3. In all cases not within the last preceding Rule, the entry of judgment shall be dated as of the day on which the requisite documents are left with the proper officer for the purpose of such entry, and the judgment shall take effect from that date.

RULE 4. Examination of documents. Ord. 41, R. 4, E.

4. Where under the Act or these Rules, or otherwise, it is provided that any judgment may be entered or signed upon the filing of any affidavit or production of any document, the officer shall examine the affidavit or document produced, and if the same be regular and contain all that is by law required he shall enter judgment accordingly.

(*x*) Gillott *v.* Kerr, 24 W. R., 428, W. N., 1876, 116, and see Hall *v.* Snellings, 20 Sol. Jour. 312 M. R., Hillman *v.* Mayhew, 24 W. R., 485.

(*y*) Jenkins *v.* Davies, L. R., 1 Chan. D. 696; 24 W. R., 690.

(*z*) Gilbert *v.* Smith, 24 W. R., 568; 20 Sol. Jour. 500, A. C.

(*a*) Rolfe *v.* M'Claren, L. R., 3 Chan. D. 106, 24 W. R., 816; 20 Sol. Jour. 451, V. C. H.

(*b*) Mellor *v.* Sidebottom, 21 Sol. Jour. 297, V. C. H.

Order 40.

Rule 5. When under an order or certificate. Ord. 41, R. 5, E.

5. Where by the Act or these Rules, or otherwise, any judgment may be entered pursuant to any order or certificate, or return to any writ, the production of such order or certificate sealed with the seal of the Court, or of such return, shall be a sufficient authority to the officer to enter judgment accordingly.

Rule 6. Of non-suit, effect of. Ord. 41, R. 6.

6. Any judgment of non-suit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident, any judgment of non-suit may be set aside on such terms, as to payment of costs and otherwise, as to the Court or a Judge shall seem just.

Hitherto the effect of a judgment of *Nonpros* was that plaintiff might have commenced a fresh action for the same matter.

Under this rule its effect will be final and conclusive as an ordinary judgment on the merits, unless the Judge otherwise shall direct as was done in a case before Mr. Justice Brett.(*a*) When an action is dismissed for want of prosecution it is at an end and cannot be revived or restored.(*b*)

Order XLI.

Order 41.

Execution.

Rule 1. Judgment for payment of money to any person. Ord. 42, R. 1, E.

1. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any Court whose jurisdiction is transferred by the said Act might have been enforced at the time of the passing thereof.

A suitor obtaining judgment in any action in the High Court is entitled to enforce it by every writ of execution which was in use heretofore in any Court of Common Law or Equity for a similar purpose whether a fieri facias, elegit, sequestration or attachment.

A demand was rendered unnecessary in Chancery by 127 G. O., 31st Oct. 1867.

Rule 2. Payment into Court. Ord. 42, R. 2, E.

2. A judgment for the payment of money into Court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law, by attachment.

Rule 3. For possession of land. Ord. 42, R. 3, E.

3. A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession.

(*a*) See Mattock *v.* Neath, 20 Sol. Jour. 232.
(*b*) See Whistler *v.* Hancock, 22 Sol. Jour. 264, Q. B. D.

Order 41.

RULE 4. Recovery of other property.

4. A judgment for the recovery of any property other than land or money may be enforced :

By writ for delivery of the property :
By writ of attachment :
By writ of sequestration.

Ord. 42, R. 4, E.

A plaintiff is entitled to have judgment entered for recovery of specific chattels, and execution by writ of delivery, where damages would be inappropriate.(*c*)

RULE 5. Requiring person to do act. Ord. 42, R. 5, E.

5. A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal.

RULE 6. Several writs of execution.

6. In these Rules the term "writ of execution" shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding Rules of this Order shall be applicable to the case.

The writ of elegit seems to have been abolished as regards all judgments entered after 15th July, 1850, by the statute 13 & 14 Vic., c. 29 (usually called the Judgment Mortgage Act), but then existing judgments, *i.e.*, judgments entered on or before 15th July, 1850, were not affected by this enactment; and so far such judgments if duly revived may still (as it seems) be enforced by elegit, but otherwise the writ appears to be obsolete.

It is to be observed that while the Schedule E contains a form of præcipe for a writ of elegit (No. 2) Appendix F contains no corresponding writ, and the form was struck out at the latest revision of the appendix, but the præcipe for it remains This must have occurred through an inadvertence.

The old writ of *capias ad satisficiendum* although included in the enumeration above is now obsolete, and its purpose is partially fulfilled by orders of committal under "The Debtors' Act." All mention of the writ of capias is omitted in Schedules D. & E. containing præcipes for writs and writs of execution.

RULE 7. Relief, subject to conditions. Order for execution. Ord. 42, R. 7, E.

7. Where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is

(*c*) Ivory *v.* Cruickshank, W. N., 1876, 249, 20 Sol. Jour. 146, Quain, J.

Order 41.

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, 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.

Semble whether this applies to a judgment entered on a bond in a penalty in case of non-performance of a covenant or agreement at a future time, and if so, whether execution can be awarded by order of a judge without assignment of breaches or assessment of damages, under 9 Wm. III., c. 10, ss. 8 & 9.(*d*)

Probably a judgment against an executor out of assets of his testator, *quando acciderint* may come within the purport of this rule, and so possibly to have execution on a recognizance on condition.

Rule 8. On judgment against partners.

8. Where a judgment is against partners in the name of the firm, execution may issue in manner following:—

(*a*.) Against any property of the partners as such:

(*b*.) Against any person who has admitted on the pleadings that he is, or 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 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 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.

Rule 9. Issue on production of judgment.

9. No writ of execution shall be issued without the production to the officer by whom the same should be issued of the judgment upon which the writ of execution is to issue, or an office copy thereof, showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

(*d*) See Hall *v.* Blackwell, 10 Ir. Com. Law Rep., App. 38, Q. B. Buchanan *v.* Jack, Ir. Rep., 5 Com. Law 41 Ex. Quin *v.* O'Keeffe, 10 Ir. Com. Law. Rep. 393, Q. B.

Order 41.
RULE 10.
Præcipe for.
Ord. 42, R. 10, E.

10. No writ of execution shall be issued without the party issuing it, or his solicitor, filing a præcipe for that purpose. The præcipe shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or of the firms against whose goods, the execution is to be issued; and shall be signed by or on behalf of the solicitor of the party issuing it, or by the party issuing it, if he do so in person. The forms in Appendix (E) hereto may be used, with such variations as circumstances may require.

RULE 11.
Indorsement of name and abode of solicitor, &c.
Ord. 42, R. 11, E.

11. Every writ of execution shall be indorsed with the name and place of abode or office of business of the solicitor actually suing out the same; and in case no solicitor shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the village, street, and number of the house of such plaintiff's or defendant's residence, if any such there be.

This rule was for the protection of the sheriff.(*d*)

RULE 12.
Teste and forms.
Ord. 42, R. 12, E.

12. Every writ of execution shall bear date of the day on which it is issued. The forms in Appendix (F) hereto may be used, with such variations as circumstances may require.

RULE 13.
Poundage, fees, and expenses.
Ord. 42, R. 13, E.

13. In every case of execution the party entitled to execution may levy the poundage, fees, and expenses of execution, over and above the sum recovered.

The expenses of execution include costs of the writ, and of levying where there is a seizure of goods.(*e*)

The sheriff is entitled to deduct poundage only where there is a levy, and where debt and costs are paid or tendered on demand, or on presenting the warrant, so that a seizure and sale become unnecessary, there is no right to poundage.(*f*)

After a levy sheriff is entitled to deduct the poundage out of the sum levied, even if there be no surplus.(*g*) Where a term of years was sold for £500 to pay a debt marked at £30, the

(*d*) See Martin *v.* Gregg, 5 Ir. Law Rep. 559; Long *v.* Littledale, 13 Ir. Law Rep. 68 Ex.

(*e*) See as to this, Rooney *v.* Farrell, Ir. Rep. 5 Com. Law 377, Q. B.; Yates *v.* Meehan, 11 Ir. Com. Law Rep. App. 1, Q. B.

(*f*) Nash *v.* Dickenson, L. R, 2 C. P., 252; see Yates *v.* Meehan, *ubi supra.*

(*g*) Yates *v.* Meehan, *ubi supra.*

Order 41.

sheriff could only have poundage on the latter sum.(*h*) If he has had to pay a landlord's rent out of the levy he is entitled to poundage thereon.(*i*)

RULE 14. Indorsement of amount really due and interest. Ord. 42, R. 14, E.

14. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of £4 per cent. per annum from the time when the judgment was entered up, provided that in cases where there is an agreement between the parties that more than £4 per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.

See Com. Law Re. (Ire.) Act, 1853, s. 127, following the 6 Anne, c. 7, ss. 1 & 2, which subjected any person who wilfully, fraudulently, or maliciously overcharges the debtor, to forfeit to the party grieved treble damage; see Ferg. C. L. Pro. 166.

Semble is this enactment repealed, or does this endorsement or the memorandum contained in the Præcipe Appendix E. fulfil the requirement.

RULE 15. Fieri facias and elegit. Ord. 42, R. 15, E.

15. Every person to whom any sum of money or any costs shall be payable under a judgment, shall immediately after the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of fieri facias, or in cases where a writ of elegit may now by law be issued, a writ or writs of elegit, to enforce payment thereof, subject nevertheless as follows:—

(*a.*) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(*b.*) The Court or Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods at which such execution might otherwise issue.

As to Elegit, see note on Rule 6, *ante*.

The fourteen days interval which should elapse between verdict had out of term, and judgment and execution thereon is now abolished. If the unsuccessful party wishes to prevent immediate execution he must apply for a stay.

(*h*) Byrne *v.* Hutchinson, Ir. Rep. 9 Com. Law, 75 Q. B.
(*i*) *Ib.*

Order 41.

RULE 16.

16. A writ of execution if unexecuted shall remain in force for one year only from its issue unless renewed in the manner hereinafter provided, but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed, by the party issuing it, for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority, according to the time of the original delivery thereof.

Writ in force for a year.

Renewal of.

Ord. 42, R. 16, E.

See Com. Law Pro. Act, 1853, ss. 141 & 143. Ferg. 181.

This rule requires the leave of the Court or Judge for the renewal.

As to rules on the sheriff to return writs, see 120, and 121, G. O. 1854, Common Law.

RULE 17.

17. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding Rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

How renewed.

Ord. 42, R. 17, E.

RULE 18.

18. As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.

Execution within six years.

Ord. 42, R. 18, E.

See Com. Law Pro. (Ire.) Act, 1853, s. 148, which contains the words "by or against the survivors of them," and *semble* can, execution issue against the survivor of two or more parties named in a judgment without the order of the Court.

RULE 19.

19. Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, 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 seem just.

Change of parties.

Application for leave to issue.

Issue.

Ord. 42, R. 19, E.

See Com. Law Pro. (Ire.) Act, 1853, s. 149.

Order 41.

The application for leave to issue execution on change of parties, and to ascertain the right to execution by an issue is analogous to the writ of *scire facias*, or revivor on suggestion, used in former times, and it may be that an order to issue execution will become equivalent to a judgment of revivor, as affording a fresh terminus *a quo*, as regards the Statute of Limitations.

RULE 20 Orders enforced as judgments. Ord. 42, R. 20, E.

20. Every order of the Court or a Judge, whether in an action, cause, or matter, may be enforced in the same manner as a judgment to the same effect.

An order for payment of money may be enforced by execution in cases in which an order of committal would be inapplicable, or by making it a set-off or counterclaim.(*k*)

RULE 21. Enforcing orders for third persons. Ord. 42, R. 21, E.

21. In cases other than those mentioned in Rule 18, any person not being a party in an action, who obtains any order or in whose favour any order is made, shall be 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 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.

See 128 G. O., 31 Oct., 1867, Chancery.

See Com. Law Pro. (Ire.) Act, 1853, s. 143, as to having execution against shareholders in a company, on a judgment against the public officer.(*l*)

RULE 22. Audita querela, application in nature of. Ord. 42, R. 22, E.

22. No proceeding by *audita querela* shall hereafter be used; but any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just.

RULE 23. Existing rights of execution. Ord. 42, R. 23, E.

23. Nothing in any of the Rules of this Order shall take away or curtail any right heretofore existing to enforce or give effect to any judgment or order in any manner or against any person or property whatsoever.

RULE 24. Existing order of issue. Ord. 42, R. 24, E.

24. Nothing in this Order shall affect the order in which writs of execution may be issued.

(*k*) See Philpott *v.* Lehain, 20 Sol. Jour., 605, C. P. D.

(*l*) See Bergin *v.* Pepper, 7 Ir. Com. Law Rep., 45 Ex., as to service of the writ of *scire facias*.

Order 41.

Hitherto a party could not have two different kinds of execution concurrently,(*m*) nor could a second kind be issued until the first had been returned.(*n*) It is presumed a party may issue any number of writs of execution of the same kind to different counties, subject to the disallowance of costs if the taxing officer considers them unnecessary. See 104 G. O., 1854, Common Law.

Order XLII.

Writs of Fieri Facias and Elegit.

Order 42.

Rule 1. Fieri facias and elegit, effect of. Ord. 43, R. 1, E.

1. Writs of fieri facias and of elegit shall have the same force and effect as the like writs have heretofore had, and shall be executed in the same manner in which the like writs have heretofore been executed.

See Com. Law Pro. (Ire.) Act, 1853, s. 131, as to what may be seized under a Fi. fa., and see s. 137 as to disposal of proceeds.

As to elegit, see note to Ord. xli., R. 6, *ante*.

As to liability of sheriff to a purchaser on sale of a leasehold interest of defendant in lands, see.(*o*)

Rule 2. Venditioni exponas, &c. Ord. 43, R. 2, E.

2. Writs of venditioni exponas, distringas nuper vice comitem, and all other writs in aid of writs of fieri facias and elegit, may be issued and executed in the same cases and in the same manner as heretofore.

Order XLIII.

Attachment.

Order 43.

Rule 1. Writ of attachment, effect. Ord. 44, R. 1, E.

1. A writ of attachment shall have the same effect as a writ of attachment issued out of the Court of Chancery has heretofore had.

The writ of attachment in Chancery procedure was for the purpose of compelling a person to obey the order of the Court and to answer for his contempt in refusing or neglecting to comply. In this sense it is described in the Ord. xli. R. 6, as a writ of execution.

The Debtors Act does not interfere with the ordinary jurisdiction of the Court to enforce obedience to its orders, except so far as they require payment of a sum of money or costs, and in this respect its use is restricted to certain classes of cases. Where an order is made under it, *ex. gr.* against a trustee or executor, to pay money into Court by a certain day, although his means of subsistence be so very slender that he is unable to pay within the time, yet Court has no jurisdiction to discharge him when arrested on an order of committal.(*p*)

(*m*) See Fennell *v.* Dempsey, 1 Ir. Jur., 64 C. P.

(*n*) See Hayden *v.* Shearman, 4 Ir. Com. Law Rep., 169 Ex.; Sugrue *v.* Hovenden, 7 Ir. Com. Law Rep., 318, C. P.

(*o*) Kearney *v.* Ryan, Ir. Rep. 10 Com. Law, 500 C. P.

(*p*) Ransom *v.* Boyd, W. N. 1877, 236 M. R.

Order 43.

As to attachment of a trustee, see (*q*) and after judgment and execution against him in the ordinary way.(*qq*)

Under the G. O., 16th April, 1873, R. 6, Chancery, where any person, by any decree or order of the Court, made in any suit or matter, was directed to do any act other than or besides the payment of money or costs, and after due service of the decree or order refused or neglected to do such act according to the exigency of the decree or order, the person prosecuting it, at the expiration of the time limited for the performance thereof, was entitled to a writ or writs of attachment against the disobedient person.

If a party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents, he is liable to attachment under Order xxxi., R. 19, *ante*.

Before an attachment can be had for disobedience of a decree, *ex. gr.*, to assign certain premises, a specific time should be fixed by the decree, *ex. gr.* seven days after service of the order and presenting of the assignment.(*r*)

Any contempt of court in general is punishable by attachment, when it consists of disobeying an order or hindering the administration of justice, but the exercise of an arbitrary jurisdiction of this nature, is to be jealously and carefully guarded, and it is stated that courts ought not to resort to it except in extreme cases where no other remedy can be found.(*rr*)

The Form of the writ in Appendix F, No. 5, does not state at what time the writ should be returned. If not returned by the Sheriff within a reasonable time an application may be necessary to require him to do so.(*s*)

See where attachment refused when its execution might be dangerous to the life of the party in default.(*t*)

Rule 2. Not to issue without leave. Ord. 44, R. 2, E.

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.

A writ of attachment no longer issues as of course, or as of right and without an express order to that effect to be made by the court or a judge. Thus upon an order made on a solicitor to pay costs, no attachment can issue without an express order in that behalf made on notice to the party sought

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(*q*) Lewer *v.* Barnett, L. R. 6 Chan. D. 252. See as to agent Hutchinson *v.* Hartmont, W. N. 1877, 29; as a promoter and director of a public company; Phosphate Sewage Company *v.* Hartmont, W. N. 1877, 167 V. C. M., as to solicitor getting money of his client; *In re* A. & B., solicitors, W. N. 1877, 207 M. R.

(*qq*) Drewitt *v.* Edwards, 26 W. R. 60, Ex. D. S. C. 122, A. C.

(*r*) Rendall *v.* Gordner, 21 Sol. Jour. 750, Fry, J.

(*rr*) Republic of Costa Rica *v.* Erlanger, W. N., 1877, 60, 21 Sol. Jour. 360 A. C.; see S. C. W. N., 1877, 4, V. C. M.; and see Clarke *v.* Roche, 21 Sol. Jour. 360, A. C.

(*s*) See Owen *v.* Pritchard, W. N., 1876, 147, V. C. H.

(*t*) Culley *v.* Buttifant, W. N., 1875, 213, V. C. H.

to be attached.(*u*) Notice takes the place of the Rule *nisi*, or conditional order.(*v*) Service of notice of the application on the solicitor of the party has been held sufficient.(*w*) Order 43.

ORDER XLIV.

Attachment of Debts.

Order 44.

RULE 1. Preliminary examination of defendant as to debts owing to him. Ord. 45, R. 1, E.

1. Where a judgment is for the recovery by or payment to any person of money, the party entitled to enforce it may apply to the Court or a Judge for an order that the judgment debtor be orally examined as to whether any and what debts are owing to him, before an officer of the Court, or such other person as the Court or Judge shall appoint; and the Court or Judge may make an order for the examination of such judgment debtor, and for the production of any books or documents.

The Com. Law Pro. (Ire.), 1856, contained no provision enabling plaintiff to examine the defendant orally similar to the above, which in this respect follows the English Com. Law Pro. Act, 1854, s. 60.

RULE 2. Order to attach debt of garnishee. Ord. 45, R. 2, E.

2. The Court or a Judge may, upon the ex parte application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his solicitor stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court or a Judge, as such Court or Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

Judgment, what is.

Former provisions similar to this had been held to apply only to judgments proper of the Superior Courts and not to mere orders, to which the effect of a judgment had been given by

(*u*) *In re* a Solicitor, L. R., 1 Chan. D. 445, 24 W. R., 103 M. R.; see Garling *v.* Royds, L. R., 1 Chan. D. 81, in which the order was perfected before the J. Act came into force.

(*v*) Baigent *v.* Baigent, L. R., 1 Pro. D. 431, 24 W. R. 43; see *In re* Goods of Cartwright, W. N., 1876, 21 Prob.

(*w*) Richards *v.* Kitchen, 25 W. R. 602, V. C. B., W. N., 1877, 128 V. C. B. *sed vide* Anon. W. N., 1876, 105, 20 Sol. Jour. 241, Denman, J.

Order 44. 3 & 4 Vic., c. 105, s. 27.(*g*) It is not altogether clear whether the same distinction is to be made now, since orders may be enforced in the same manner as a judgment to the same effect, Ord. xli., R. 20.

The garnishee.

The garnishee must be resident within the jurisdiction of the Court, and a company whose head office is in London with an agent in Ireland transacting business is not such.(*h*)

A debtor to one of several defendants, joint debtors, may be made garnishee.(*i*)

If defendant be a corporation aggregate, plaintiff does not seem to be warranted in calling for the examination of a director or the secretary as to debts due to the company.(*k*)

Debts.

Nothing can be attached but a debt.

Rent due by a tenant to his landlord was attachable less poor rates and income tax,(*l*) and the proceeds of an execution in the hands of a sheriff for a debt due to the judgment debtor in the principal action.(*m*) As to money in the hands of an assignee in bankruptcy, dividends payable to the judgment debtor see,(*n*) in hands of an official liquidator of a company.(*o*) It may be a debt *in præsenti* but payable *in futuro*,(*p*) and it may be unascertained in its exact amount,(*q*) but a mere notice to treat for defendant's lands by a public company under which nothing has been done is not a debt owing or accruing.(*r*)

A promissory note not yet due is not a debt which can be attached by a garnishee order to answer a judgment debt,(*s*) nor is a sum of money presented by a Grand Jury in favour of the defendant.(*t*)

Equitable debts.

Formerly the debt attachable should be a legal debt, such that the Court might direct the liability to be tried by an action.(*u*) If a judgment creditor could not in Equity obtain

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(*g*) Financial Corporation *v.* Price, L. R. 4, C. P. 155. Best *v.* Pembroke, L. R. 8, Q. B. 363.

(*h*) Martyn *v.* Kelly, Ir. Rep. 5, Com. Law 404, Ex.

(*i*) See Miller *v.* Wynn, 1 El. and E. 1075.

(*k*) See Dickson *v.* Neath Company, L. R. 4, Ex. 87.

(*l*) Hall *v.* Pritchett, 26 W. R., 95 Q. B. D.; see Anon. W. N., 1876, 9.

(*m*) Leake *v.* Noble, 6 Ir. Com. Rep., 510 Q. B.; Mitchell *v* Lee, L. R. 2 Q. B. 259.

(*n*) Murray *v.* Simpson, 8 Ir. Com. Law Rep., App. 45.

(*o*) Dawson *v.* Malley, Ir. Rep. 1, Com. Law 207, Ex.

(*p*) See Boyse *v.* Simpson, 8 Ir. Com. Law Rep. 523, Ex.

(*q*) Sparks *v.* Younge, 8 Ir. Com. Law Rep. 251, Ex.; Anon. W. N., 1876-9, 20 Sol. Jour. 178. Daniel *v.* M'Carthy, 7 Ir. Com. Law Rep. 261, Q. B.; and see Russell *v.* Ferguson, Ir. Rep. 2, Com. Law 78, Ex.

(*r*) Richardson *v.* Elmit, L. R. 2, C. P. D. 9.

(*s*) Pyne *v.* Kinna, Ir. Rep. 11, Com. Law 40, C. P.

(*t*) Cassin *v.* Shortall, Ir. Rep. 11 Com. Law 157, Q. B. See Geraghty *v.* Sharkey, 2 Ir. Jur., N. S. 424.

(*u*) See Boyse *v.* Simpson, 8 Ir. Com. Law Rep. 523, Ex. *per* Pigot, C.B.

a charge on an equitable debt by analogy to the attachment of a legal debt.(*n*)

Now it seems there is no distinction between a legal and an equitable debt in this respect.(*o*)

The liability of the garnishee if disputed is to be tried by an issue. See Rule 7, *infra*.

As to including several debts in one order due by several persons to the judgment debtor.(*p*) Several debts.

RULE 3. Service of order. Ord. 45, R. 3, E.

3. Service of an order that debts due or accruing to the judgment debtor 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.

See Com. Law Pro. (Ire.) Act, 1856, s. 64.

The plaintiff becomes a creditor holding security and is in a position resembling that of an execution creditor who has seized, and his right cannot be defeated by the subsequent bankruptcy of the garnishee.(*q*) When once attached, the garnishee it seems cannot affect it by any set-off or cross demand, although the state of the account between him and the judgment debtor may and ought to be gone into as regards the particular debt.(*r*)

RULE 4. Order for execution in undisputed cases. Ord. 45, R. 4, E.

4. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Court or Judge may order execution to issue, and it may issue accordingly without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment debt.

See Com. Law Pro. Act (Ire.), 1856, s. 65.

RULE 5. When liability disputed, issue to try. Ord. 45, R. 5, E.

5. If the garnishee disputes his liability, the Court or Judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

See Com. Law Pro. Act (Ire.), 1856, s. 66, which speaks of a writ of *scire facias*.

(*n*) Horsley *v.* Cox, L. R. 4, Chan. 92. See Stevens *v.* Phelps, L. R. 10 Chan. 423, *per* Mellish, L. J.

(*o*) See Wilson *v.* Dundas, W. N., 1875, 232; 20 Sol. Jour. 99, Quain, J.

(*p*) Doherty *v.* M'Daid, 16 Ir. Com. Law Rep., App. 22.

(*q*) See Emmanuel *v.* Bridger, L. R., 9 Q. B., 286.

(*r*) Sampson *v.* Seaton Ry. Co., L. R. 10 Q. B., 28.

Order 44.

RULE 6. When lien or charge set up. Ord. 45, R. 6, E.

6. 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 Judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

This corresponds with the English Com. Law Pro. Act, 1860, s. 29, but is new to Ireland.

Where accruing rents were transferred by way of mortgage with the estate to a mortgagee an order of attachment on the rents was set aside.(*s*)

RULE 7. Disposal of lien or charge. Ord. 45, R. 7.

7. After hearing the allegations of such third person under such order, and of any other person whom by the same or any subsequent order the Court or 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.

This corresponds to the English Com. Law Pro. Act, 1860, s. 30, E. It is new in Ireland.

RULE 8. Payment discharges garnishee. Ord. 45, R. 8, E.

8. Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment reversed.

See Com. Law Pro. (Ire.) Act, 1856, s. 67, Ord. 45, R. 8, E.

Payment into Court is equivalent to payment to the judgment creditor, so far as discharging the garnishee, and the subsequent execution of a composition deed by debtor does not displace the judgment creditor's right.(*t*)

RULE 9. Attachment book. Ord. 45, R. 9, E.

9. There shall be kept by the proper officer a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise; and copies of any entries made therein may be

(*s*) Collins *v.* Thompson, 13 Ir. Com. Law Rep., App. 51, C. P. see Swiney *v.* Enniskillen and Bundoran Ry. Co., Ir. Rep. 2 Com. Law, 328, Q. B.

(*t*) Culverhouse *v.* Wickens, L. R., 3 C. P. 295; and see Wood *v.* Dunn, L. R. 2 Q. B. 73, Ex. Cham.

taken by any person upon application to the proper officer. Order 44.

See Com. Law Pro. Act (Ire.), 1856, s. 68.

10. The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court or a Judge. RULE 10. Costs of proceedings. Ord. 45, R. 10.

See Com. Law Pro. Act (Ire.), 1856, s. 69, and Waldron *v.* Parrott.(*u*)

ORDER XLV.

Charging of Stock or Shares and Distringas. Order 45.

1. An order charging stock or shares may be made by any Divisional Court, or by a Judge, and the proceedings shall be such as are directed by 3 & 4 Vic., c. 105, and 16 & 17 Vic. ch. 113, and every such order shall have the same effect as provided by those statutes. Attaching stock or shares of debtor. Ord. 46, R. 1, E.

See 3 & 4 Vic., c. 105, s. 23; and Com. Law Pro. Act (Ire.), 1853, s. 132, which seem applicable to plain cases in which stock or shares stand simply in the name of the debtor or his trustee. They do not apply to funds in hands of an executor of a deceased debtor(*v*) nor of a trustee or other person not the beneficial owner in his own right.(*w*)

Under Pigot's Act, 3 & 4 Vic., c. 105, s. 23 & 24, the creditor should have issued execution, but under the Com. Law Pro. (Ire.) Act, s. 132, an order attaching might be made without issue of an execution provided the plaintiff was in a condition to issue one.(*x*)

Where a plaintiff's bill was dismissed with costs an order *nisi* charging railway shares belonging to plaintiff with amount of defendant's costs when taxed was made before taxation.(*y*) But in a later case it was held that where the specific sum due to the party against whom the charging order is sought in any cause or matter is unascertained, and subject to an account, and his costs untaxed, neither can be charged(*z*)

However, when the amount is ascertained, and is a *debitum in præsenti solvendum in futuro* it may be charged.(*a*)

(*u*) Waldron *v.* Parrott, 9 Ir. Com. Law Rep. 175, Ex.

(*v*) Wallace *v.* M'Cann, 4 Ir. Eq. Rep. 522, M. R.

(*w*) *In re* Blakely Ordnance Co., W. N., 1876, 290; 25 W. R. 111, V. C. M.

(*x*) Fletcher *v.* Egan, 8 Ir. Com. Law Rep., App. 5, Q. B.

(*y*) Burns *v.* Irving, L. R. 3 Chan. D. 291; 24 W. R. 66.

(*z*) Widgery *v.* Tepper, L. R., 6 Chan. D. 364, A. C.; Hodgens *v.* Hodgens, Ir. Rep., 11 Eq. 439, V. C.; see *contra* Burns *v.* Irving, L. R., 4 De Gex and J., 38.

(*a*) Bagnall *v.* Carlton, L. R., 6 Chan. D. 130, V. C. B.

Order 45.
RULE 2.
Statutory injunction.

2. Any person claiming an interest in Government stock, transferable at the Bank of Ireland, may sue out a statutory injunction in the same manner as provided by the Chancery (Ireland) Act, 1867, such writ to issue out of the office of the High Court, whence writs of summons issue.

See Chan. (Ire.) Act, 1867, s. 171 & 172; see on this *In re* Locke, W. N., 1877, 38, V. C. M.

ORDER XLVI.

Order 46.

Writ of Sequestration.

RULE 1.
For non-payment of money into Court or other contempt.
Ord. 47, E.

1. Where any person is by any judgment directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment 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 has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery.

As to issue of a writ of sequestration in lieu of an attachment for nonpayment of money or costs to another person, see 2 G. O. 16th April, 1873, R. 2, Chancery.

To enforce subpœna for costs, *ib.* Rule 5. After arrest of a party for disobedience of a decree or order to do a certain act, see *ib.* R. 6.

Application of proceeds.

There was an essential difference between a sequestration on mesne process and one to compel payment of money under a decree or order, as regards the application of the moneys levied by the sequestrators. Under the latter they might be applied to satisfy the demand but not so on mesne process, Daniel's Chan. Prac. 913, 5th Ed.

Under mesne process, a sale was not directed except for payment of expenses or where the goods were perishable.

As sequestration was neither in form nor in substance an execution, the property seized was regarded as *in custodia legis*, and no right was acquired by the party at whose instance it was issued,(*z*) and where the proceeds were rents and profits of land a prior incumbrancer might have a preferable claim on the fund.(*a*)

(*z*) See Burne *v.* Robinson, 7 Ir. Eq. Rep. 193, *per* Blackburne, M. R.
(*a*) *Ib.* p. 188.

Order 46.

2. Any person entitled to issue a writ of sequestration under the preceding rule shall, before issuing same, issue a summons to approve of one or more sequestrators, and to obtain directions as to his or their security, and accounting; which summons shall, in actions and matters assigned to the Chancery Division, be issued from the chambers of the Judge to whom the action is assigned, and, in actions assigned to the Queen's Bench, Common Pleas, or Exchequer Divisions, from the office of the Master of the Division. On a certificate from the Chief Clerk or the Master of the Division, as the case may be, of the approval of such person or persons, which certificate shall not require to be approved or signed by a Judge, the writ may issue directed to such person or persons.

Rule 2. Summons to approve of sequestrator.

3. One sequestrator only shall be named in the writ, unless a Judge shall otherwise direct.

Rule 3. One only unless otherwise ordered.

4. Every sequestrator shall enter into security by recognizance or otherwise in like manner as receivers in the Court of Chancery now do, or as a Judge shall direct, and the amount and nature of such security shall be directed, and the sureties approved of at Chambers or by the Master as the case may be, upon the summons mentioned in R. 2 of this order, or by a Judge. A sequestrator shall not enter upon the execution of the writ until he has obtained a memorandum signed by the Chief Clerk or the Master, as the case may be, that he has duly perfected his security.

Rule 4. Security for sequestrator.

5. Every sequestrator shall be bound to account at Chambers in the Chancery Division, and before the Master of the Division, in the Queen's Bench, Common Pleas, and Exchequer Divisions as shall be directed upon his appointment, or at any time by a Judge, and not less than once in each year, except a Judge shall otherwise direct.

Rule 5. Accounting.

6. The practice now in force in the Court of Chancery(*a*) as to receivers and sequestrators shall, subject to the preceding rules, apply to sequestrators to be appointed under this order in any Division.

Rule 6. Other sequestrators.

7. All certificates and memoranda under this order shall be filed—in the Chancery Division, in the Record and Writ Office; and in the other Divisions, in the office of the Master.

Rule 7. Filing certificates.

(*a*) *Sic.* in Authorized Rule.

Order 47.

Order XLVII.

Writ of Possession.

Rule 1. Writ of possession. Ord. 48, R. 1, E.

1. A judgment that a party do recover possession of any land may be enforced by writ of possession in manner heretofore used in actions of ejectment in the Superior Courts of Common Law.

Rule 2. Without order. Ord. 48, R. 2, E.

2. Where by any judgment any person therein named is directed to deliver up possession of any lands to some other person, the person prosecuting such judgment 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, and that the same has not been obeyed.

Order 48.

Order XLVIII.

Writ of Delivery.

Delivery of other property. Ord. 49, E.

A writ for delivery of any property other than land or money may be issued and enforced in the manner heretofore in use in actions of detinue in the Superior Courts of Common Law.

Order 49.

Order XLIX.

Change of Parties by Death, &c.

Rule 1. Actions not abated by marriage, &c., where cause of action continues. Ord. 50, R. 1, E.

1. An action 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.

Abatement.

What was called the abatement of an action or suit, by death, marriage or bankruptcy, had already been abolished at law by Com. Law Pro. Act (Ire.), 1853, ss. 156, 161. In Equity, when a suit became abated or defective by death or change of parties it might be continued by an order of course made on the mere statement of counsel, of the abatement or change, or transmission or interest, or liability, and the order obtained *ex parte*, became binding on new or surviving parties after service, unless steps were taken by them to discharge it, see Chan. (Ire.) Act, 1867, s. 157. This is substantially the plan of the present order.

What actions.

A suit or action commenced before the 1st January, 1878, is not within the provisions of this order, and in case of a change of parties occurring it must be revived or continued in the old way.(*b*) After judgment if any death or other change

(*b*) Davey *v.* Whittaker, W. N., 1876, 17, 24 W. R. 244, V. C. B.; see Crane *v.* Loftus, 24 W. R., 93 V. C. H.

takes place, execution is to be had under Order xli., R. 19. As to the cause of action surviving, see the rule *actio personalis moritur cum personâ* (387) p. 326, *ante*, qualified by 3 & 4 Vic., c. 105, s. 31, as to injuries to real or personal property,(*c*) and by Lord Campbell's Act, 9 & 10 Vic., c. 93.(*d*) Order 49.

2. In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, assignee, trustee, or other successor in interest, if any, of such party be made a party to the action, or be served with notice thereof 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 action as may be just. Rule 2. Court order persons to be served with notice. Ord. 50, R. 2, E.

At law in case of marriage of a female plaintiff or defendant, a suggestion of the fact was necessary, in order to have judgment and execution against husband as well as wife; execution might issue for her by authority of her husband without any proceeding, and the authority of the attorney employed by her when sole continued till countermanded by her husband, Com. Law Pro. Act (Ire.), 1853, s. 161, see Ferg. 204, 2nd Ed. But the husband could not be joined as a co-plaintiff with his wife without his express consent (*e*) Marriage of female.

In equity, on the marriage of a female plaintiff, the suit should be revived by husband and wife jointly, unless it was conversant about her separate estate, when she should continue to sue by some next friend.(*f*) When a female defendant married, the husband's name should be introduced in all subsequent proceedings.

Now, in case of marriage of a female plaintiff or defendant, where it is sought to affect her husband with liability or to invest him with authority to carry on the suit in his name, or to settle all questions involved in the action, an order to continue should be applied for. If the wife desires to carry on the suit in her own name, she must provide a solvent next friend, or give security for costs.(*g*) Where the suit was by husband and wife suing as administratrix, and after decree the husband died, having received assets, the cause was revived by the widow against the executors of the husband.(*h*)

(*c*) See Earl of Leitrim *v.* Maddison, Ir. Rep. 3 Com. Law, 601, C. P.; Chamberlaine *v.* Drumgoole, 13 Ir. Com. Law Rep., App. 1, Q. B.

(*d*) See Bradshaw *v.* Lancashire Ry. Co., L. R., 10 C. P., 189; Osborn *v.* Gillett, L. R., 8 Exch., 88.

(*e*) Quilligan *v.* Quilligan, Ir. Rep. 4, Eq. 463, Prob.

(*f*) But see Griffin *v.* Morgan, L. R. 4 Chan. 351.

(*g*) See Quilligan *v.* Quilligan, *ubi supra.*

(*h*) O'Hanlon *v.* Unthank, Ir. Rep. 10 Eq. 493 M. R.

Order 49.

Deaths.

On the death of a sole plaintiff at law, his legal representative, by leave of the Court, might file a suggestion, and proceed Com. Law Pro. Act (Ire.) 1853, s. 157, 215.(*i*) After verdict, see s. 159, 160.(*k*)

In equity, the executor or administrator should revive, unless plaintiff sued in a representative capacity.(*l*)

Death of sole defendant, see Com. Law Pro. Act.

Rule 3. On assignment, continuance of action. Ord. 50, R. 3, E.

3. In case of an assignment, creation, or devolution of any estate or title pendente lite, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

Assignment.

Both at law and in equity where a plaintiff had assigned his interest in the suit after decree or judgment, his assignee should have proceeded by writ of revivor.(*m*) Now where a plaintiff assigns his interest to trustees before decree, it is an order of course that he and the trustees shall continue the action,(*n*) but as to what is assignable see note.(*o*)

As to transfer of interest in defendants, Town Commissioners, &c.(*p*), as to defendant's interest being transmitted, see Chan. (Ire.) Act, 1857, ss. 158, 218, 221; like at law, Com. Law Pro. Act, 1853; after verdict, s. 159; after interlocutory judgment, s. 160; after writ of error.(*q*)

As to death of one of several plaintiffs or defendants at law a suggestion was entered, Com. Law Pro. Act (Ire.), 1853, s. 156, 213, 214, 216. In equity a side bar rule was entered to proceed by or against survivors, if the right survived to them, otherwise a representative of the deceased should be made a party, and this sometimes was ordered to stand over where the surviving plaintiff had no interest. See Chan. (Ire.) Act, 1867, s. 154. In a case since the J. Act, where one of several plaintiffs died, he being the principal party and his rights not surviving to the others, who brought the action to a hearing, without making his personal representative a party, on objection taken, the cause was ordered to stand over on payment of costs of the day.(*r*)

Bankruptcy of plaintiff.

As to bankruptcy of a sole plaintiff in an action at law, see Com. Law Pro. Act (Ire.), 1853, s. 162.(*s*)

(*i*) See Mahony *v.* Lewis, 6 Ir. Com. Law Rep. 475, Q. B.

(*k*) See Moore *v.* Browne, 8 Ir. Com. Law Rep. App. 25 Q. B.

(*l*) See Greene *v.* Greene, Ir. Rep. 5 Eq. 224.

(*m*) Orr *v.* Cooper, Ir. Rep. 9, Com. Law 424, Q. B.; see Vibart *v.* Vibart, L. R. 6, Eq. 251; Bibby *v.* Naylor, L. R. 17, Eq. 14; Ingham *v.* Waskett, L. R. 11, Eq. 283.

(*n*) Middleton *v.* Pollock, W. N., 1876, 250 M. R.

(*o*) Paris Skating Rink Co., 25 W. R., 701 A. C.

(*p*) See Attorney-General *v.* Barrett, Ir. Rep. 6, Eq. 84, L.C.

(*q*) See M'Mahon *v.* Ellis, 12 Ir. Com. Law Rep. 437, C. P.

(*r*) Lydall *v.* Martinson, L. R. 5, Chan. D. 780, 25 W. R. 866.

(*s*) See Macnamara *v.* Lynch, 8 Ir. Com. Law Rep., App. 2, Q. B.

In equity it rendered the suit defective, as the plaintiff ceased to have any interest in it, and the assignee or trustee might continue it in his own name and in default of so doing, the defendant might move to dismiss the bill for want of prosecution—with costs. In a case under the Judicature the order made was to dismiss the bill with costs, the defendant undertaking not to enforce them against the plaintiff personally but only against his estate in bankruptcy.(*t*) After decree a defendant might revive,(*u*) where bankruptcy occurred after the cause was set down for hearing, the trustee was allowed to proceed in the name of the bankrupt on giving security for costs.(*v*) Order 49.

Where a plea of bankruptcy of the plaintiff in an action was pleaded and allowed and costs paid, the assignee or trustee electing not to proceed with that action further, was not precluded from afterwards commencing a fresh action for the same cause.(*w*)

But as the bankruptcy of the plaintiff causes no absolute abatement, it is in the discretion of the Court to allow the action to proceed without making the assignees parties to it (subject to the right of the defendant to apply for security for costs), and in one case an application to stay proceedings on the ground of plaintiff's bankruptcy was refused where one of the two trustees in bankruptcy was already a defendant in the suit, and the other was willing that the suit should proceed, though objecting to incur the risk of taking active steps in the matter, the Court only requiring that the latter should have notice of the proceedings.(*w*) However, the Court of Appeal deemed that it was not a wise exercise of the discretion intrusted to the Judge to permit a plaintiff who has ceased to have any interest in the subject matter to continue the proceedings where the trustees might, if so advised, do so by an order of course.(*x*)

On the bankruptcy of a sole defendant at law, he might plead the fact in bar of further continuance.(*y*) In equity plaintiff had the option to dismiss his bill (but with costs to be paid by him),(*z*) and prove his demand under the bankruptcy, or to proceed making the assignees parties by a common order. Bankrupty of defendant.

Where a defendant's estate went into liquidation after plaintiff was entitled to move for judgment, in default of a defence in a Chancery action to foreclose a mortgage, it was

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(*t*) See Wright *v.* Swindon Ry. Co., L. R. 4, Chan. D. 164, M. R.

(*u*) Thomas *v.* Buxton, L. R. 3, Chan. 407.

(*v*) Anon. W. N., 1875, 202, 20 Sol. Jour. 57, Lush, J.

(*w*) Bennett *v.* Gamgee, L. R. 2, Exch. D. 11, 25 W. R. 81, S. C. affirmed W. N., 1877, 20 A. C.

(*w*) Jackson *v.* North Eastern Ry. Cy., W. N. 1877, 80 V. C. M.,

(*x*) S. C., L R., 5 Chan. D., 844; 25 W. R. 518; 21 Sol. Jour. 498 A. C.; see Eldridge *v.* Burgess, W. N., 1878, 14, Fry, J.

(*y*) But not his having filed a petition; see Anon. 20 Sol. Jour. 82, Lush, J.

(*z*) See Blackmore *v.* Smith, 1 Mac. & Gord. 80.

Order 49.

ordered that the action should be continued against the trustees in place of the original defendant.(*a*)

After a defendant, who became bankrupt, suffering judgment to go by default, on the application of his trustee the judgment was set aside on payment into Court of the amount of debt and costs with liberty to defend the action in the name of the defendant,(*b*) the bankruptcy can effect no change, as the assignee will be bound by the proceeding, but nevertheless it may be more convenient that he should be added and an order of this nature has been made.(*c*)

Accession of a new interest.

Events occurring after commencement of the action may cause an accession of a new title, *ex. gr.* the birth of a child, one of a class or a tenant in tail in remainder may require an order under Rule 4, to bind him by the previous proceedings.

Absconding plaintiff.

Under the head "or any other event" where a plaintiff being a trustee and executor in an administration suit absconded, an order was made substituting a defendant beneficially interested as plaintiff.(*d*)

Rule 4. Order in case of marriage, &c.

Ord. 50, R. 4, E.

4. Where by reason of marriage, death, or bankruptcy, or any other event occurring after the commencement of an action, 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 action, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action, 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 rule does not say on whose application the order is to be made, and what steps a defendant should take in default of plaintiff's proceeding. Probably the defendant may move to dismiss the action for want of prosecution, in the case of the death of a plaintiff, and serve his personal representative, or other person who ought to proceed.(*e*)

(*a*) Walker *v.* Blackmore, W. N. 1876, 112 V. C. H.; but see Campbell *v.* Im. Thurn, W. N. 1875, 195; 20 Sol. Jour. 31 Lush, J.

(*b*) Goddard *v.* Poole, W. N. 1875, 230; 20 Sol. Jour. 98, Quain, J.

(*c*) Kino *v.* Rudkin, L. R., 6 Chan. D., 160; 21 Sol. Jour. 689, Fry, J.

(*d*) Johnson *v.* Kershaw, 20 Sol. Jour. 332 V. C. H.

(*e*) Wright *v.* Swindon Ry. Cy., W. N. 1876, 250, M. R.. S. C.. 255.

It is presumed no evidence will be necessary as to the facts, and the order will be made on the statement of counsel at the peril of its being set aside if unfounded in fact, or irregular.

RULE 5. Service of order to bind *sub modo*. Ord. 50, R. 5, E.

5. An order so obtained shall, unless the Court or Judge shall otherwise direct, be served upon the continuing party or parties to the action, 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 served therewith who is not already a party to the action 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.

See Chan. (Ire.) Act, 1867, s. 157.

See as to allowing an order of revivor to be made unresisted. (*f*)

RULE 6. Discharging order. Ord. 50, R. 6, E.

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 action, shall be served with such order, 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.

If the party served do not move to discharge or vary the order, the action will proceed from the point where it was when the event occurred by which the defect was occasioned, and if time is expiring, or has expired, to answer, application should be made to extend it. (*g*)

RULE 7 Persons under disability, time for. Ord. 50, R. 7, E.

7. Where any person being under any disability other than coverture, and not having had a guardian ad litem appointed in the action, is served with any such order, 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 or guardians 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.

As to how far proceedings taken before such an order affect persons under disability, see (*h*).

(*f*) Conolly *v.* Luscombe, L. R., 3 H. L. C., 139.

(*g*) See Harpur *v.* Pedder, 20 Sol. Jour. 149, Q. B. D.; Earl Beauchamp *v.* Winn, L. R., 2 Eq., 302.

(*h*) See Capps *v.* Capps, L. R., 4 Chan. 1; Cuthbert *v.* Hornsby, L. R., 13 Eq., 202.

Order L.

Order 50.

Transfers and Consolidation.

Rule 1. Transfer of action by Lord Chancellor. Ord. 51, R. 1, E.

1. Any action or actions may be transferred from one division to another of the High Court, or from one Judge to another of the Chancery Division, by an order of the Lord Chancellor, provided that no such transfer shall be made from or to any division without the consent of the President of the Division.

As to transfer of actions from one division of the High Court to another, see Chapter XX., p. 176, ante.

In the Chancery Division, as between the Judges thereof, the Lord Chancellor can make the order, as to transfer of actions, alone. The Court of Appeal has no such power.(*i*)

The Lord Chancellor also can transfer statutory petitions.(*k*)

In England where the parties consent in writing and apply to the Secretary's Office of the Lord Chancellor, the Lord Chancellor makes the order of transfer. Where parties do not consent, an application must be made in Court.(*l*)

Rule 2. Chancery transfers for hearing only. Ord. 51, R. 1(A), E.

2. In the Chancery Division a transfer of a cause from one Judge to another may by the same or a separate order be ordered to be made or to be deemed to have been made for the purpose only of trial or of hearing, and in such case the original and any further hearing shall take place before the Judge to whom the cause shall be so transferred; but all other proceedings therein, whether before or after the hearing or trial of the cause, shall be taken and prosecuted in the same manner as if such cause had not been transferred from the Judge to whom it was assigned at the time of transfer, and as if such Judge had made the decree or judgment, if any, made therein, unless the Judge to whom the cause is transferred shall direct that any further proceedings therein, before or after the hearing or trial thereof, shall be taken and prosecuted before himself.

This rule is borrowed from one introduced into England by reason of the lately appointed Judge, Mr. Justice Fry, having no staff for chamber business. Its purpose here may possibly be to meet a similar exigency in regard to the Land Judges of the Chancery Division.

Rule 3. Transfer by order of a Judge. Ord. 51, R. 2, E.

3. Any action may, at any stage, be transferred from one division to another by an order made by the Court or any Judge of the Division to which the action is assigned:

(*i*) *In re* Hutley, L. R., 1 Chan. D. 11.
(*k*) *In re* Boyd's Trust, L. R., 1 Chan. D. 41.
(*l*) See memorandum in L. R., 1 Chan. D. 41, 24 W. R. 19.

provided that no such transfer shall be made without the consent of the President of the Division to which the action is proposed to be transferred. Order 50.

The consent of the President of the Division to which the action is proposed to be transferred is a condition subsequent and not precedent to the order of the Judge.(*m*)

A Judge at Chambers of any Common Law Division has power to order the transfer of a cause belonging to any of them to another or to the Chancery Division.(*n*)

4. When an order has been made by any Judge of the Chancery Division for the winding up of any company under the Companies Acts, 1862 and 1869, 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 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. Rule 4. Transfer by order of Chancery Judge of actions relating to assets or companies. Ord. 51, R. 2(A) E.

See on this subject Chapter xxviii. (265), p. 220, *ante*.

An order has been made for this purpose *ex parte*, subject of course to be discharged.(*o*)

5. Any action transferred to the Chancery Division shall, by the order directing the transfer, be directed to be assigned to one of the Judges of such Division to be named in the order. Rule 5. Transfer to Chancery Division. Ord. 51, R. 3, E.

6. Actions in any division or divisions may be consolidated by order of the Court or a Judge in the manner heretofore in use in the Superior Courts of Common Law. Rule 6. Consolidation of action.

See 2, Ferg. Prac. 1026. Hemstead *v.* Phœnix Gas Com., 3 H. & C. 745. Morley *v.* Midland Ry. Com. 3 F. & F. 961. Since the J. Act, the Court has consolidated an action of debt and an action for recovery of land brought by mortgagees against mortgagor,(*p*) but has refused to do so in case of an action for malicious prosecution with another for amount of salary due to plaintiff.(*q*) Ord. 51, R. 4, E.

(*m*) Humphreys *v.* Edwards, W. N. 1875, 208, M. R.; and see as to giving such consent, Barr *v.* Barr, W. N., 1876, 44; 20 Sol. Jour. 272, Prob.

(*n*) Hillman *v.* Mayhew, L. R. 1, Ex. D. 132, 24 W. R. 435.

(*o*) Field *v.* Field, W. N., 1877, 98, V. C. M. Whitaker *v.* Robinson, W. N., 1877, 201, V. C. H.

(*p*) Hambury *v.* Noone, 20 Sol. Jour. 161, Huddlestone, B.

(*q*) Anon. 20 Sol. Jour. 101, Quain, J

Order 50.

Actions against different underwriters of the same policy of insurance have been continually consolidated.(*r*)

Several actions arising of one and the same contract and sub-contracts, instead of being consolidated, were ordered to come on together the evidence in each to be used in all.(*s*)

Order LI.

Interlocutory Orders as to Injunctions or Interim Preservation of Property.

Order 51.

Rule 1. Order for interim custody and preservation of property. Ord. 52, R. 1, E.

1. When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured.

See 2 Daniel's Chan. Practice, 4th edition p. 1427, and Smith *v.* Peters, L. R., 20, Eq. 511, M. R., per Sir Geo. Jessel, M. R., as to the large powers of the Court of Chancery to interpose by way of interlocutory order ancillary to the due performance of its main function in the administration of justice at the hearing of the cause(*a*) Courts of Law possessed a jurisdiction of a similar character in the action of Replevin(*aa*) which is still recognised as being competent under the J. Act. See Schedule A, Part ii, Sec. iv.

As to relief by way of Mandamus and Injunction, see Chapter xxxvii, p. 281; and as to Receiver, see Chapter xxxiv. p. 295, *ante*. Where a mandatory injunction was claimed in an action for obstructing ancient lights, and the amount of damage might materially influence the Court in granting or refusing the injunction it was considered that they should be first ascertained and an issue was directed to a special Jury(*b*) for substantial damage must be proved.(*c*)

See as to an injunction against a suit in Ireland,(*d*) injunction to restrain a married woman from alienating her separate property by a creditor having no specific charge refused.(*e*)

See as to undertaking to pull down buildings continued *pendente lite*, as not being an idle form but enforced notwithstanding large expenditure.(*f*)

(*r*) See Foxwell *v.* Webster, 4 De. Gex, Jo. & Sm., 77, Smith *v.* Whichard.

(*s*) See Debenham *v.* Lacey, 24 W. R., 900; 20 Sol. Jour. 703 V. C. H. See Concha *v.* Murietta, 21 Sol. Jour. 296, A. C., Amos *v.* Chadwick, L. R., 4 Chan. D. 869.

(*a*) See also Hagell *v.* Currie, L. R., 2 Chan. 449.

(*aa*) See Gibbons *v.* M'Evilly, Ir. Rep., 1 Com. Law. 453, C. P.

(*b*) See Burrell *v.* Cartwright, 21 Sol. Jour. 238, V. C. H.

(*c*) Kino *v.* Rudkin, L. R., 6 Chan. D. 160.

(*d*) Eustace *v.* Lloyd, W. N., 1876, 299; 25 W. R., 211, V. C. B.

(*e*) National Provincial Bank of England *v.* Thomas, 24 W. R., 1013, M. R.

(*f*) Twinbarrow *v.* Braid, 21 Sol. Jour. 688, A. C.

Order 51.
RULE 2.
Order for sale of chattels.
Ord. 52, R. 2, E.

2. It shall be lawful for the Court or a Judge, on the application of any party to any action, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as to the Court or Judge may seem desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once.

It may be questioned how far the Court will make such an order for sale of goods at the instance of plaintiff where he is in actual possession of them, and may sell if he chooses without an order.(*g*)

As to time and manner of applying, see Rule 4, *infra*.

RULE 3.
Order for detention and sale or inspection.
Ord. 52, R. 3, E.

3. It shall be lawful for the Court or a Judge, upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property, being the subject of such action, and for all or any of the purposes aforesaid to authorize any person or persons to enter upon or into any land or building in the possession of any party to such action, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

As to exercise of this jurisdiction of interim detention and preservation of property, see note.(*h*) As to detention and preservation of money it must be the property of the applicant, and not of the opposite side, and where plaintiff applied that defendant should lodge money in Court before judgment was refused (*i*)

Inspection of premises.

As to inspection of property, the Court of Chancery made orders in proper cases, *ex. gr.*, of premises in case of an allegation of nuisance,(*k*) of obstruction of ancient lights and of machinery in patent suits, where the object clearly was *bona fide* to help plaintiff to prove his case.(*l*) An order to break the soil for purpose of inspection was deemed premature on motion.(*m*) An order has been made to permit a certain person to enter and make a valuation of house and furniture, where there was a contract of sale on those terms.(*n*)

(*g*) See Anon. 20 Sol. Jour., 100, Quain, J.
(*h*) Watts *v.* Watts, 24 W. R., 489; 20 Sol. Jour., 431 Prob.
(*i*) Luscher *v.* Comptoir d'Escompte de Paris, W. N., 1875, 200; 20 Sol. Jour., 31 Lush, J.
(*k*) Barlow *v.* Bartery, W. N., 1870, 136, V. C. S.
(*l*) See Batley *v.* Dymock, L. R., 19 Eq., 90.
(*m*) Ennor *v.* Barwell, 1 De Gex., F. & Jo. 529.
(*n*) Smith *v.* Peters, L. R. 20. Eq. 511. M. R.

Order 51.

A similar jurisdiction had been conferred at Common Law by Com. Law Pro. Act (Ire.), 1853, s. 47.(*o*)

Since the J. Act, the Court has made an order to inspect defendant's mine and the working of it, under and near the plaintiff's mine, to see how far defendant had trespassed on plaintiff's ground, and to measure the coal taken away.(*p*)

So an order has been made *ex parte*, for some person authorized by plaintiff to inspect defendant's premises, where an injuction was sought to restrain his selling bottles of brandy, as of the plaintiff, and for delivery of all such as were on the premises.(*q*)

The Court refused in an action for obstructing ancient lights an order to inspect plaintiff's premises at the instance of a defendant, before the nature of his defence had been disclosed.(*r*)

Applications of this nature are seldom granted *ex parte*.(*s*)

In an action to restrain defendant from infringing plaintiff's patent, where defendant denied the validity of the patent and plaintiff sought an inspection of the defendant's process of manufactures, which was resisted as calculated to disclose trade secrets to a rival manufacturer, the Court ordered an inspection by two skilled witnesses, nominated one by each side, and bound in honour not to disclose trade secrets.(*t*)

RULE 4. Application, how made. Ord. 52, R. 4, E.

4. An application for an order under section 28, subsection 8, of the Act, or under Rules 2 or 3 of this Order, may be made to the Court or a Judge by any party. If the application be by the plaintiff for an order under the said subsection 8 it may be made either *ex parte* or with notice, and if for an order under the said Rules 2 or 3 of this Order it may be made after notice to the defendant at any time after the issue of the writ of summons, and if it be by any other party, then on notice to the plaintiff, and at any time after appearance by the party making the application.

RULE 5. Application under Rule 1. Ord. 52, R. 5, E.

5. An application for an Order under Rule 1 may be made by the plaintiff at any time after his right thereto appears from the pleadings; or, if there be no pleadings, *sic.* is made to appear by affidavit or otherwise to the satisfaction of the Court or a Judge.

RULE 6. Claim of lien. Ord. 52, R. 6, E.

6. Where an action is brought to recover, or a defendant in his statement of defence seeks by way of counterclaim to recover specific property other than land, and

(*o*) See Boilan *v.* Dublin and Belfast Ry. Co., 7 Ir. Jour., 382 Ex.; Bennett *v.* Griffiths, 3 El. & El., 467.

(*p*) Cooper *v.* Ince Hall Co., W. N., 1876, 24; 20 Sol. Jour., 241, Lindley, J.

(*q*) Hennessy *v.* Bohmann, W. N., 1877, 14, V. C. M.

(*r*) Anon. W. N., 1876, 53, Archibald, J.

(*s*) See Anon. 20 Sol. Jour. 101, Quain, J.

(*t*) Flower *v.* Lloyd, 20 Sol. Jour. 703, A. C.

the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a Judge may, at any time after such last-mentioned claim appears from the pleadings, or, if there be no pleadings, by affidavit or otherwise to the satisfaction of such Court or Judge, order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or Judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it. Order 51.

A motion made by plaintiff for delivery of a ship over which defendant claimed a lien was refused as being equivalent to a final judgment, in detinue, and not to be granted on interlocutory motion.(*u*)

Order LII.

Motions and other Applications. Order 52.

Rule 1. Applications, when by motion. Ord. 53, R. 1, E.

1. Where by these Rules any application is authorized to be made to the Court or a Judge in an action, such application, if made to a Divisional Court or to a Judge in Court, shall be made by motion.

Rule 2. Notice of motion to be given except in certain cases. Ord. 53, R. 3, E.

2. Except where by the practice existing at the time of the passing of the Act any order or rule has heretofore been made ex parte absolute in the first instance, and except where by these Rules it is otherwise provided, and except where the motion is for a rule to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court or 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.

Conditional orders and orders to show cause or nisi, are virtually abolished, except so far as any special order or rule expressly provides to the contrary,(*v*) i.e. in all actions; but

(*u*) Sultan of Turkey *v.* Union Bank of London, W. N., 1877, 79, M. R.

(*v*) *In re* Baigent, 24 W. R. 43, Prob.

Order 52.

an application to enforce an award in the matter of an arbitration is not an action(*w*) so an application to assign an administrative bond.(*x*)

RULE 3. Interval of time in notice. Ord. 53, R. 4, E.

3. Unless the Court or 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.

See 194 G. O., 27th March, 1843, Chancery.

Service.

As to service, personal service is good without leave, on a defendant who has not appeared.(*y*) But when the motion is for judgment, service may be made by filing it with the officer.(*z*)

Where the application is for an attachment, the notice should be served personally, unless the Court shall otherwise order. Com. Law. *Vide ante*, Ord. xliii. R. p. 646 *ante*.

RULE 4. Ord. 53, R. 5, E. Court may require further notice.

4. If on the hearing of a motion or other application the Court or 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.

RULE 5. Adjournment. Ord. 53, R. 6, E.

5. 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.

If the party serving notice of motion does not appear to move it, the Court may order him to pay the opposite party or his attorney, if he appears, the costs of appearing to oppose it,(*a*) but where the notice was wholly invalid *ex. gr.* to appear on a day on which the Court could not sit, or on a day earlier than the date of the notice, the Court has in England refused to give costs.(*b*)

RULE 6. Service of notice without leave. Ord. 53, R. 7, E.

6. 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 in the action, has not appeared within the time limited for that purpose.

(*w*) *In re* Arbitration between Robert Phillips and others, L. R., 1 Q. B. D. 78, 24 W. R. 158, 20 Sol. Jour. 132.

(*x*) *In re* Goods of Cartwright, 24 W. R. 214, Prob.

(*y*) Saunders *v.* Miller, 24 W. R. 392.

(*z*) Dymond *v.* Croft, 24 W. R. 700, M. R.

(*a*) Berry *v.* Exchange Trading Company, L. R. 1 Q. B. D. 77, 24 W. R. 318.

(*b*) Daubney *v.* Shuttleworth, L. R. 1 Ex. D. 53; 24 W. R. 321, C. P. D.

Order 52.

7. 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.

RULE 7. Before time for appearance with leave.

Ord. 53, R. 8, E.

ORDER LIII.

Sittings at Chambers.

Order 53.

RULE 1. Sittings at stated times.

1. The Judges of the Chancery Division, and a judge of each of the Queen's Bench, Common Pleas and Exchequer Divisions shall sit at Chambers as often as they shall respectively deem necessary for the despatch of the Chamber business of their respective courts, and the times at and during which they shall respectively so sit shall be from time to time fixed by them respectively.

As to attendance of counsel at Chambers, in England the Master of the Rolls stated that except in applications for time, in which counsel could not be allowed to appear, it was of course to allow them, and it was not necessary in his Chambers to have any express allowance. In the Chambers of the V. C. of Ireland it is(*c*) stated only one counsel would be heard, but application might be made to adjourn the case into Court.(*d*)

RULE 2. Applications proper for Chambers generally.

2. The following applications, in addition to such as by the Act or these orders are authorized to be made at Chambers, may be made at Chambers unless the Court or a Judge shall direct any particular application to be made in Court, viz.:—

(1.) To extend the time for the delivery of any pleading, or for the taking of any other proceeding in an action.

(2.) For orders for accounts under Order XIV.

(3.) For a statement of the names of the persons who are co-partners in any firm under Order XV. Rule 10.

(4.) To determine the sufficiency of an affidavit under Order XXXI. *R.* 8.

(5.) For an order requiring a party to answer or to answer further under Order XXXI. *R.* 9.

(6.) For production of documents under Order XXXI. *R.* 10.

(7.) For discovery of documents under Order XXXI. *R.* 11.

(*c*) See Webb *v.* Fitzgerald, W. N. 1875; 244 M. R.

(*d*) Roseingrave *v.* Burke Ir. Rep 7 Eq. 186 V C

Order 53.

(8.) For inspection of documents under Order XXXI. Rules 16 & 17.

(9.) For directions as to the mode of trial under Order XXXV. *R.* 3.

(10.) For, or in respect of, security for costs.

(11.) For the appointment of guardians *ad litem* of infants, or persons of unsound mind.

(12.) For the appointment of a special guardian for the purpose of concurring in a special case.

(13.) To appoint commissioners to take the separate examination of a married woman for any purpose arising in an action or matter.

(14.) Under the Interpleader Act, 9 & 10 Vic., c. 74.

(15.) For the appointment of an arbitrator or umpire under the Common Law Procedure Amendment Act (Ireland), 1856, sec. 15.

Also in the Chancery Division.

Chancery Division.

(16.) To stay concurrent suit when the decree or order is in prosecution at Chambers.

(17.) For liberty to invest, or to change the investment of money under the control of the Court, or to approve of the investment of money in purchase or mortgage.

(18.) For directions to executors or trustees as to the management of property.

(19.) For the appointment of a guardian for the purposes of the Leases and Sales of Settled Estates Act.

(20.) For directions as to applications to the Court, or as to consenting to such applications, under the last-mentioned Act.

(21.) For directions for any other purpose under the last-mentioned Act.

(22.) By vendor or purchaser of real or leasehold estate under the 37 & 38 Vic., c. 78, sec. 9.

(23.) For the appointment of guardians of the persons or fortunes of infants.

(24.) For directions or orders as to the care, maintenance, or advancement of infants being wards of Court, or as to the management of their property, whether under the general jurisdiction of the Court or under any statute specially authorizing the same.

(25.) For payment of the dividends of any stocks or funds standing to the separate credit of any person or persons.

(26.) For the payment or transfer of any stocks or moneys standing to the separate credit of any person or

persons to the person or persons to whose credit same shall stand, or to the personal representatives of such person or persons. Order 53.

(27.) Under the Trustee Relief Act, in all cases where the trust fund does not exceed £300 cash or £300 stock.

(28.) Under the Trustee Acts in all cases where any judgment, decree, or order has been made for the sale or conveyance of lands, tenements, or hereditaments of any tenure or of any estate or interest therein.

(29.) To appoint new Trustees of Charities.

(30.) All such other applications as, according to the practice of the Court of Chancery heretofore, have been properly made at Chambers.

Also in Queen's Bench, Common Pleas, and Exchequer Divisions.

(31.) To make a consent a rule of Court.

(32.) To substitute service of any process or to have service deemed good, or to serve out of the jurisdiction. For Common Law Division.

(33.) By a person not named in a writ of summons for recovery of land, for liberty to defend.

(34.) To examine a witness by commission or on interrogatories.

(35.) Under Order XLIV. for a Garnishee Order, or an order to pay, or other application in reference thereto.

(36.) Motions under the Bills of Exchange Act.

(37.) For an order to revive a judgment.

3. When any application, which by the Act or by this order or any of the foregoing orders is authorized to be made at Chambers, shall be made in Court, any additional costs occasioned thereby shall be borne and paid by the party making same, unless the Court or a Judge shall otherwise order. Rule 3. Additional costs of moving in Court disallowed.

4. In addition to the foregoing applications the Court may, subject to these orders, in any case direct that any business shall be disposed of at Chambers which such Court shall think may be more conveniently disposed of at Chambers than in open Court. [Rule 4. Court may direct what business disposed of at Chambers.

See Chan. (Ire.) Act, 1867, s. 133 and 135, as to powers of Chancery Judges to adjourn matters for consideration in chambers.

It was declared to be contrary to the practice of the Court of Chancery to hear causes or even to grant an injunction, *e. gr.*, restraining the publication of letters, in private, without the consent of both parties, except in cases which concern lunatics

Order 53.

or wards of court or perhaps where a hearing in public would defeat the whole object of the suit or matter, or cause an entire destruction of it.(*e*)

RULE 5. Chancery practice as to summons continued.

5. In the Chancery Division the practice heretofore existing in the Court of Chancery as to the issuing and hearing of summonses, and the conduct of business at Chambers shall, subject to these orders, continue to regulate such proceedings.

Appeal from.

In England the practice as to appealing from an order made by a judge of the Chancery Division at chambers is to require the party to ask the judge for a certificate that the case has been fully argued, and that he does not require it to be re-argued, or to ask for an adjournment into court. If the judge should refuse, the Court of Appeal may give leave to enter the case for hearing on appeal as a matter of course.(*f*)

RULE 6. Common Law Chambers, practice as to.

6. In the Queen's Bench, Common Pleas, and Exchequer Divisions, the following shall be the practice at Chambers:—(*a*). All applications at Chambers shall be by summons, when notice of such application is required, and such summonses shall issue from the offices of such Divisions respectively. Such summonses may be in the form No. 2 in Appendix G, with such variations as the circumstances of the case may require. (*b*). A copy of such summons shall be left by the party obtaining such summons, with the officer who shall issue same.

(*c.*) All summonses in these Divisions shall be served two clear days before the return thereof.

(*d.*) Where any of the parties summoned to attend a Judge at Chambers, fails so to attend, whether upon the return of the summons, or at any time appointed for the consideration or further consideration thereof, the Judge may proceed *ex parte* if he think it expedient so to do.

(*e.*) No further summons shall be necessary for any adjournment unless the Judge shall direct the same.

(*f.*) The cost of counsel attending a Judge at Chambers, whose attendance shall have been taken down by the proper officer shall be allowed, unless the Judge shall certify it not to be a proper case for counsel to attend.

(*g.*) The Judge at Chambers may adjourn into Court any application made to him at Chambers which he shall deem more convenient to be considered in Court.

RULE 7. Appeal within eight days. Ord. 54, R. 6.

7. In the Queen's Bench, Common Pleas, and Exchequer Divisions every appeal to the Court from any decision at

(*e*) Andrew *v.* Raeburn, L. R. 9, Chan. 522, *per* Lord Cairns, L. C.
(*f*) Thomas *v.* Elsom, 25 W. R., 871, W. N., 1877, 205 A. C.

chambers shall be by motion, and shall be made within eight days after the decision appealed against. Order 53.

See Chapter xvii., p. 155, *ante*.

The notice of appeal must be given at least two clear days before the day named for the appeal, and so as that it can be heard within eight days from the decision appealed from.(*g*) The analogous rule has been acted on very strictly in England.(*h*)

8. A judge sitting at Chambers may, if from the circumstances he shall so think fit, hear and dispose of any Chamber application in an action assigned to any other division. Rule 8. Judge may hear cases from other Divisions.

Order LIV.

Nisi Prius Sittings in Dublin.

Order 54.

1. The Judges of the Queen's Bench, Common Pleas, and Exchequer Divisions, shall arrange among themselves for the trial of causes and questions, or issues of fact, which are to be tried by jury in Dublin. Rule 1. Arrangements as to trials.

2. The Clerk of the Rules of the Division of which the Judge presiding in any Court for the trial of causes and questions or issues of fact in Dublin, shall be a member, shall be the proper officer to make entries and render accounts of all fines or penal sums imposed by such Court. Appeals against such fines shall be heard by the Judges of such Division, or some or one of them. Rule 2. Clerk of Rules to enter fines. Appeals as to fines.

3. The precepts for the return of jurors for the trial in Dublin of issues of fact shall be under the hand of one of the Judges of the High Court of Justice and shall be directed to the Sheriffs of the county and county of the city of Dublin respectively. Rule 3. Precepts for jurors.

The precepts shall be issued at least fifteen days before the earliest day which shall be named therein for the attendance of jurors, and shall command the said sheriffs, respectively, to summon and return such numbers of common and special jurors, respectively, as shall be therein mentioned, to attend the Courts of the High Court of Justice which, during such respective periods as shall be therein mentioned, shall be held for the trial of issues of fact, and the men so summoned and returned shall (subject to all just challenges and objec- Fifteen days before day for jurors attendance. Jurors qualified to act.

(*g*) Fox *v.* Wallis, L. R. 2, C. P. D. 45, 25 W. R. 287, A. C.; and see Deykin *v.* Coleman, 25 W. R. 294, A. C.

(*h*) Hallum *v.* Hill, 24 W. R., 956; Crom *v.* Samuel, L. R. 2, C. P. D. 21, 24 W. R. 45, 21 Sol. Jour. 29.

Order 54.

tions), be qualified and liable to serve upon all such common juries and special juries, respectively, as shall be empannelled to try any issue or issues which may come on for trial before the High Court, or any Judge thereof, during the period for which such jurors shall have been summoned and returned, other than and except issues for the trial of which a special jury shall have been ordered to be struck by the proper officer under the 34 & 35 Vic., c. 65, s. 33.

Except as to special juries specially struck under old practice.

Order LV.

Security for Costs.

Order 55.

Amount to be fixed by Chief Clerk or Master.

Ord. 55, R. Feb., 1876, E.

In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form, as the Chief Clerk in actions assigned to the Chancery Division and the Master in actions assigned to the Queen's Bench, Common Pleas, and Exchequer Divisions, shall direct.

This rule assimilates the practice in all divisions to that which prevailed in the Common Law Courts, requiring a plaintiff out of the jurisdiction to give not a nominal but substantial amount of security,(*a*) and further security may be demanded as the suit proceeds.(*b*) But the rule cannot be extended to defendants or third parties.(*c*) See 31 & 32 Vic., c. 54, Judgments Extension Act, under which security for costs cannot now be required from a plaintiff or petitioner resident in Scotland or England in actions at law,(*d*) and it would seem neither in actions in the Chancery Division now, but *semble* as to *matters* not being actions.(*e*)

Order LVI.

Notices and Paper, &c.

Order 56.

Rule 1.

Notices in writing or in print.

Ord. 56, R. 1, E.

1. All notices required by these Rules shall be in writing or in print, or partly in writing and partly in print, unless expressly authorized by a Court or Judge to be given orally.

(*a*) Republic of Costa Rica *v.* Erlanger, L. R., 3 Chan. D., 62; 24 W. R., 955, A. C. overruling S. C., 24 W. R. 880, V. C. M.

(*b*) *Ib.* But see Paxton *v.* Bell, W. N., 1876, 221, 24 W. R. 1013.

(*c*) *In re* Percy *v.* Kelly, Nickel and Iron Co., L. R. 2 Chan. D. 531, 24 W. R. 1057, M. R.

(*d*) Raeburn *v.* Andrews, L. R., 9 Q. B., 119.

(*e*) *In re* East Llangynog Lead Mining Co., W. N., 1875, p. 81, M. R.

Order 56.

Rule 2.

2. All pleadings, affidavits, orders, accounts, notices, and other documents required to be printed, or partly written and partly printed, or to be filed in any of the Offices or Chambers of the Supreme Court of Judicature (Ireland), other than Receivers' accounts, shall be written or printed on cream-wove machine-drawing foolscap folio paper, 18 lbs. per mill ream, with an inner margin three-quarters of an inch wide, and an outer margin of two inches and a half wide; and such of the said documents as shall be printed in whole or in part shall be so printed in pica type leaded. Such of the said documents as shall be in manuscript shall be written on paper of the like description, and shall be ruled with twenty-seven lines on each page, and the complement to be written thereon shall be three folios of seventy-two words in each page. And for the purpose of all attested or office copies of any such pleadings or documents, the paper so described shall be ruled in like manner with twenty-seven lines on each page, and the complement to be written thereon shall be three folios of seventy-two words in each page.

Prints on special paper with margin.

Manuscript paper.

Attested copies.

Ord. 56, R. 2, E.

Even though an action be undefended a statement of claim in the Chancery Division exceeding 10 folios must be printed as required by Ord. xviii., Rule 2, *ante*, and it has been held that this order does not allow the Judge to dispense with it.(*f*)

Rule 3.

3. Any affidavit may be sworn to, whether it be in print or in manuscript, or partly in print and partly in manuscript.

Affidavits sworn to in print or manuscript.

Order LVII.

Time.

Order 57.

Rule 1.

1. Where by these Rules or by any judgment or order given or made after the commencement of the Act, time for doing any act or taking any proceeding is limited by months, not expressed to be lunar months, such time shall be computed by calendar months.

Months to be calendar months.

Ord. 51, R. 1, E.

See 253 G. O., 31 Oct., 1867, Chancery.

Rule 2.

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.

Days less than six, Sunday, &c., excluded.

Ord. 51. R. 2, E.

See 254 G. O., 31 Oct., 1867, Chancery, which after the words "Good Friday" added, "and other days on which the offices are closed."

(*f*) Attorney-General *v.* Moas, 21 Sol. Jour., 631, Fry, J.

Order 57.

RULE 3. When last day or holiday act may be done on next day.

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.

See as to appeal from Chambers.(*g*) As to appeal from Court of Bankruptcy.(*h*)

See Com. Law Pro. Act (Ire.), 1853, s. 232, and 255 G. O., 31 Oct., 1867, Chancery.(*i*)

See 252 G. O., 31 Oct., 1867, Chancery, as to excluding the first day; and see as to time limited by Act of Parliament.(*k*)

RULE 4. Long Vacation—no pleading to be delivered. Ord. 51, R. 4, E.

4. No pleadings shall be amended or delivered in the long vacation, unless directed by a Court or a Judge.

RULE 5. Long Vacation not reckoned for filing or amending pleadings, &c. Ord. 51, R. 5, E.

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 a Court or a Judge.

See 258 G. O., 31 Oct., 1867, Chancery.

Other vacations were included in 256 G. O., 31 Oct., 1867, Chancery.

Com. Law Pro. Act (Ire.), 1853, s. 192.(*l*)

RULE 6. Time enlarged or abridged even after full time expired. Ord. 51, R. 6, E.

6. A 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.

See 250 G. O., 31 Oct., 1867, Chancery.

As to enlarging time to appeal, see (*m*) Chap. LVIII., R. *infra*, to set aside a judgment obtained through negligence and omission of solicitor not communicated to client.(*n*)

(*g*) Taylor *v.* Jones, L. R., 1 C. P. D., 87; 20 Sol. Jour., 92.

(*h*) *In re* Gilbert, L. R. 4, Chan. D., 794; 25 W. R., 364.

(*i*) See White *v.* Tyrrell, 5 Ir. Com. Law Rep. 278, C. P.

(*k*) Ammerman *v.* Digges, 12 Ir. Com. Law Rep. App. 1, Ex.

(*l*) See M'Kenney *v.* Reynolds, 6 Ir. Com. Law Rep. 133, Ex.

(*m*) Purnell *v.* Great Western Ry. Cy., 24 W. R., 720; 20 Sol. Jour. 585, A. C.

(*n*) Michell *v.* Wilson, 25 W. R., 380.

Order LVIII.

Order 58.

Appeals.

Schedule Rules.

33. 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 such 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.

Appeals by way of rehearing. On notice in a summary way. Ord. 58, R. 2, E.

See (559) p. 415, *ante*.

As to appeal from part of an order or decree, see (549) p. 408, *ante*.

34. 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 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 seem just, 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 to the Court of Appeal may seem fit.

Notice of appeal. Service of. Ord. 58, R. 3, E.

See (555) p. 411, *ante*.

35. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Court of First Instance, 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. 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. The Court of Appeal

Powers of Court of Appeal.

Evidence.

Order 53.

Judgment.
Ord. 58, R. 5, E.

shall have power 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. The powers aforesaid 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. 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 seem just.

See (561 and 562) p. 418, as to evidence.
(563) p. 420, as to amendment.

Respondent's notice.
Ord. 58, R. 6.

36. It shall 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 shall, within such time as is by these Rules prescribed, 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.

See (556) p. 412, *ante*.

Rules of Court.

Rule 1.
Bills of exceptions and error abolished.
Ord. 58, R. 1, E.

1. Bills of exceptions and proceedings in error except as otherwise provided by the Act shall be abolished.

Though formal bills of exceptions are abolished the actual right to take an exception is carefully preserved by the J. A., 1877, s. 48, § 3. See Chap. liv. (522), p. 396, *ante*.

As to appeals generally, see Chap. lvii., p. 404, *ante*.

If appellant does not appear when called on, the appeal will be dismissed with costs.(*p*)

Rule 2.
Fourteen and four days' notice of appeal.
Ord. 58, R. 4, E.

2. Notice of appeal from any judgment, whether final or interlocutory, shall be a fourteen days notice, and notice of appeal from any interlocutory order shall be a four days notice.

See (554) p. 411, *ante*.

Rule 3.
Eight and two days, when by respondent.
Ord. 58, R. 7, E.

3. Subject to any special order which may be made, notice of appeal by a respondent under the 36th Rule in the schedule to the Act shall in the case of any appeal from a final judgment be an eight days notice, and in

(*p*) *Ex parte* Lows, W. N., 1877, 26 W. R., 229; 255, A. C.

the case of an appeal from an interlocutory order a two days notice. Order 58

See (556) p. 412, *ante*.

4. 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. Rule 4. Documents lodged on entering appeal. Listing. Ord. 58, R. 8, E.

See (557) *ante*, p. 413.

5. 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 11 of this Order. Rule 5. Time for appeal in statutory matter and bankruptcy, 21 days. Ord. 58, R. 9, E.

See (550) p. 408, *ante*.

6. 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 Appeal Court may allow. Rule 6. Four days from refusal of an order *ex parte*. Ord. 58, R. 10, E.

See (552) p. 409, *ante*.

7. When any question of fact is involved in an appeal, the 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: Rule 7. Evidence on questions of fact.

(*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. Prints of affidavits printed.

(*b.*) As to any evidence given orally, by the production of a copy of the Judge's notes, or, where the appeal is from the Master of the Rolls or the Vice-Chancellor, the notes of the Clerk in Court, or such other materials as the Court may deem expedient. Notes of Judge or Clerk in Court. Ord. 58, R. 11, E.

See (560) p. 416, *ante*.

Order 58.

RULE 8. Printing evidence for appeal. Ord. 58, R. 12, E.

8. 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.

See (560), p. 417, *ante*; (566), p. 421.

RULE 9. Evidence of ruling or direction of Judge. Ord. 58, R. 13, E.

9. 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.

See (560), p. 417, *ante*.

RULE 10. Appeal not hindered by interlocutory order. Ord. 58, R. 14, E.

10. 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 seem just.

See (567), p. 422, *ante*.

RULE 11. Time for appeal, 21 days from interlocutory, one year from final order. Deposit when directed. Ord. 58, R. 15, E.

11. No appeal from any interlocutory order 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 by such leave, be brought after the expiration of one year. The said respective periods shall be calculated 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.

See (550), p. 408, *ante*. An appeal from an interlocutory judgment or demurrer has twelve months.(*a*)

As to deposit, see (558), p. 413.

RULE 12. Appeal no stay of execution. Ord. 58, R. 16, E.

12. 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 so order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct.

See (568), p. 422, *ante*.

RULE 13. Application to a Judge

13. Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal,

(*a*) Dwyer Esmonde, 28th Jan., 1878, A. C. (Ire.)

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. Order 58. or Court of Appeal. Ord. 58, R. 17, E.

See (569), p. 424, *ante*.

14. Every application to a Judge of the Court of Appeal shall be by motion, and the provisions of Order LII. shall apply thereto. Rule 14. Application by motion. Ord. 58, R. 18, E.

Order LIX.

Effect of Non-compliance. Order 59.

Non-compliance with any of these Rules shall not render the proceedings in any action void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit. Irregularities, how dealt with. Ord. 59, E.

See Chan. (Ire.) Act, 1867, s. 164; and 179 G. O., 1854, Com. Law, as to prompt application to take advantage of any irregularity.

Order LX.

Sittings and Vacations. Order 60.

1. The sittings of the Court of Appeal and the sittings in Dublin of the High Court of Justice shall be four in every year, viz., the Michaelmas sittings, the Hilary sittings, the Easter sittings, and the Trinity sittings. Rule 1. Four sittings, periods of. Ord. 61, R. 1, E.

The Michaelmas sittings shall commence on the 2nd of November and terminate on the 21st of December; the Hilary sittings shall commence on the 11th of January and terminate on the 1st of April; the Easter sittings shall commence on the 15th of April and terminate on the 18th of May; and the Trinity sittings shall commence on the 1st June and terminate on the 8th of August.

As to abolition of terms, see J. A., 1877, s. 29, p. 454, *ante*, and to their being preserved as to other matters.(*a*)

A notice of motion for a day not within the period of the sittings is bad.(*b*)

2. The vacations to be observed in the several courts and offices of the Supreme Court shall be four in every Rule 2. Four Vacations:

(*a*) And see (112), p. 97, *ante*. *In re* arbitration of College of Christ and Martin, L. R. 3, Q. B. D. 16; 25 W. R. 637, A. C.

(*b*) Daubney *v.* Shuttleworth, L. R. 1, Ex. D. 58; 24 W. R. 321.

Order 60. year, viz., the Long vacation, the Christmas vacation, the Easter vacation, and the Whitsun vacation.

Long vacation. The Long vacation shall commence on the 10th of August and terminate on the 24th of October.

Christmas. The Christmas vacation shall commence on the 24th of December and terminate on the 6th of January.

Easter. Whitsuntide. The Easter vacation shall commence on Good Friday and terminate on Easter Tuesday, and the Whitsun vacation shall commence on the Saturday before Whitsunday and shall terminate on the Tuesday after Whitsunday.

Ord. 61, R. 2, E.

Rule 3. Days inclusive. 3. The days of the commencement and termination of each sitting and vacation shall be included in such sitting and vacation respectively.

Ord. 61, R. 3, E.

Rule 4. Offices open. 4. The several offices of the Supreme Court shall be open on every day of the year, except Sundays, Good Friday, Saturday before Easter, Monday and Tuesday in Easter week, Whit Monday and Tuesday, Christmas Day, and the seven next following days, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving.

Ord. 61, R. 4, E.

Rule 5. Closed on Saturdays. 5. The offices of the Supreme Court (including the Judges' chambers) shall close on Saturdays at 2 o'clock.

Ord. 61, R. 4(A), E. The courts in England usually rise at the same hour.

Rule 6. Vacation Judge. 6. One of the Judges of the High Court shall be selected at the commencement of each long vacation for the hearing in Dublin during vacation of all such applications as may require to be immediately or promptly heard. Such Judge shall act as vacation Judge for one year from his appointment. In the absence of arrangement between the Judges, the vacation Judge shall be the Judge last appointed (whether as Judge of the said High Court or of any Court whose jurisdiction is by the Act transferred to the High Court) who has not already served as vacation Judge of any such Court, and if there shall not be a Judge for the time being of the said High Court who shall not have so served, then the vacation Judge shall be the senior Judge who has so served once only according to seniority of appointment, whether in the said High Court or such other Court as aforesaid.

Ord. 61, R. 5, E.

Lord Chancellor not included. The Lord Chancellor shall not be liable to serve as vacation Judge.

Order 60.

RULE 7. Reversing order of vacation Judge. Ord. 61, R. 6, E.

7. No order made by a vacation Judge shall be reversed or varied except by a Divisional Court or the Court of Appeal, or a Judge thereof, or the Judge who made the order. Any other Judge of the High Court may sit in vacation for any vacation Judge.

RULE 8. Business discharged in vacation. Ord. 61, R. 7, E.

8. A vacation Judge may dispose of all actions, matters, and other business of an urgent nature during any interval between the sittings of any division of the High Court to which such business may be assigned, although such interval may not be called or known as a vacation.

ORDER LXI.

Short-hand Reporting.

Order 61.

RULE 1. Application to have evidence reported.

1. Any party desiring that the evidence in a case of trial by jury shall be reported by a short-hand writer shall within four days after service of notice of trial (or within such further time as may be allowed by the Court or a Judge), apply to the Judge in whose list the case shall have been entered for trial for an order that the evidence shall be so reported, and the Judge if satisfied that it is expedient or desirable so to do, shall make an order to that effect, and appoint a short-hand writer.

See J. A., 1877, s. 61. § 2, p. 471.

RULE 2. Lodgment of sum for expenses.

2. The Judge may by the same or any other order direct such sum or sums as he shall think fit, to be lodged with the Registrar for the future payment of such short-hand writer, and in case of non-lodgment of such sum the Judge may revoke or discharge the original order.

RULE 3. Copies for Judge and parties.

3. The Judge shall have power to direct copies of the short-hand writer's transcript of the evidence or of any part thereof to be furnished to him, and to the parties respectively, within such time as he shall think fit.

RULE 4. Expenses, how borne.

4. The expenses of the short-hand writer shall be borne by the party applying for the order that the evidence shall be so reported unless the Judge shall immediately after the trial certify that in his opinion it was expedient that the evidence should have been so reported. If the Judge shall give such certificate such expenses shall be part of the costs in the cause. The fees to be paid to the short-hand writer shall be hereafter fixed by Rules of Court.

Order 62.

Applications to remit ejectments for non-payment of rent.

Order LXII.

Remitter.

The powers conferred by the 60th section of the Act, in reference to remitting ejectments for non-payment of rent to the Civil Bill Courts, shall be exercised upon such application and in the same manner as applications under the 5th section of the Common Law Procedure Act, 1870, heretofore were. *Vide* p. 49, *ante*.

Order 63.

Rule 1.

Appeals from Recorder and Chairman of Dublin to Judge of Nisi Prius.

Order LXIII.

Appeals from Recorder, and Chairman of Dublin.

1. Appeals (other than appeals under the 33 & 34 Vic., c. 46,) from decrees or dismisses of the Recorder of Dublin, and decrees, dismisses, and orders of the Chairman of the county of Dublin, shall be heard by such one of the Judges constituting the Courts for the trial of questions and issues of fact as such Judges shall arrange amongst themselves.

Rule 2.

Limit of time for, within 14 days.

2. Every such appeal shall be entered with the proper officer within fourteen days from the date of the decree, dismiss, or order complained of.

The following orders have been made in respect to these appeals:—

"Order 63, Rule 2.—Every appeal (other than appeals under the 33 & 34 Vic., c. 46) shall be entered with the proper officer within fourteen days from the date of the decree, dismiss, or order complained of.

"Further Order.—It is ordered that the Registrar of the former Consolidated Nisi Prius Court shall be the proper officer with whom to enter [actions for trial for the Hilary sittings, 1878, for the county and county of the city of Dublin, respectively, and] dockets of appeals as directed by the Rules of Court, Order 63.

"Dated this 3rd of January, 1878.

"George A. C. May, *C.J.*,
"M. Morris, *C.J.*, *C.P.*,
"C. Palles, *C.B.*"

Order 64.

Rule 1.

Orders not to apply to Probate Division (with exceptions) at present.

Order LXIV.

Limitation of Orders.

1. None of the foregoing Orders or Rules, except Order L., Rules 1 and 3, and Order LVIII., shall apply to proceedings in respect of business within the exclusive cognizance of the Court of Probate or the Court for Matrimonial Causes and Matters. The forms hitherto in use in these Courts respectively shall, in such proceedings, continue and be in use in the Probate and

Matrimonial Division, with the substitution of the words "in the High Court of Justice, Probate and Matrimonial Division" for the reference to the said Courts in the same respectively, until the 1st day of January, 1879, unless in the meantime altered by Rules of Court. Order 64.

2. None of the foregoing Orders or Rules shall apply to any of the following, viz. :— Rule 2. Not to apply otherwise.

Criminal Proceedings.

Proceedings on the Crown Side of the Queen's Bench Division.

Proceedings on the Revenue Side of the Exchequer Division.

Proceedings before the Land Judges of the Chancery Division.

Order LXV.

Interpretation of Terms. Order 65.

The provisions of the 3rd section of the Supreme Court of Judicature Act (Ireland), 1877, shall apply to these Rules. Interpretation of terms as in sec. 3, J. A.

In the construction of these Rules unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following :—

"Person" shall include a body corporate or politic : Person.

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

(*a.*) Where any duty to be discharged under the Act or these Rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same :

(*b.*) Where any new duty is under the Act or these Rules to be discharged, the proper officer to discharge the same shall be such officer, having previously discharged analogous duties, as may from time to time be directed to discharge the same, in the case of an officer of the Supreme Court, or the High Court of Justice, or the Court of Appeal, not attached to any division, by the Lord Chancellor, and in the case of an officer attached to any division, by the President of the division, and in the case of an officer attached to any Judge, by such Judge :

"The Act" shall mean the Supreme Court of Judicature Act (Ireland), 1877. Act.

FORMS.

Appendix A.

APPENDIX (A).

Part I., Form 1.

PART I.

FORMS OF WRITS OF SUMMONS, &c.

No. 1. [*Title in full.*]

187 . [*Here put the letter and number.*]

In the High Court of Justice in Ireland.

[*Insert name of Division*] Division.

County of [*When it is proposed that the action shall be tried by a Judge and Jury, insert the county or place where the Cause is to be tried.*]

Between A.B. Plaintiff,

and

C.D. and E.F. Defendants.

Victoria, by the grace of God, &c.

To C.D. of in the county of and E.F. of

We command you, That within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the [*Insert name of Division*] Division of Our High Court of Justice in Ireland, in an action at the suit of A.B.; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness.—John Thomas Ball, Lord High Chancellor of Ireland, at Dublin, this day of 18 .

Memorandum to be subscribed on the writ.

This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, within six calendar months from the date of such renewal, including the day of such date, and not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor at the [*Insert the office of the Court in which the appearance is to be entered*] office at .

Indorsements to be made on the writ before issue thereof.

The plaintiff's claim is for, &c.

This writ was issued by E.F. of solicitor for the said plaintiff, who resides at , *or*, this writ was issued

by the plaintiff in person, who resides at [*Mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any*].

Indorsement to be made on the writ after service thereof.

This writ was served by X.Y. on L.M. [the defendant *or* one of the defendants], on *Monday*, the day of 18 .

(Signed) X.Y.

No. 2. Form 2.

Writ of Summons (Summary Bills of Exchange Acts).

187 . [*Here insert letter and No.*]

In the High Court of Justice in Ireland.

[*Insert Division*] Division.

County of [*Insert venue as directed for Form* 1.]

(*Notice pursuant to* 24 *&* 25 *Vic., c.* 43.)

The Defendant C.D. is hereby warned and required to take notice, that this action being brought on the bill of exchange [*or promissory note*] mentioned in the indorsement hereon, is brought under the "Summary Procedure on Bills of Exchange (Ireland) Act, 1861," and that unless within twelve days from the service hereof he shall obtain leave from a Judge of the High Court of Justice in Ireland to appear and defend the action, and shall within that time cause an appearance to be entered for him, the Plaintiff A.B. will be entitled, without any further notice whatever, to issue execution against for the sum of pounds, shillings, and pence, and the costs of this action.

Leave to appear may be obtained on an application to a Judge, supported by affidavit, showing that there is a defence to the action on the merits, or that it is reasonable that the Defendant should be allowed to appear and defend the action, or by lodging the amount claimed in Court.

Between A.B. Plaintiff,

and

C.D. Defendant.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and so forth.

To C.D. of in the county of .

We command you, That within twelve days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of Our High Court of Justice in

Forms. Appendix A. Part I., Form 2.

Ireland, in an action at the suit of A.B.; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness.—John Thomas Ball, Lord High Chancellor of Ireland, at Dublin, this day of 18 .

Memorandum to be subscribed on the writ.

This writ is to be served within (*twelve*) calendar months from the date thereof, or, if renewed, within six calendar months from the date of such renewal, including the day of such date, and not afterwards.

The defendant [*or defendants*] may appear hereto by entering an appearance [*or appearances*] either personally or by solicitor, at the [*Insert the office of the Court in which the appearance is to be entered*] office at .

Indorsements to be made on the writ before issue thereof.

The plaintiff's claim is for £ , due on foot of a bill of exchange [*or promissory note*], of which the following is a copy:—[*Set out here the bill or note in full, with the indorsements thereon*].

This writ was issued by E.F. of solicitor for the said plaintiff in person, whose registered residence is at , *or*, this writ was issued by the plaintiff in person who resides at [*Mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any*].

Indorsement to be made on the writ after service thereof.

This writ was served by X.Y. on C.D. [the defendant *or* one of the defendants], on *Monday*, the day of 18 .

(Signed) X.Y.

Form 3.

No. 3.

Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction.

187 . [*Here put the letter and number.*] In the High Court of Justice in Ireland.

Division.

Between A.B. Plaintiff,
and
C.D. and E.F. Defendants.

Victoria, by the grace of God, &c.

To C.D. of .

We command you, C.D., That within [*Here insert the*

number of days directed by the Court or Judge ordering the service or notice] after the service of this writ [*or notice of this writ, as the case may be*] on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the Division of Our High Court of Justice in an action at the suit of A.B. ; and take notice, that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence. Witness, &c.

Memoranda and Indorsements as in Form No. 1.

Indorsement to be made on the writ before the issue thereof.

N.B.—*This writ is to be used where the Defendant or all the Defendants or one or more Defendant or Defendants is or are out of the jurisdiction.*

No. 4.

Notice of Writ in lieu of service to be given out of the jurisdiction.

187 . [*Here put the letter and number.*]

Between A.B. Plaintiff,

and

C.D., E.F., and G.H. Defendants.

To G.H. of .

Take notice, that A.B., of has commenced an action against you, G.H., in the Division of Her Majesty's High Court of Justice in Ireland, by writ of that Court, dated the day of , A.D. 18 ; which writ is indorsed as follows [*copy in full the indorsements*], and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action ; and in default of your so doing, the said A.B. may proceed therein, and judgment may be given in your absence.

You may appear to the said writ by entering an appearance personally or by your solicitor at the [ ] office at .

(Signed) A.B. of &c.

or

X.Y. of &c.

Solicitor for A.B.

In the High Court of Justice in Ireland.

Division.

Forms.

Appendix A.

Part I., Form 5.

No. 5.

Form of Memorandum for Renewed Writ.

In the High Court of Justice in Ireland.

Division.

Between A.B., Plaintiff,

and

C.D., Defendant.

Seal renewed writ of summons in this action indorsed as follows :—

[*Copy original writ and the indorsements.*]

Form 6.

No. 6.

Memorandum of Appearance.

187 . [*Here put the letter and number.*]

High Court of Justice in Ireland.

[*Chancery*] Division.

A.B. v. C.D., and others.

Enter an appearance for in this action.

Dated this day of

X.Y.,

Solicitor for the Defendant.

The registered address of X.Y. is

or [C.D.,

Defendant in person.

The address of C.D. is

His address for service is .]

The said defendant requires [*or*, does not require] a statement of complaint to be filed and delivered.

Form 7.

No. 7.

Notice to limit Defence as required by Order XI., 9.

[*Here put the letter and number.*]

In the High Court of Justice in Ireland.

Queen's Bench (*or* Chancery, C.P., *or, &c.*) Division.

Between A. B., Plaintiff,

and

C.D., and

E.F., Defendants.

The defendant C.D. limits his defence to part only of the property mentioned in the writ in this action, that is to say, to the close called "*the Big field*."

G.H.,

Solicitor for the said Defendant C.D.

To Mr. X.Y., Plaintiff's solicitor.

PART II.

SECTION I.

GENERAL INDORSEMENTS.

In matters assigned by the 36th Section of the Act to the Chancery Division.

1. *Creditor to administer Estate.*

The Plaintiff's claim is as a creditor of X.Y., of deceased, to have the [real and] personal estate of the said X.Y. administered. The defendant C.D. is sued as the administrator of the said X.Y. [and the defendants E.F. and G.H. as his co-heiresses-in-law].

2. *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the day of , 18 , of X.Y., deceased, to have the [real and] personal estate of the said X.Y. administered. The defendant C.D. is sued as the executor of the said X.Y. [and the defendants E.F. and G.H. as his devisees].

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership dealings between the plaintiff and defendant [under articles of partnership dated the day of], and to have the affairs of the partnership wound up.

4. *By Mortgagee.*

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the day of made between [*or by deposit of title deeds*], and that the mortgage may be enforced by foreclosure or sale.

5. *By Mortgagor.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage dated and made between [*parties*], and to redeem the property comprised therein.

6. *Raising portions.*

The plaintiff's claim is that the sum of £ , which by an indenture of settlement dated , was provided for the portions of the younger children of may be raised.

7. *Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture dated and made between , carried into execution.

Forms.

Appendix A. Part II., Sec. I.

8. *Cancellation or Rectification.*

The plaintiff's claim is to have a deed dated and made between [*parties*], set aside or rectified.

9. *Specific Performance.*

The plaintiff's claim is for specific performance of an agreement dated the day of , for the sale by the plaintiff to the defendant of certain [*freehold lands*] at .

Sec. II.

Section II.

Money claims where no Special Indorsement under Order II., Rule 3.

Goods sold. The plaintiff's claim is £ for the price of goods sold.

[*This Form shall suffice whether the claim be in respect of goods sold and delivered, or of goods bargained and sold.*]

Money lent. The plaintiff's claim is £ for money lent [*and interest*].

Several demands. The plaintiff's claim is £ whereof £ is for the price of goods sold, and £ for money lent, and £ for interest.

Rent. The plaintiff's claim is £ for arrears of rent.

Salary, &c. The plaintiff's claim is £ for arrears of salary as a clerk [*or as the case may be*].

Interest. The plaintiff's claim is £ for interest upon money lent.

General average. The plaintiff's claim is £ for a general average contribution.

Freight, &c. The plaintiff's claim is £ for freight and demurrage.

The plaintiff's claim is £ for lighterage.

Tolls. The plaintiff's claim is £ for market tolls and stallage.

Penalties. The plaintiff's claim is £ for penalties under the Statute. [. . . .]

Banker's balance. The plaintiff's claim is £ for money deposited with the defendant as a banker.

Fees, &c., as solicitors. The plaintiff's claim is £ for fees for work done [*and £ money expended*] as a solicitor.

Commission. The plaintiff's claim is £ for commission earned as [*state character as auctioneer, cotton broker, &c.*]

Medical attendance, &c. The plaintiff's claim is £ for medical attendances.

Return of premium. The plaintiff's claim is £ for a return of premiums paid upon policies of insurance.

Warehouse rent. The plaintiff's claim is £ for the warehousing of goods.

The plaintiff's claim is £ for the carriage of goods by railway. — Carriage of goods.

The plaintiff's claim is £ for the use and occupation of a house. — Use and occupation of houses.

The plaintiff's claim is £ for the hire of [*furniture*]. — Hire of goods.

The plaintiff's claim is £ for work done as a surveyor. — Work done.

The plaintiff's claim is £ for board and lodging. — Board and lodging.

The plaintiff's claim is £ for the board, lodging, and tuition of X.Y. — Schooling.

The plaintiff's claim is £ for money received by the defendant as solicitor [*or factor, or collector, or, &c.*] of the plaintiff. — Money received.

The plaintiff's claim is £ for fees received by the defendant under colour of the office of — Fees of office.

The plaintiff's claim is £ for a return of money overcharged for the carriage of goods by railway. — Money overpaid.

The plaintiff's claim is £ for a return of fees overcharged by the defendant as .

The plaintiff's claim is £ for a return of money deposited with the defendant as stakeholder. — Return of money by stakeholder.

The plaintiff's claim is £ for money intrusted to the defendant as stakeholder, and become payable to plaintiff. — Money won, from stakeholder.

The plaintiff's claim is £ for a return of money intrusted to the defendant as agent of the plaintiff. — Money intrusted to agent.

The plaintiff's claim is £ for a return of money obtained from the plaintiff by fraud. — Money obtained by fraud.

The plaintiff's claim is £ for a return of money paid to the defendant by mistake. — Money paid by mistake.

The plaintiff's claim is £ for a return of money paid to the defendant for [*work to be done left undone; or, a bill to be taken up; not taken up, or, &c.*] — Money paid for consideration which has failed.

The plaintiff's claim is £ for a return of money paid as a deposit upon shares to be allotted.

The plaintiff's claim is £ for money paid for the defendant as his surety. — Money paid by surety for defendant.

The plaintiff's claim is £ for money paid for rent due by the defendant. — Rent paid.

The plaintiff's claim is £ upon a bill of exchange accepted [*or indorsed*] for the defendant's accommodation. — Money paid on accommodation bill.

The plaintiff's claim is £ for a contribution in respect of money paid by the plaintiff as surety. — Contribution by surety.

The plaintiff's claim is £ for a contribution in respect of a joint debt of the plaintiff and the defendant, paid by the plaintiff. — By co-debtor.

Forms.

Appendix A. Part II., Sec. II.

Money paid for calls. The plaintiff's claim is £ for money paid for calls upon shares, against which the defendant was bound to indemnify the plaintiff.

Money payable under award. The plaintiff's claim is £ for money payable under an award.

Life policy. The plaintiff's claim is £ upon a policy of insurance upon the life of X.Y., deceased.

Money bond. The plaintiff's claim is £ upon a bond to secure payment of £1,000 and interest.

Foreign judgment. The plaintiff's claim is £ upon a judgment of the Court, in the [*Empire of Russia*].

Bills of exchange, &c. The plaintiff's claim is £ upon a cheque drawn by the defendant.

The plaintiff's claim is £ upon a bill of exchange accepted [*or drawn or indorsed*] by the defendant.

If the action is brought under the Bills of Exchange Acts there must be a special indorsement as in Appendix A., Part I., Form 2.

The plaintiff's claim is £ upon a promissory note made [*or indorsed*] by the defendant.

The plaintiff's claim is £ against the defendant A.B. as acceptor, and against the defendant C.D. as drawer [*or indorser*] of a bill of exchange.

Surety. The plaintiff's claim is £ against the defendant as surety for the price of [*goods sold*].

The plaintiff's claim is £ against the defendant A.B. as principal, and against the defendant C.D. as surety, for the price of goods sold [*or arrears of rent, or for money lent, or for money received by the defendant* A.B. *as traveller for the plaintiffs, or, &c.*]

Del credere agent. The plaintiff's claim is £ against the defendant as a *del credere* agent for the price of goods sold [*or as losses under a policy*].

Calls. The plaintiff's claim is £ for calls upon shares.

Waygoing crops, &c. The plaintiff's claim is £ for crop, tillage, manure [*or as the case may be*] left by the defendant as outgoing tenant of a farm.

Sec. III.

Section III.

Indorsement for Costs, &c. [*Add to the above Forms*].

And £ for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days [*or if the writ is to be served out of the jurisdiction, or notice in lieu of service allowed, insert the time for appearance limited by the order*] from the service hereof, further proceedings will be stayed.

Forms.

Section IV.

Damages and other Claims.

Appendix A. Part II., Sec. IV.

The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

Agent, &c.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [*and £ for arrears of wages*].

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [*or, &c.*] of the plaintiff [*and £ for money received as factor, &c.*]

Apprentices.

The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of X.Y. to the defendant [*or plaintiff*].

Arbitration.

The plaintiff's claim is for damages for non-compliance with the award of X.Y.

Assault, &c.

The plaintiff's claim is for damages for assault [*and false imprisonment and for malicious prosecution*].

By husband and wife.

The plaintiff's claim is for damages for assault and false imprisonment of the plaintiff C.D.

Against husband and wife.

The plaintiff's claim is for damages for assault by the defendant C.D.

Solicitor.

The plaintiff's claim is for damages for injury by the defendant's negligence as solicitor of the plaintiff.

Bailment.

The plaintiff's claim is for damages for negligence in the custody of goods [*and for wrongfully detaining the same*].

Pledge.

The plaintiff's claim is for damages for negligence in the keeping of goods pawned [*and for wrongfully detaining the same*].

Hire.

The plaintiff's claim is for damages for negligence in the custody of furniture lent on hire [*or a carriage lent*], [*and for wrongfully, &c.*]

Banker.

The plaintiff's claim is for damages for wrongfully neglecting [*or refusing*] to pay the plaintiff's cheque.

Bill.

The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

Bond.

The plaintiff's claim is upon a bond conditioned not to carry on the trade of a [ ].

Carrier.

The plaintiff's claim is for damages for refusing to carry the plaintiff's goods [*by railway*].

The plaintiff's claim is for damages for refusing to carry the plaintiff [*by railway*].

The plaintiff's claim is for damages for breach of duty in and about the [*carriage and delivery of coals by railway*].

Forms.

Appendix A. Part II., Sec. IV.

The plaintiff's claim is for damages for breach of duty in and about the [*carriage and delivery of machinery by sea*].

The plaintiff's claim is for damages for breach of charter-party of ship [*Mary*].

Charter-party.

Claim for return of goods; damages.

The plaintiff's claim is for return of [*household furniture, or, &c.*], or their value, and for damages for detaining the same.

Damages for depriving of goods.

The plaintiff's claim is for wrongfully depriving plaintiff of goods [*household furniture, &c.*]

Defamation.

The plaintiff's claim is for damages for libel.

The plaintiff's claim is for damages for slander.

Distress. Replevin.

The plaintiff's claim is in replevin for goods wrongfully distrained.

Wrongful distress.

The plaintiff's claim is for damages for improperly distraining.

[*This Form shall 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.*]

Recovery of Land (*a*).

Ejectment.

The plaintiff's claim is to recover possession of [*a house, No.] in street* [*or of a farm called Blackacre*], situate in the barony of in the county of

To establish title and recover rents.

The plaintiff's claim is to establish his title to [*here describe property*], and to recover the rents thereof.

[*The two previous Forms may be combined.*]

Or (*b*).

To establish title and recover mesne profits.

The plaintiff's claim is to recover possession of [*a house, No. in street*] in the parish of [*or of a farm called Whiteacre, situate in the barony of and county of*], and the sum of £ for mesne profits of the said premises while the possession thereof has been withheld.

Dower.

The plaintiff's claim is for dower.

Fishery.

The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing.

Fraud.

The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [*or a business, or shares, or, &c.*]

The plaintiff's claim is for damages for fraudulent misrepresentation of [*the credit of* A.B.]

Guarantee.

The plaintiff's claim is for damages for breach of a contract of guarantee for A.B.

The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff [*as the defendant's agent to distrain*].

The plaintiff's claim is for a loss under a policy [*upon the ship "Royal Charter," and freight or cargo*], [*or, for return of premiums*].

[*This Form shall be sufficient whether the loss claimed be total or partial.*]

Fire insurance.

The plaintiff's claim is for a loss under a policy of fire insurance upon [*house and furniture*].

The plaintiff's claim is for damages for breach of a contract to insure [*a house*].

Landlord and tenant.

The plaintiff's claim is for damages for breach of contract [*to keep a house in repair*].

The plaintiff's claim is for damages for breaches of covenants contained in [*a lease of a farm*].

Medical man.

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's [*negligence*] as a medical man.

Mischievous animal.

The plaintiff's claim is for damages for injury by the defendant's [*dog*].

Negligence.

The plaintiff's claim is for damages for injury to the plaintiff [*or, if by husband and wife, to the plaintiff*, C. D.] by the negligent [*driving of the defendant or his servants*].

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway [*by the negligence of the defendant's servants*].

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station [*from the defective condition of the station*].

Lord Campbell's Act.

The plaintiff's claim is as executor of A.B. deceased, for damages for the death of the said A.B. [*from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants*].

Promise of marriage.

The plaintiff's claim is for damages for breach of promise of marriage.

Seduction.

The plaintiff's claim is for damages for the seduction of the plaintiff's [*daughter*].

Sale of goods.

The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

The plaintiff's claim is for damages for non-delivery [*or short delivery, or defective quality, or other breach of contract of sale*] *of cotton* [*or, &c.*]

The plaintiff's claim is for damages for breach of warranty [*of a horse*].

Sale of land.

The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] land.

Forms. *Appendix A.* Part II., Sec. IV.

The plaintiff's claim is for damages for breach of a contract to let [*or take*] a house.

The plaintiff's claim is for damages for breach of a contract *to sell* [*or purchase*] *the lease, with goodwill, fixtures, and stock in trade of a public-house.*

The plaintiff's claim is for damages for breach of covenant for title [*or for quiet enjoyment, or, &c.*] *in a conveyance of land.*

Trespass to land.

The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [*or cutting his grass, or pulling down his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river*].

Support.

The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [*or house, or mine*].

Way.

The plaintiff's claim is for damages for wrongfully obstructing a way [*public highway or a private way*].

Water-course, &c.

The plaintiff's claim is for damages for wrongfully diverting [*or obstructing, or polluting, or diverting water from*] a watercourse.

The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [*or into the plaintiff's mine*].

The plaintiff's claim is for damages for [*wrongfully obstructing the plaintiff's use of a well*].

Pasture.

The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture.

[*This Form shall be sufficient whatever the nature of the right of pasture be.*]

Light.

The plaintiff's claim is for damages for [*obstructing the access of light to plaintiff's house*].

Sporting.

The plaintiff's claim is for damages for the infringement of the plaintiff's right of sporting.

Patent.

The plaintiff's claim is for damages for the infringement of the plaintiff's patent.

Copyright.

The plaintiff's claim is for damages for the infringement of the plaintiff's copyright.

Trade mark.

The plaintiff's claim is for damages for wrongfully using [*or imitating*] the plaintiff's trade mark.

Work.

The plaintiff's claim is for damages for breach of contract to build a ship [*or to repair a house, &c.*]

The plaintiff's claim is for damages for breach of a contract [*to employ the plaintiff to build a ship, &c.*]

Nuisance.

The plaintiff's claim is for damages [*to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory, or, &c.*]

The plaintiff's claim is for damages from nuisance *by noise from the defendant's works* [*or stables, or, &c.*]

The plaintiff's claim is for damages for *loss of the plaintiff's goods* in the defendant's inn.

Inn-keeper.

Add to Indorsement :—

And for a mandamus.

Mandamus.

Add to Indorsement :—

And for an injunction.

Injunction.

Add to Indorsement where claim is to land, or to establish title or both.

And for mesne profits.

Mesne profits.

And for an account of rents or arrears of rent.

Arrears of rent.

And for breach of covenant for [*repairs*].

Breach of covenant.

Section V.

Sec. V.

Special Indorsements under Order II., Rule 3.

1. The plaintiff's claim is for the price of goods sold. The following are the particulars :—

	£	s.	d.
1873—31st December—			
Balance of account for *butcher's meat* to this date, . . .	35	10	0
1874—1st January to 31st March—			
Butcher's meat supplied, . .	74	5	0
	109	15	0
1874—1st February.—Paid, . .	45	0	0
Balance due, . .	64	15	0

2. The plaintiff's claim is against the defendant A.B. as principal and against the defendant C.D. as surety, for the price of goods sold to A.B. The following are the particulars :—

1874—2nd February. Guarantee by C.D. of the price of woollen goods, to be supplied to A.B.

	£	s.	d.
2nd February—To goods, .	47	15	0
3rd March—To goods, .	105	14	0
17th March—To goods, .	14	12	0
5th April—To goods, . .	34	0	0
	202	1	0

3. The plaintiff's claim is against the defendant, as

Forms. *Appendix A.* Part II., Sec. V.

maker of a promissory note. The following are the particulars:—

Promissory note for £250, dated 1st January, 1874, made by defendant, payable four months after date.

Principal, ...	£250
Interest, ...	

4. The plaintiff's claim is against the defendant A.B. as acceptor, and against the defendant C.D. as drawer, of a bill of exchange. The following are the particulars:—

Bill of exchange for £500, dated 1st January, 1874, drawn by defendant C.D. upon and accepted by defendant A.B., payable three months after date.

Principal, ...	£500
Interest, ...	

5. The plaintiff's claim is for principal and interest due upon a bond. The following are the particulars:—

Bond dated 1st January, 1873. Condition for payment of £100 on the 26th December, 1873.

Principal due, ...	£50
Interest, ...	

6. The plaintiff's claim is for principal and interest due under a covenant. The following are the particulars:—

Deed dated covenant to pay £100 and interest.

Principal due, ...	£80
Interest, ...	

Sec. VI.

Section VI.

Indorsements of Character of Parties.

Executors.

The plaintiff's claim is as executor [*or administrator*] of C.D., deceased, for, *&c.*

The plaintiff's claim is against the defendant A.B., as executor [*or, &c.,*] of C.D., deceased, for, *&c.*

The plaintiff's claim is against the defendant A.B., as executor of X.Y., deceased, and against the defendant C.D., in his personal capacity, for, *&c.*

By husband and wife, executrix.

The claim of the plaintiff C.D., is as executrix of X.Y., deceased, and the claim of the plaintiff A.B. as her husband, for

Against husband and wife, executrix.

The claim of the plaintiff is against the defendant C.D., as executrix of the defendant C.D., deceased, and against the defendant A.B., as her husband, for

Forms.

Appendix A.

Part II., Sec. VI.

The plaintiff's claim is as trustee under the bankruptcy of A.B., for

The plaintiff's claim is against the defendant as trustee under the bankruptcy of A.B., for

Trustee in bankruptcy. Trustees.

The plaintiff's claim is as [*or the plaintiff's claim is against the defendant as*] trustee under the will of A.B. [*or under the settlement upon the marriage of* A.B. *and* X.Y., *his wife*].

Public officer.

The plaintiff's claim is as public officer of the Bank, for

The plaintiff's claim is against the defendant as public officer of the Bank, for

The plaintiff's claim is against the defendant A.B. as principal, and against the defendant C.D. as public officer of the Bank, as surety, for

Heir and devisee.

The plaintiff's claim is against the defendant as heir-at-law of A.B., deceased.

The plaintiff's claim is against the defendant C.D. as heir-at-law, and against the defendant E.F. as devisee of lands under the will of A.B.

The plaintiff's claim is as well for the Queen as for himself, for

---

APPENDIX (B.)

Appendix B.

Form 1.

Form 1.

Notice by Defendant to Third Party.

187 . [*Here put the letter and number.*]

Notice filed 187 .

In the High Court of Justice in Ireland.

Queen's Bench Division.

Between A.B., plaintiff,
and
C.D., defendant.

To Mr. X.Y.

Take notice, that this action has been brought by the plaintiff against the defendant [as surety for M.N. upon a bond conditioned for payment of £2,000 and interest to the plaintiff.

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are [his co-surety under the said bond, *or*, also surety

Forms.
Appendix B.
Form 1.

for the said M.N. in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of , A.D.]]

Or [as acceptor of a bill of exchange for £500, dated the day of , A.D. , drawn by you before and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.]

Or [to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal.

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.]

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant C.D., you must cause an appearance to be entered for you within eight days after service of this notice.

In default of your so appearing, you will not be entitled in any future proceeding between the defendant C.D. and yourself to dispute the validity of the judgment in this action, whether obtained by consent or otherwise.

(Signed) E.T.

Or,

X.Y.,

Solicitor for the defendant,

E.T.

Appearance to be entered at

Form 2.

FORM 2.

187 . [*Here put the letter and number.*]

In the High Court of Justice in Ireland.

Queen's Bench Division.

Between A.B., plaintiff,

and

C.D., defendant.

The plaintiff confesses the defence stated in the paragraph of the defendant's statement of defence [*or*, of the defendant's further statement of defence].

FORM 3. Form 3.

187 . [*Here put the letter and number.*]

In the High Court of Justice in Ireland.

Division.

Between A.B., plaintiff,

and

C.D., defendant.

The particulars of the plaintiff's complaint herein, and of the relief and remedy to which he claims to be entitled appear by the indorsement upon the writ of summons.

FORM 4. Form 4.

"To the within-named X.Y.

"Take notice that if you do not appear to the within "counter-claim of the within-named C.D. within eight "days from the service of this defence and counter-"claim upon you, you will be liable to have judgment "given against you in your absence.

"Appearances are to be entered at ."

FORM 5. Form 5.

Notice of Payment into Court.

187 . B. No.

In the High Court of Justice in Ireland.

Q.B. Division.

A.B. v. C.D.

Take notice that the Defendant has paid into Court £ , and says that that sum is enough to satisfy the plaintiff's claim [*or the plaintiff's claim for, &c.*]

To Mr. X.Y.

the Plaintiff's Solicitor.

Z.,

Defendant's Solicitor.

FORM 6. Form 6.

Acceptance of Sum paid into Court.

187 . B. No.

In the High Court of Justice in Ireland.

Q.B. Division.

A.B. v. C.D.

Take notice that the Plaintiff accepts the sum £ paid by you into Court in satisfaction of the claim in respect of which it is paid in.

Forms.
Appendix B.
Form 7.

FORM 7.

Form of Interrogatories.

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B., Plaintiff,

and

C.D., E.F., and G.H., Defendants.

Interrogatories on behalf of the above-named [*plaintiff*, or *defendant* C.D.] for the examination of the above-named [*defendants* E.F. *and* G.H., or *plaintiff*].

1. Did not, &c.
2. Has not, &c.

&c. &c. &c.

[*The defendant* E.F. *is required to answer the interrogatories numbered* .]

[*The defendant* G.H. *is required to answer the interrogatories numbered* .]

Form 8.

FORM 8.

Form of Answer to Interrogatories.

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B., Plaintiff,

and

C.D., E.F., and G.H., Defendants.

The answer of the above-named defendant E.F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E.F., make oath and say as follows:—

Form 9.

FORM 9.

Form of Affidavit as to Documents.

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B., Plaintiff,

and

C.D., Defendant.

I, the above-named defendant C.D., make oath and say as follows:—

1. I have in my possession or power the documents

relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*Here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*State when*].

6. That [*Here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power, of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

FORM 10.

Form 10.

Form of Notice to produce Documents.

In the High Court of Justice in Ireland.

Q.B. Division.

A.B. v. C.D.

Take notice, that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim*, or *defence*, or *affidavit, dated the day of* A.D.]:—

Describe documents required.

X.Y.,

Solicitor to the

To Z.,

Solicitor for

Forms.

Appendix B.

Form 11.

FORM 11.

Form of Notice to inspect Documents.

In the High Court of Justice in Ireland.

Q.B. Division.

A.B. v. C.D.

Take notice, that you can inspect the documents mentioned in your notice of the day of A.D. [*except the deed numbered in that notice*] at my office on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [*plaintiff or defendant*] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. , on the ground that [*state the ground*]:—

X. Y.,
Solicitor to the

To Z.,
Solicitor for

Form 12.

FORM 12.

Form of Notice to admit Documents.

In the High Court of Justice in Ireland.

Division.

A.B. v. C.D.

Take notice, that the plaintiff [*or defendant*] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [*or plaintiff*], his solicitor or agent, at , on , between the hours of ; and the defendant [*or plaintiff*] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To E.F., solicitor [*or agent*] for defendant [*or plaintiff*].
G.H., solicitor [*or agent*] for plaintiff [*or defendant*].

[*Here describe the documents, the manner of doing which may be as follows:*—]

Forms. *Appendix B.* Form 12.

ORIGINALS.

Description of Document.	Dates.
Deed of covenant between A.B. and C.D., first part, and E.F., second part.	January 1, 1848.
Indenture of lease from A.B. to C.D., . .	February 1, 1848.
Indenture of release from A.B., C.D., first part, &c.,	February 2, 1848.
Letter—defendant to plaintiff, ...	March 1, 1848.
Policy of insurance on goods by ship *Isabella* on voyage from Oporto to London.	December 3, 1847.
Memorandum of agreement between C.D., captain of said ship, and E.F.	January 1, 1848.
Bill of exchange for £100 at three months, drawn by A.B., on and accepted by C.D., indorsed by E.F. and G.H.	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A.B. in the parish of X.	Jan. 1, 1848.	
Letter—plaintiff to defendant.	Feb. 1, 1848,	Sent by General Post, Feb. 2, 1848.
Notice to produce papers, .	March 1, 1848,	Served March 2, 1848, on defendant's attorney by E.F., of———
Record of a judgment of the Court of Queen's Bench in an action J.S. v. J.N.	Trinity Term, 10th Vic.	
Letters Patent of King Charles II. in [ ]	Jan. 1, 1680.	

FORM 13. Form 13.

Setting down Special Case.

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B., Plaintiff,

and

C.D. and others, Defendants.

Set down for argument the special case filed in this action on the , 187 .

X.Y., Solicitor for

Forms.

Appendix B.

Form 14.

FORM 14.

Form of Notice of Trial.

In the High Court of Justice in Ireland.

Division.

A.B. v. C.D.

Take notice of trial of this action [*or of the issues in this action ordered to be tried*] by a Judge and Jury [*or as the case may be*] in the County of Kildare, [*or as the case may be*] for the day of next.

X.Y., plaintiff's Solicitor [*or as the case may be*].

Dated

To Z., defendant's Solicitor [*or as the case may be*].

Form 15.

FORM 15.

Form of Certificate of Officer after Trial by a Jury.

30th November, 1878. 187 . No.

In the High Court of Justice in Ireland.

Division.

Between A.B., Plaintiff,

and

C.D., Defendant.

I certify that this action was tried before the Honorable Mr. Justice and a special jury of the county of on the 12th and 13th days of February, 1878.

The jury found [*State findings*].

The Judge directed that judgment should be entered for the plaintiff for £ with costs of summons [*or as the case may be*].

A.B.,

[Title of Officer.]

Appendix C. Pleadings.

APPENDIX (C.)

Pleadings.

Form 1. Account stated.

No. 1.

Account Stated.

187 . B. No.

In the High Court of Justice in Ireland.

Queen's Bench Division.

Writ issued 3rd August, 1877.

Between A.B. . . . . Plaintiff,

and

E.F. . . . . Defendant.

Statement of Claim.

Claim.

1. Between the 1st of January and the 28th of

February, 1877, the plaintiff supplied to the defendant various articles of drapery; and accounts and invoices of the goods so supplied, and their prices, were from time to time furnished to the defendant, and payments on account were from time to time made by the defendant.

2. On the 28th February, 1877, a balance remained due to the plaintiff of £75 9*s*., and an account was on that day sent by the plaintiff to the defendant showing that balance.

3. On the 1st of March following, the plaintiff's collector saw the defendant at his house, and asked for payment of the said balance, and the defendant then paid him by cheque £25 on account of the same. The residue of the said balance, amounting to £50 9*s*. has never been paid.

The plaintiff claims £ .

The plaintiff proposes that this action should be tried in [*the county of Kildare*].

No. 2.

Form 2.

Administration of an Estate.

Administration of estate.

[187 . B. No. 233.]

In the High Court of Justice in Ireland.

Chancery Division.

[*Name of Judge.*]

Writ issued 22nd January, 1878.

In the matter of the estate of A.B., deceased.

Between E.F. . . . Plaintiff,

and

G.H. . . . Defendant.

Statement of Claim.

Claim.

1. A.B. of K., in the county of L., died on the 1st of July, 1875, intestate. The defendant G.H. is the administrator of A.B.

2. A.B. died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered(*a*) into possession of the real estate of A.B., and received the rents thereof. The legal estate in such real estate is outstanding in mortgagees under mortgages created by the intestate.

(*a*) Word "into" omitted in this as in the English form.

Forms.
Appendix C. Pleadings, Form 2.

3. A.B. was never married; he had one brother only, who pre-deceased him without having been married, and two sisters only, both of whom also pre-deceased him, namely, M.N. and P.Q. The plaintiff is the only child of M.N., and the defendant is the only child of P.Q.

The plaintiff claims—

1. To have the real and personal estate of A.B. administered in this Court, and for that purpose to have all proper directions given and accounts taken.
2. To have a receiver appointed of the rents of his real estate.
3. Such further or other relief as the nature of the case may require.

[187 . B. No. 233.]

In the High Court of Justice in Ireland.

Chancery Division.

[*Name of Judge.*]

In the matter of the estate of A.B., deceased.

Between E.F. . . Plaintiff,

and

G.H. . . Defendant.

Statement of Defence.

Defence.

1. The plaintiff is an illegitimate child of M.N. She was never married.

2. The intestate was not entitled to any real estate at his death. The lands of [ ] situate in [ ] were by the marriage settlement of intestate, bearing date the day of settled upon him for his life only, with remainder in the event of his not having children (which event happened), to the said M.N. and P.Q. as tenants in common in tail—with cross remainders between them—and the said M.N. died unmarried in the lifetime of P.Q.

3. The personal estate of A.B. was not sufficient for the payment of his debts, and has all been applied in payment of his funeral and testamentary expenses, and part of his debts.

Reply.

[187 . B. No. 233.]

In the High Court of Justice in Ireland.

Chancery Division.

[*Name of Judge.*]

In the matter of the estate of A.B., deceased.

Between E.F. . . Plaintiff,

and

G.H. . . Defendant.

The plaintiff joins issue with the defendant upon his defence.

No. 3. Form 3.

Administration of Estate.

[187 . B. No. 234.]

In the High Court of Justice in Ireland.

Chancery Division.

[*Name of Judge.*]

Writ issued 2nd January, 1878.

In the matter of the estate of A.B., deceased.

Between E.F. . . Plaintiff,

and

G.H. . . . Defendant.

Statement of Claim.

1. A.B. of K., in the county of L., duly made his last will, dated the 1st day of March, 1873, whereby he appointed the defendant and M.N. (who died in the testator's lifetime) executors thereof, and devised and bequeathed his real and personal estate to and to the use of his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain 21, or a daughter who should attain that age, or marry, upon trust as to his real estate for the person who would be the testator's heir-at-law, and as to his personal estate for the persons who would be the testator's next of kin if he died intestate at the time of the death of the plaintiff, and such failure of his issue, as aforesaid. Claim.

2. The testator died on the 1st day of July, 1873, and his will was proved by the defendant on the 4th of October, 1873. The plaintiff has not been married.

3. The testator was at his death entitled to real and personal estate; the defendant entered into the receipt of the rents of the real estate and got in the personal estate; he has sold some part of the real estate.

Forms.
Appendix C. Pleadings.
Form 3.

The plaintiff claims—

1. To have the real and personal estate of A.B. administrated in this court, and for that purpose to have all proper directions given and accounts taken.
2. Such further or other relief as the nature of the case may require.

[187 . B. No. 234.]

In the High Court of Justice in Ireland.
Chancery Division.
[*Name of Judge.*]
In the matter of the estate of A.B. deceased.

Between E.F. . . . . Plaintiff,
and
G.H. . . . . Defendant.

Statement of Defence.

Defence.

1. A.B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some real estate which the defendant sold, and which produced the net sum of £4,300, and the testator had some personal estate which the defendant got in and which produced the net sum of £1,204. The defendant applied the whole of the said sums and the sum of £84 which the defendant received from rents of the real estate in the payment of the funeral and testamentary expenses and some of the debts of the testator. The defendant made up his accounts and sent a copy thereof to the plaintiff on the 10th of January, 1875, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer. The defendant submits that the plaintiff ought to pay the costs of this action.

[187 . B. No. 234.]

In the High Court of Justice in Ireland.
Chancery Division.
[*Name of Judge.*]
In the matter of the estate of A.B., deceased.

Between E.F. . . . . Plaintiff,
and
G.H. . . . . Defendant.

Reply.

Reply.

The plaintiff joins issue with the defendant upon his defence.

No. 4.

Administration of Estate.

[187 . B. No. 235.]

In the High Court of Justice in Ireland.

Chancery Division.

[*Name of Judge.*]

In the matter of the estate of W.H. deceased.

Writ issued 2nd January, 1878.

Between A.B. and C. his wife, . Plaintiffs,

and

E.F. and G.H., . . . Defendants.

Statement of Claim.

Claim.

1. W.H. of H., in the county of L., duly made his last will, dated the 19th day of March, 1861, whereby he appointed the defendants the executors thereof, and bequeathed to them all his personal estate in trust, to call in, sell, and convert the same into money, and thereout to pay his debts and funeral and testamentary expenses, and to divide the ultimate surplus into three shares, and to pay one of such three shares to each of his two children, T.H. and E., the wife of E.W., and to stand possessed of the remaining third share upon trust for the children of the testator's son, J.H., in equal shares, to be divided among them when the youngest of such children should attain the age of 21 years. And the testator devised his real estates to the defendants upon trust until the youngest child of the said J. H. should attain the age of 21 years to pay one third part of the rents thereof to the said T. H., and one third part thereof to the said E. W., and to accumulate the remaining third part by way of compound interest, and so soon as the youngest child of the said J. H. should attain the age of 21 years, to sell the said real estates, and out of the proceeds of such sale to pay the sum of £1,000 to the said T. H., and to invest one moiety of the residue in manner therein mentioned, and stand possessed thereof in trust to pay the income thereof to the said E., the wife of the said E.W., during her life for her separate use, and after her death for her children, the interests of such children being contingent on their attaining the age of 21 years, and to divide the other moiety of such proceeds of sale and the accumulations of the third share of rents thereinbefore directed to be accumulated among such of the children of the said J. H. as should be then

Forms.
Appendix C. Pleadings.
Form 4.

living, and the issue of such of them as should be then dead, in equal shares per stirpes.

2. The testator died on the 25th day of April, 1873, and his said will was proved by the defendants in the month of June, 1873.

3. The testator died possessed of one third share in [*a leasehold colliery called the Paradise Colliery, and in the engines, machinery, stock in trade, book debts, and effects belonging thereto. He was also entitled to real estate, and other personal estate*].

4. The testator left T. H. and E., the wife of E. W., him surviving. J. H. had died in the testator's lifetime, leaving four children, and no more. The plaintiff C. B. is the youngest of the children of J. H., and attained the age of 21 years on the 1st of June, 1871. The other three children of J. H. died without issue in the lifetime of the testator.

5. E. W. has several children, but no child has attained the age of 21 years.

6. T. H. is the testator's heir-at-law.

7. The defendants have not called in, sold, and converted into money the whole of the testator's personal estate, but have allowed a considerable part thereof to remain outstanding; and in particular the defendants have not called in, sold, or converted into money the testator's interest in the said colliery, but have, from the death of the testator to the present time, continued to work the same in partnership with other persons interested therein. The estate of the testator has sustained considerable loss by reason of such interest not having been called in, sold, or converted into money.

8. The defendants did not upon the death of the testator sell the testator's furniture, plate, linen, and china, but allowed the testator's widow to possess herself of a great part thereof, without accounting for the same, and the same has thereby been lost to the testator's estate.

9. The defendants have not invested the share of the testator's residuary personal estate given by his will to the children of the testator's son J. H., and have not accumulated one-third of the rents and profits of his real estate as directed by the said will, but have mixed the same share and rents with their own moneys, and employed them in business on their own account.

10. The defendants have sold part of the real estates of the testator, but a considerable part thereof remains unsold.

11. A receiver ought to be appointed of the outstanding

personal estate of the testator and the rents and profits of his real estate remaining unsold.

The plaintiffs claim:—

1. That the estate of the said testator may be administered, and the trusts of his will carried into execution under the direction of the court.

2. That it may be declared that the defendants by carrying on the business of the said colliery instead of realising the same, have committed a breach of trust, and that the parties interested in the testator's estate are entitled to the value of the testator's interest in the said partnership property as it stood at the testator's death, with interest thereon, or at their election to the profits which have been made by the defendants in respect thereof since the testator's death, whichever shall be found most for their benefit.

3. That an account may be taken of the interest of the testator in the said colliery, and in the machinery, book debts, stock, and effects belonging thereto, according to the value thereof at the testator's death, and an account of all sums of money received by or by the order, or for the use of the defendants, or either of them, on account of the testator's interest in the said colliery, and that the defendants may be ordered to make good to the estate of the testator the loss arising from their not having realised the interest in the testator in the said colliery within a reasonable time after his decease.

4. That an account may be taken of all other personal estate of the testator come to the hands of the defendants, or either of them, or to the hands of any other person by their or either of their order, or for their or either of their use, or which, but for their wilful neglect or default, might have been so received; and an account of the rents and profits of the testator's real estate, and the moneys arising from the sale thereof, possessed or received by or by the order, or for the use of the defendants, or either of them.

5. That the real estate of the testator remaining unsold may be sold under the direction of the court.

6. That the defendants may be decreed, at the election of the parties interested in the testator's estate, either to pay interest at the rate of £5 per cent. per annum upon such moneys belonging to the estate of the testator as they have improperly mixed with their own moneys and employed in business on their own account, and that half-yearly rests may be made in taking such account as respects all moneys which by the said will were directed

Forms. *Appendix C. Pleadings.* Form 4.

to be accumulated, or to account for all profits by the employment in their business of the said trust money.

7. That a receiver may be appointed of the outstanding personal estate of the testator, and to receive the rents and profits of his real estate remaining unsold.

8. Such further or other relief as the nature of the case may require.

[187 . B. 235.]

In the High Court of Justice in Ireland.

Chancery Division.

[*Name of Judge.*]

Between A.B. and C. his wife . Plaintiffs,

and

E.F. and G.H. . Defendants.

Statement of Defence of the above-named Defendants.

Defence.

1. Shortly after the decease of the testator, the defendants, as his executors, possessed themselves of and converted into money the testator's personal estate, except his share in the colliery mentioned in the plaintiff's statement of claim. The money so arising were applied in payment of part of the testator's debts and funeral and testamentary expenses, but such moneys were not sufficient for the payment thereof in full.

2. The Paradise colliery was, at the testator' decease, worked by him in partnership with J.Y., and W.Y., and T.Y., both since deceased. No written articles of partnership had been entered into, and for many years the testator had not taken any part in the management of the said colliery, but it was managed exclusively by the other partners, and the defendants did not know with certainty to what share therein the testator was entitled.

3. Upon the death of the testator, the defendants endeavoured to ascertain the value of the testator's share in the colliery, but the other partners refused to give them any information. The defendants thereupon had the books of the colliery examined by a competent accountant, but they had been so carelessly kept that it was impossible to obtain from them any accurate information respecting the state of the concern; it was, however, ascertained that a considerable sum was due to the testator's estate.

4. Between the death of the testator and the beginning of the year 1874, the defendants made frequent applications to J.Y., W.Y., and T.Y. for a settlement of the

accounts of the colliery. Such applications having proved fruitless, the defendants, in January, 1874, filed their bill of complaint in the Court of Chancery against J.Y., W.Y., and T.Y., praying for an account of the partnership dealings between the testator and the defendants thereto, and that the partnership might be wound up under the direction of the Court.

5. The said T.Y. died in the year 1874, and the suit was revived against J.P. and T.S., his executors. The suit is still pending.

6. As to the Paradise colliery, the defendants have acted to the best of their judgment for the benefit of the testator's estate, and they deny being under any liability in respect of the said colliery not having been realised. They submit to act under the direction of the Court as to the further prosecution of the said suit and generally as to the realisation of the testator's interest in the said colliery.

7. With respect to the statements in the eighth paragraph of the statement of claim, the defendants say, that upon the death of the testator, they sold the whole of his furniture, linen, and china, and also all his plate, except a few silver teaspoons of very small value, which were taken possession of by his widow, and they applied the proceeds of such sale as part of the testator's personal estate, and they deny being under any liability in respect of such furniture, linen, china, and plate.

8. With respect to the statements in paragraph seven of the statement of claim, the defendants say that all moneys received by them, or either of them, on account of the testator's estate, were paid by them to their executorship account at the bank of Messrs. H. and Co., and until the sale of the testator's real estate took place as hereinafter mentioned, the balance to their credit was never greater than was necessary for the administration of the trusts of the testator's will, and they therefore were unable to make any such investment or accumulation as directed by the testator's will. No moneys belonging to the testator's estate have ever been mixed with the moneys of the defendants, or either of them, nor has any money of the testator's been employed in business since the testator's decease, except that his share in the said colliery, for the reason hereinbefore appearing, has not been got in.

9. In 1874, after the plaintiff C.B. had attained her age of twenty-one years, the defendants sold the real estate of the testator for sums amounting to £15,080, and no

Forms. Appendix C. Pleadings. Form 4.

part thereof remains unsold. They received the purchase moneys in December, 1874, and on the day of 1875, they paid such proceeds into Court to the credit of this action, with the exception of £500 retained on account of costs incurred and to be incurred by them.

[187 . B. No. 235.]

In the High Court of Justice in Ireland.
Chancery Division.
[*Name of Judge.*]

Between A.B. and C. his wife, . . Plaintiffs,
and
E.F. and G.H., . . . Defendants.

Reply.

The plaintiff joins issue with the defendants upon their defence.

Form 5.

No. 5.
Agent.

[187 . B. No. .]

In the High Court of Justice in Ireland.
Division.

Writ issued 3rd February, 1878.

Between A.B. and Company, . . Plaintiffs,
and
E.F. and Company, . . Defendants.

Statement of Claim.

Claim.

1. The plaintiffs are manufacturers of artificial manures, carrying on business at , in the county of .

2. The defendants are commission agents, carrying on business in *Dublin*.

3. In the early part of the year , the plaintiffs commenced, and down to the 187 , continued to consign to the defendants, as their agents, large quantities of their manures for sale, and the defendants sold the same, and received the price thereof, and accounted to the plaintiffs therefor.

4. No express agreement has ever been entered into between the plaintiffs and the defendants with respect to the terms of the defendants' employment as agents. The defendants have always charged the plaintiffs a commission at per cent. on all sales effected by them, which is the rate of commission ordinarily charged by del credere agents in the said trade. And the defendants, in fact,

always accounted to the plaintiffs for the price, whether they received the same from the purchasers or not.

5. The plaintiffs contend that the defendants are liable to them as del credere agents, but if not so liable are under the circumstances hereinafter mentioned liable as ordinary agents.

6. On the , the plaintiffs consigned to the defendants for sale a large quantity of goods, including tons of .

7. On or about the , the defendants sold tons of part of such goods to one G. H. for £ , at three months' credit, and delivered the same to him.

8. G. H. was not, at that time, in good credit and was in insolvent circumstances, and the defendants might, by ordinary care and diligence have ascertained the fact.

9. G. H. did not pay for the said goods, but before the expiration of the said three months for which credit had been given was adjudicated a bankrupt, and the plaintiffs have never received the said sum of £ or any part thereof.

The plaintiffs claim:—

1. Damages to the amount of £ .
2. Such further or other relief as the nature of the case may require.

The plaintiffs propose that this action should be tried in the county of [ ].

[Title as in claim, omitting date of issue of writ.]

Statement of Defence.

Defence.

1. The defendants deny that the said commission of per cent. mentioned in paragraph 4 of the claim is the rate of commission ordinarily charged by del credere agents in the said trade, and say that the same is the ordinary commission for agents other than del credere agents, and they deny that they ever accounted to the plaintiffs for the price of any goods, except after they had received the same from the purchasers.

2. The defendants deny that they were ever liable to the plaintiffs as del credere agents.

3. With respect to the eighth paragraph of the plaintiffs' statement of claim, the defendants say that at the time of the said sale to the said G.H., the said G.H. was a person in good credit. If it be true that the said G.H.

Forms. Appendix C. Pleadings. Form 5.

was then in insolvent circumstances (which the defendants do not admit), the defendants did not and had no reason to suspect the same, and could not by ordinary care or diligence have ascertained the fact.

[Title as in defence.]

Reply.

Reply.

The plaintiffs join issue upon the defendants' statement of defence.

Form 6.

No. 6.

Bill of Exchange.

187 . B. No.

Bill of exchange.

In the High Court of Justice in Ireland.
Division.

Writ issued 3rd February, 1878.

Between A.B. and C.D. . . Plaintiffs,
and
E.F. and G.H. . . Defendants.

Statement of Claim.

Claim.

1. Messrs. M.N. & Co. on the day of drew a bill of exchange upon the defendants for £ payable to the order of the said Messrs. M.N. & Co. three months after date, and the defendants accepted the same.

2. Messrs. M.N. & Co. indorsed the bill to the plaintiffs.

3. The bill became due on the , and the defendant has not paid it.

The plaintiffs claim :—

[Title.]

Statement of Defence.

Defence.

1. The bill of exchange mentioned in the statement of claim was drawn and accepted under the circumstances hereinafter stated, and except as hereinafter mentioned there never was any consideration for the acceptance or payment thereof by the defendants.

2. Shortly before the acceptance of the said bill it was agreed between the said Messrs. M.N. & Co. the drawers thereof, and the defendants, that the said Messrs. M.N. & Co. should sell and deliver to the defendants free on board ship at the port of 1,200 tons of coal during

the month of , and that the defendants should pay for the same by accepting the said Messrs. M.N. & Co.'s draft for £ at six months.

3. The said Messrs. M.N. & Co. accordingly drew upon the defendants, and the defendants accepted the bill of exchange now sued upon.

4. The defendants did all things which were necessary to entitle them to delivery by the said Messrs. M.N. & Co. of the said 1,200 tons of coal under their said contract, and the time for delivery has long since elapsed; but the said Messrs. M.N. & Co. never delivered the same, or any part thereof, but have always refused to do so, whereby the consideration for the defendants' acceptance has wholly failed.

5. The plaintiffs first received the said bill, and it was first indorsed to them after it was overdue.

6. The plaintiffs never gave any value or consideration for the said bill.

7. The plaintiffs took the said bill with notice of the facts stated in the second, third, and fourth paragraphs hereof.

[Title.]

Reply.

Reply.

1. The plaintiff joins issue upon the defendants' statement of defence.

2. The plaintiff gave value and consideration for the said bill in manner following, that is to say, on the day of , 187 , the said Messrs. M.N. & Co. were indebted to the plaintiff in about £ , the balance of an account for goods sold from time to time by him to them. On that day they ordered of the plaintiff further goods to the value of about £ , which last-mentioned goods have since been delivered by him to them. And at the time of the order for such last-mentioned goods it was agreed between Messrs. M.N. & Co. and the plaintiff, and the order was received upon the terms, that they should indorse and hand over to him the bill of exchange sued upon, together with various other securities on account of the said previous balance, and the price of the goods so ordered on that day. The said securities, including the bill sued upon, were thereupon on the same day indorsed and handed over to the plaintiff.

Forms.

Appendix C. Pleadings.

Form 7. Bill of exchange and consideration.

No. 7.

Bill of Exchange.

187 . B. No.

In the High Court of Justice in Ireland.
Division.

Writ issued 3rd February, 1878.

Between A.B. and C.D. . . . Plaintiffs,
and
E.F. and G.H. . . . Defendants.

Statement of Claim.

Claim.

1. The plaintiffs are merchants, factors, and commission agents, carrying on business in [ ]

2. The defendants are merchants and commission agents carrying on business at [ ].

3. For several years prior to the , 1875, the plaintiffs had been in the habit of consigning goods to the defendants for sale, as their agents, and the defendants had been in the habit of consigning goods to the plaintiffs for sale, as their agents; and each party always received the price of the goods sold by him for the other; and a balance was from time to time struck between the parties, and paid.

On the of , the moneys so received by the defendants for the plaintiffs, and remaining in their names, largely exceeded the moneys received by the plaintiffs for the defendants, and a balance of £ was accordingly due to the plaintiffs from the defendants.

4. On or about the , 1875, the plaintiffs sent to the defendants a statement of the accounts between them showing the said sum as the balance due to the plaintiffs from the defendants; and the defendants agreed to the said statement of accounts as correct, and to the said sum of £ as the balance due by them to the plaintiffs, and agreed to pay interest on such balance if time were given to them.

5. The defendants requested the plaintiffs to give them three months time for payment of the said sum of £ and the plaintiffs agreed to do so upon the defendants accepting the bills of exchange hereinafter mentioned.

6. The plaintiffs thereupon on the drew two bills of exchange upon the defendants, one for £ and the other for £ , both payable to the order of the plaintiffs three months after date, and the defendants accepted the bills.

The said bills became due on the , 187 , and the defendants have not paid the bills, or either of them, nor the said sum of

Form 7.

The plaintiffs claim :—

£ and interest to the date of judgment.

The plaintiffs propose that the action should be tried at [ ].

Form 8.

No. 8.

Charter-Party.

187 . B. No.

Charter-party.

In the High Court of Justice in Ireland. Division.

Writ issued 3rd January, 1878.

Between A.B. and C.D. . . . . Plaintiffs,
and
E.F. and G.H. . . . . Defendants.

Statement of Claim.

Claim.

1. The plaintiffs were, on the 1st August, 1874, the owners of the steamship "British Queen."

2. On the 1st August, 1874, the ship being then in Calcutta, a charter-party was there entered into between John Smith, the master, on behalf of himself and the owners of the said ship, of the one part, and the defendants of the other part.

3. By the said charter-party it was agreed, amongst other things, that the defendants should be entitled to the whole carrying power of the said steamship for the period of four months certain, commencing from the said 1st August, 1874, upon a voyage or voyages between Calcutta and Mauritius and back ; that the defendants should pay for such use of the said steamship to the plaintiffs' agents at Calcutta, monthly, the sum of £1,000 ; that the charter should terminate at Calcutta ; and that if at the expiration of the said period of four months the said steamship should be upon a voyage, then the defendants should pay pro ratâ for the hire of the ship up to her arrival at Calcutta, and the complete discharge of her cargo there.

4. The "British Queen" made several voyages in pursuance of the said charter-party, and the first three monthly sums of £1,000 each were duly paid.

5. The period of four months expired on the 1st December, 1874, and at that time the steamship was on a

Forms. *Appendix C. Pleadings.* Form 8.

voyage from Mauritius to Calcutta. She arrived at Calcutta on the 13th December, and the discharge of her cargo there was completed on the 16th December, 1874.

6. The plaintiffs' agents at Calcutta called upon the defendants to pay to them the fourth monthly sum of £1,000, and a sum of £500 for the hire of the steamship from the 1st to the 16th December, 1874, but the defendants have not paid any part of the said sums.

The plaintiffs claim :—

The sum of £1,500, and interest upon £1,000, part thereof, from the 1st December, 1874, until judgment.

The plaintiffs propose that this action should be tried in Dublin.

[Title.]

Statement of Defence.

Defence.

1. By the charter-party sued upon it was expressly provided that if any accident should happen to, or any repairs should become necessary to the engines or boilers of the said steamship, the time occupied in repairs should be deducted from the period of the said charter, and a proportionate reduction in the charter money should be made.

2. On the repairs became necessary to the engines and boilers of the steamship, and ten days were occupied in effecting such repairs.

3. On the an accident happened to the engines of the steamship at Mauritius, and two days were occupied in effecting the repairs necessary in consequence thereof.

4. The defendants are therefore entitled to a reduction in the charter money of £400.

Counter-claim.

By way of set-off and counter-claim the defendants claim as follows :—

5. By the charter-party it was expressly provided that the charterers should furnish funds for the steamship's necessary disbursements, except in the port of Calcutta, without any commission or interest on any sum so advanced.

6. The defendants paid for the necessary disbursements of the ship in the port of Mauritius between the and the 1874, sums amounting in all to £625 14*s.* 6*d.*

7. The charter-party also contained an express warranty that the steamship was at the date thereof capable of

steaming nine knots an hour on a consumption of 30 tons of coal a day, and it was further provided by the charter-party that the charterers should provide coal for the use of the said steamship.

8. The steamship was at the date of the charter-party only capable of steaming less than eight knots to an hour, and that only on a consumption of more than 35 tons of coal a day.

9. In consequence of the matters mentioned in the last paragraph, the steamship finally arrived at Calcutta at least 15 days later, and remained under charter at least 15 days longer than she would otherwise have done. She was also during the whole period of the said charter at sea for a much larger number of days than she would otherwise have been, and consumed a much larger quantity of coal on each of such days than she would otherwise have done, whereby the defendants were obliged to provide for the use of the steamship much larger quantities of coal than they would otherwise have been.

The defendants claim :—

£ damages in respect of the matters stated in this set-off and counter-claim.

[Title.]

Reply.

Reply.

1. The plaintiff joins issue upon the second, third, and fourth paragraphs of the defendants' statement of defence.

2. With respect to the alleged set-off stated in paragraph 6 the plaintiff does not admit the correctness of the amount therein stated. And all sums advanced by them for disbursements were paid or allowed to them by the plaintiffs by deducting the amount thereof from the third monthly sum of £1,000 paid (subject to such deduction) to the plaintiffs' agents at Calcutta by the defendant on or about the 12th November, 1878.

3. With respect to the alleged breach of warranty and the alleged damages therefrom stated in the 7th, 8th, and 9th paragraphs, the plaintiffs say that the steamship was at the date of the charter-party capable of steaming nine knots an hour on a consumption of 30 tons of coal a day. If the steamship did not, during the said charter, steam more than eight knots an hour, and that on a consumption of more than 35 tons a day, as alleged (which the plaintiffs do not admit), it was in consequence of the

Forms. bad and unfit quality of the coals provided by the defen-
Appendix C. dants for the ship's use.
Pleadings.

[Title.]

Form 8. *Joinder of issue.*

Rejoinder. The defendants join issue upon the plaintiffs' reply to their set-off and counter-claim.

Form 9. No. 9.

False Imprisonment.

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Writ issued 3rd January, 1878.

Between A.B., . . . Plaintiff.

and

E.F., . . . Defendant.

Statement of Claim.

Claim. 1. The plaintiff is a journeyman painter. The defendant is a builder, having his building yard, and carrying on business at and for six months before and up to the 22nd August, 187 , the plaintiff was in the defendant's employment as a journeyman painter.

2. On the said 22nd August, 187 , the plaintiff came to work as usual in the defendant's yard, at about six o'clock in the morning.

3. A few minutes after the plaintiff had so come to work the defendant's foreman X.Y., who was then in the yard, called the plaintiff to him, and accused the plaintiff of having on the previous day stolen a quantity of paint, the property of the defendant, from the yard. The plaintiff denied the charge, but X.Y., gave the plaintiff into the custody of a constable, whom he had previously sent for, upon a charge of stealing paint.

4. The defendant was present at the time when the plaintiff was given into custody, and authorized and assented to his being so given into custody; and in any case X.Y., in giving him into custody, was acting within the scope and in the course of his employment as the defendant's foreman, and for the purposes of the defendant's business.

5. The plaintiff upon being so given into custody, was taken by the said constable a considerable distance through various streets, on foot, to the police station, and he was there detained in a cell till late in the same afternoon, when he was taken to the police

court, and the charge against him was heard before the magistrate then sitting there, and was dismissed.

6. In consequence of being so given into custody, the plaintiff suffered annoyance and disgrace, and loss of time and wages, and loss of credit and reputation, and was thereby unable to obtain any employment or earn any wages for three months. The plaintiff claims £ damages.

The plaintiff proposes that this action should be tried in [ ]

[Title.]

Statement of Defence.

Defence.

1. The defendant denies that he was present at the time when the plaintiff was given into custody, or that he in any way authorized or assented to his being given into custody. And the said X.Y., in giving the plaintiff into custody, did not act within the scope or in the course of his employment as the defendant's foreman, or for the purposes of the defendant's business.

2. At some time about five or six o'clock on the being the evening before the plaintiff was given into custody, a large quantity of paint had been feloniously stolen by some person or persons from a shed upon the defendant's yard and premises.

3. At about 5.30 o'clock on the evening of the the plaintiff, who had left off work about half an hour previously, was seen coming out of the shed when no one else was in it, although his work lay in a distant part of the yard from and he had no business in or near the shed. He was then seen to go to the back of a stack of timber in another part of the yard. Shortly afterwards the paint was found to have been stolen, and it was found concealed at the back of the stack of timber behind which the plaintiff had been seen to go.

4. On the following morning, before the plaintiff was given into custody, he was asked by X.Y. what he had been in the shed and behind the stack of timber for, and he denied having been in either place. X.Y. had reasonable and probable cause for suspecting, and did suspect that the plaintiff was the person who had stolen the paint, and thereupon gave him into custody.

[Title.]

Reply.

Reply.

The plaintiff joins issue upon the defendant's statement of defence.

Forms.

Appendix C. Pleadings.

Form 10. Foreclosure.

No. 10.

Foreclosure.

187 . W. No. 672.

In the High Court of Justice in Ireland.

Chancery Division.

[*Name of Judge.*]

Writ issued 1st January, 1878.

Between R.W., ... Plaintiff,

and

O.S. and J.B. . . Defendants.

Statement of Claim.

Claim.

By an indenture dated the 25th of March, 1867, made between the defendant O.S., of the one part, and the plaintiff of the other part, the defendant O.S., in consideration of the sum of £10,000 paid to him by the plaintiff, conveyed to the plaintiff and his heirs a farm containing 398 acres, situate in the parish of B., in the county of D., with all the coal mines, seams of coal and other mines and minerals in and under the same, subject to a proviso for redemption of the same premises on payment by the defendant O.S., his heirs, executors, administrators, or assigns, to the plaintiff, his executors, administrators, or assigns, of the sum of £10,000, with interest for the same in the meantime at the rate of £4 per cent. per annum, on the 25th day of September then next.

2. By an indenture dated the 1st day of April, 1867, made between the defendant O.S. of the one part, and the defendant J.B. of the other part, the defendant O. S. conveyed to the defendant J. B. and his heirs the hereditaments comprised in the hereinbefore stated security of the plaintiff, or some parts thereof, subject to the plaintiff's said security, and subject to a proviso for redemption of the same premises on payment by the defendant O.S., his heirs, executors, administrators, or assigns, to the defendant J. B. his executors, administrators, or assigns, of the sum of £15,000, with interest for the same in the meantime at the rate of £5 per cent. per annum.

3. The whole of the said sum of £10,000, with an arrear of interest thereon, remains due to the plaintiff on his said security.

The plaintiff claims as follows :—

1. That an account may be taken of what is due to

Forms.
Appendix C. Pleadings.
Form 10.

the plaintiff for principal money and interest on his said security, and that the defendants may be decreed to pay to the plaintiff what shall be found due to him on taking such account, together with his costs of this action, by a day to be appointed by the Court, the plaintiff being ready and willing, and hereby offering, upon being paid his principal money, interests, and costs, at such appointed time, to convey the said mortgaged premises as the Court shall direct.

2. That in default of such payment the defendants may be foreclosed of the equity of redemption in the mortgaged premises.

3. Such further or other relief as the nature of the case may require.

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187 . W. 672.

In the High Court of Justice in Ireland.
Chancery Division.

[*Name of Judge.*]

Between R. W. . . . Plaintiff,
and
O. S. and J. B. . Defendants,
(by original action,)

And between the said O. S. . Plaintiff,
and
The said R. W. and J. B.,
and J. W. . . . . Defendants,
(by counter-claim.)

The Defence and Counter-claim of the above-named O. S.

Defence.

1. This defendant does not admit that the contents of the indenture of the 25th day of March 1867, in the Plaintiff's statement of complaint mentioned, are correctly stated therein.

2. The indenture of the 1st day of April 1867, in the statement of claim mentioned, was not a security for the sum of £15,000 and interest at £5 per cent. per annum, but for the sum of £14,000 only, with interest at the rate of £4 10*s.* per cent. per annum.

3. This defendant submits that under the circumstances in his counter-claim mentioned, the said indentures of the 25th day of March 1867 and the 1st day of April, 1867, did not create any effectual security upon the mines and minerals in and under the lands in the same

Forms. *Appendix C. Pleadings.* Form 10. Counter-claim.

indentures comprised, and that the same mines and minerals ought to be treated as excepted out of the said securities.

And by way of counter-claim this defendant states as follows :—

1. At the time of the execution of the indenture next herein-after stated, J. C. A. was seised in fee-simple in possession of the lands described in the said indentures, and the mines and minerals in and under the same.

2. By indenture dated the 24th of March 1860, made between the said J. C. A. of the first part, E. his wife, then E. S., spinster, of the second part, and this defendant and the above-named J. W. of the third part, being a settlement made in contemplation of the marriage, shortly after solemnized, between the said J. C. A. and his said wife, the said J. C. A. granted to this defendant and the said J. W., and their heirs, all the coal mines, beds of coal, and other the mines and minerals under the said lands, with such powers and privileges as in the now-stating indenture mentioned, for the purpose of winning, working, and getting the same mines and minerals, to hold the same premises to this defendant and the said J. W. and their heirs to the use of the said J. C. A., his heirs and assigns, till the solemnization of the said marriage, and after the solemnization thereof to the use of this defendant and the said J. W., their executors and administrators, for the terms of 500 years from the day of the date of the now-stating indenture, upon the trusts therein mentioned, being trusts for the benefit of the said J. C. A., and his wife and the children of their marriage, and from and after the expiration or other determination of the said term of 500 years, and in the meantime subject thereto, to the use of the said J. C. A., his heirs and assigns for ever.

3. By indenture dated the 12th of May, 1860, made between the said J. C. A. of the one part, and W. N. of the other part the said J. C. A. granted to the said W. N. and his heirs the said lands, except the coal mines, beds of coal, and other mines and minerals thereunder, to hold the same premises unto and to the use of the said W. N., his heirs and assigns for ever, by way of mortgage, for securing the payment to the said W. N., his executors, administrators, or assigns, of the sum of £26,000, with interest as therein mentioned.

4. On the 14th of January, 1864, the said J. C. A. was adjudicated a bankrupt, and shortly afterwards J. L. was appointed creditors' assignee of his estate.

5. Some time after the said bankruptcy, the said W. N., under a power of sale in his said mortgage deed, contracted with this defendant for the absolute sale to this defendant of the property comprised in his said security for an estate in fee simple in possession, free from incumbrances, for the sum of £26,000, and the said J. L., as such assignee as aforesaid, agreed to join in the conveyance to this defendant for the purpose of signifying his assent to such sale.

6. By indenture dated the 1st of September, 1866, made between the said W. N. of the first part, the said J. L. of the second part, the said J. C. A. of the third part, and this defendant of the fourth part, reciting the said agreement for sale, and reciting that the said J. L., being satisfied that the said sum of £26,000 was a proper price, had, with the sanction of the Court of Bankruptcy, agreed to confirm the said sale, it was witnessed that in consideration of the sum of £26,000, with the privity and approbation of the said J. L., paid by this defendant to the said W. N., he the said W. N. granted, and the said C. J. A. ratified and confirmed to this defendant and his heirs, all the hereditaments comprised in the said security of the 12th day of May, 1860, with their rights, members, and appurtenances, and all the estate, right, title, and interest of them, the said W. N. and J. C. A. therein, to hold the same premises unto and to the use of this defendant, his heirs and assigns for ever.

7. The sale to this defendant was not intended to include anything not included in the security of the 12th of May, 1860, and the said J. L. only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him; and the lastly hereinbefore stated indenture did not vest in this defendant any estate in the said mines and minerals.

8. The plaintiff and the defendant J. B. respectively had before they advanced to this defendant the moneys lent by them on their securities in the plaintiff's claim mentioned, full notice that the mines and minerals under the said lands did not belong to this defendant. This fact appeared on the abstracts of title delivered to them before the preparation of their said securities. A valuation of the property made by a surveyor was furnished to them respectively on behalf of this defendant before they agreed to advance their money on their said securities; but although the said lands are in a mineral district, the mines and minerals were omitted from such

Forms.
Appendix C. Pleadings.
Form 16.

valuation, and they respectively knew at the time of taking their said securities that the same did not include any interest in the mines and minerals.

9. At the time when the securities of the plaintiff and the defendant J. B. were respectively executed, the plaintiff and the defendant J. B. respectively had notice of the said indenture of settlement of the 24th day of March, 1860.

10. At the time when the plaintiff's security was executed, the mines and minerals under the said lands, with such powers and privileges as aforesaid, were vested in this defendant and the said J. W. for the residue of the said term of 500 years, and subject to the said term, the inheritance in the same mines, minerals powers, and privileges was vested in the said J. L. as such assignee as aforesaid.

11. The said security to the plaintiff was by mistake framed so as to purport to include the mines and minerals under the said lands, and by virtue thereof the legal estate in moiety of the said mines and minerals became and now is vested in the plaintiff for the residue of the said term of 500 years.

The defendant O. S. claims as follows:

1. That it may be declared that neither the plaintiff nor the defendant J. B. has any charge or lien upon that one undivided moiety, which in manner aforesaid became vested in the plaintiff for the residue of the said term of 500 years, of and in the mines and minerals in and under the lands mentioned in the plaintiff's said security.

2. That it may be declared that the said mines and minerals, rights and privileges, which by the said indenture of settlement were vested in the defendant O. S. and the said J. W. for the said term of 500 years, upon trust as therein mentioned, ought to be so conveyed and assured as that the same may become vested in the defendant O. S. and the said J. W. for all the residue of the said term upon the trusts of the said settlement.

3. That the said R. W. and J. W. may be decreed to execute all such assurances as may be necessary for giving effect to the declaration secondly hereinbefore prayed.

4. To have such further or other relief as the nature of the case may require.

1878. W. 672.

In the High Court of Justice in Ireland,
Chancery Division.

[*Name of Judge.*]

Between R. W., . . .	Plaintiff,
and	
O. S. and J. B., . . (by original action)	Defendants.
And between the said O. S., .	Plaintiff,
and	
The said W. R. and J. W., . (by counter-claim.)	Defendants,

The reply of the Plaintiff, R. W.

Reply.

1. The plaintiff joins issue with the defendants upon their several defences, and in reply to the statements alleged by the defendant S. O., by way of counter-claim, the plaintiff says as follows:—

1. The plaintiff does not admit the execution of any such indenture as is stated in the said counter-claim to bear date the 24th of March, 1860.

2. The plaintiff does not admit that the indenture of the 12th of May, 1860, is stated correctly in the statement of claim.

3. When the defendant O. S., in the year 1866, applied to the plaintiff to advance him the sum of £10,000, he offered to the plaintiff as a security the lands which were afterwards comprised in the indenture of the 25th of March, 1867, including the mines and minerals which he now alleges were not to form part of the security, and the plaintiff agreed to lend the said sum upon the security of the said lands, including such mines and minerals. During the negotiation for the said loan a valuation of the property to be included in the mortgage was delivered to the plaintiff on behalf of the said defendant. Such valuation included the mines and minerals; and the plaintiff consented to make the loan on the faith of such valuation. The plaintiff did not know when he took his security that it did not include any interest in the said mines and minerals; on the contrary, he believed that the entirety of such mines and minerals was to be included therein.

4. The plaintiff does not admit the contents of the indenture of the 1st of September, 1866, to be as alleged, or that it was so framed as not to include the said mines and minerals, or that it was not intended to include any-

Forms. Appendix C. Pleadings. Form 10.

thing not included in the security of the 12th of May, 1860, or that J. L., in the counter-claim named, only concurred therein to signify his approval of the said sale, and did not purport to convey any estate vested in him.

5. Save so far as the plaintiff's solicitor may have had notice by means of the abstract of title that the mines and minerals under the said lands did not belong to the defendant O. S., the plaintiff had not any notice thereof, and he does not admit that it appeared from the abstract of title that such was the case. The mines were not omitted from any valuation delivered to the plaintiff as mentioned in the counter-claim.

6. The plaintiff admits that when he took his security he was aware that there was indorsed on the deed by which the said lands were conveyed by J. C. A. in the counter-claim named a notice of a settlement of 24th March, 1860, but he had no further or other notice thereof, and though his solicitor inquired after such settlement none was ever produced.

7. The plaintiff submits that if it shall appear that no further interest in the said mines and minerals was conveyed to him by his said security than one undivided moiety of a term of 500 years therein, as alleged by the said counter-claim, such interest is effectually included in the plaintiff's said security, and that he is entitled to foreclose the same.

Form 11.

No. 11.

Fraudulent Misrepresentation.

187 . B. No.

Fraud.

In the High Court of Justice in Ireland,
Division.

Writ issued 3rd January, 1878.

Between A. B., . . . Plaintiff,
and
E. F., . . . Defendant.

Statement of Claim.

Claim.

1. In or about March, 1875, the defendant caused to be inserted in the [ ] newspaper an advertisement, in which he offered for sale the lease, fixtures, fittings, goodwill, and stock-in-trade of a baker's shop and business, and described the same as an increasing business, and doing twelve sacks a week. The advertisement directed application for particulars to be made to X. Y.

2. The plaintiff having seen the advertisement applied to X. Y., who placed him in communication with the defendant, and negotiations ensued between the plaintiff and the defendant for the sale to the plaintiff of the defendant's bakery at with the lease, fixtures, fittings, stock-in-trade, and goodwill.

3. In the course of these negotiations the defendant repeatedly stated to the plaintiff that the business was a steadily increasing business, and that it was a business of more than 12 sacks a week.

4. On the 5th of April, 1875, the plaintiff, believing the said statements of the defendant to be true, agreed to purchase the said premises from the defendant for £500, and paid to him a deposit of £200 in respect of the purchase.

5. On the 15th April the purchase was completed, an assignment of the lease executed, and the balance of the purchase-money paid. On the same day the plaintiff entered into possession.

6. The plaintiff soon afterwards discovered that at the time of the negotiations for the said purchase by him and of the said agreement, and of the completion thereof, the said business was and had long been a declining business; and at each of those times, and for a long time before, it had never been a business of more than 8 sacks a week. And the said premises were not of the value of £500, or of any saleable value whatever.

7. The defendant made the false representations hereinbefore mentioned well knowing them to be false, and fraudulently, with the intention of inducing the plaintiff to make the said purchase on the faith of them.

The plaintiff claims £ damages.

[Title.]

Statement of Defence.

Defence.

1. The defendant says that at the time when he made the representations mentioned in the third paragraph of the statement of claim and throughout the whole of the transactions between the plaintiff and defendant, and down to the completion of the purchase and the relinquishment by the defendant of the said shop and business to the plaintiff, the said business was an increasing business, and was a business of over 12 sacks a week. And the defendant denies the allegations of the sixth paragraph of the statement of claim.

2. The defendant repeatedly during the negotiations

Forms. *Appendix C. Pleadings.* Form 11.

told the plaintiff that he must not act upon any statement or representation of his, but must ascertain for himself the extent and value of the said business. And the defendant handed to the plaintiff for this purpose the whole of his books, showing fully and truthfully all the details of the said business, and from which the nature, extent, and value thereof could be fully seen, and those books were examined for that purpose by the plaintiff, and by an accountant on his behalf. And the plaintiff made the purchase in reliance upon his own judgment, and the result of his own inquiries and investigations, and not upon any statement or representation whatever of the defendant.

[Title.]

Reply.

Reply. The plaintiff joins issue upon the defendant's statement of defence.

Form 12.

No. 12.

Guarantee.

187 . B. No.

Guarantee. In the High Court of Justice,(*a*)
Division.

Writ issued 3rd January, 1878.

Between A.B. and C.D. . . . Plaintiffs,
and
E.F. and G.H. . . . Defendants.

Statement of Claim.

Claim. 1. The plaintiffs are brewers, carrying on their business at under the firm of X.Y. & Co.

2. In the month of March, 1872, M.N. was desirous of entering into the employment of the plaintiffs as a traveller and collector, and it was agreed between the plaintiffs and the defendants and M.N., that the plaintiffs should employ M.N. upon the defendant entering into the guarantee hereinafter mentioned.

3. An agreement in writing was accordingly made and entered into, on or about the 30th March, 1872, between the plaintiffs and the defendant, whereby in consideration that the plaintiffs would employ M.N. as their collector the defendant agreed that he would be answerable for the due accounting by M.N. to the plaintiffs for and the due payment over by him to the plaintiffs of all moneys which he should receive on their behalf as their collector.

(*a*) "In Ireland," omitted in authorized form.

Forms.
Appendix C. Pleadings.

4. The plaintiffs employed M.N. as their collector accordingly, and he entered upon the duties of such employment, and continued therein down to the 31st of December, 1873.

Form 12.

5. At various times between the 29th of September and the 25th of December, 1873, M.N. received on behalf of the plaintiffs and as their collector sums of money from debtors of the plaintiffs amounting in the whole to the sum of £950; and of this amount M.N. neglected to account for or pay over to the plaintiffs sums amounting in the whole to £227, and appropriated the last-mentioned sums to his own use.

6. The defendant has not paid the last-mentioned sums or any part thereof to the plaintiffs.

The plaintiffs claim :—

Form 13.

No. 13.

Recovery of Land, Rent, &c.

187 . B. No.

Landlord and tenant

In the High Court of Justice,(a)
Division.

Writ issued 3rd August, 1878.

Between A.B. . . . Plaintiff,
and
C.D. . . . Defendant.

Statement of Claim.

Claim.

1. On the day of the Plaintiff, by deed, let to the defendant a house and premises, No. 52, Street, in the city of Dublin, for a term of 21 years from the day of , at the yearly rent of £120, payable quarterly.

2. By the said deed the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved whether demanded or not, should be in arrear for 21 days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the 24th June, 187 , a quarter's rent became due and on the 29th of September, 187 , another quarter's rent became due; on the 21st October, 187 , both had been in arrear for 21 days, and both are still due.

5. On the same 21st October, 187 , the house and

(a) "In Ireland," omitted in authorized form.

Forms. *Appendix C. Pleadings.* Form 13.

premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims :—

1. Possession of the said house and premises.
2. £ for arrears of rent.
3. £ damages for the defendant's breach of his covenant to repair.
4. £ for the occupation of the house and premises from the 29th of September, 187 , to the day of recovering possession.

The plaintiff proposes that this action should be tried in the county of the city of Dublin.

Form 14.

No. 14.

Negligence.

187 . B. No.

Negligence

In the High Court of Justice in Ireland,
Division.

Writ issued 3rd January, 1878.

Between A. B., . . . Plaintiff,
and
E. F., . . . Defendant.

Statement of Claim.

Claim

1. The plaintiff is a shoemaker, carrying on business at . The defendant is a soap and candle manufacturer, of .

2. On the 23rd May, 1875, the plaintiff was walking eastward along the south side of [ ] street, in the city of Dublin, at about three o'clock in the afternoon. He was obliged to cross [ ] street, which is a street running into [ ] street at right angles on the south side. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a van of the defendant's, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning turned at a rapid and dangerous pace out of [ ] street into [ ] street. The shaft of the van struck the plaintiff and knocked him down, and he was much trampled by the horse.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in conse-

quence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits. Form 14.

The plaintiff claims £ damages.

[Title.]

Statement of Defence.

1. The defendant denies that the van was the defendant's van, or that it was under the charge or control of the defendant's servant. The van belonged to Mr. John Smith, of , a carman and contractor employed by the defendant to carry and deliver goods for him; and the persons under whose charge and control the said van was were the servants of the said Mr. John Smith. Defence.

2. The defendant does not admit that the van was turned out of [ ] street, either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the van approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the statement of claim.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence. Reply.

No. 15. Form 15.

Promissory Note.

187 . B. No.

In the High Court of Justice in Ireland. Promissory note.
Division.

Writ issued 3rd January, 1878.

Between A.B. . . . Plaintiff,
and
E.F. . . . Defendant.

Statement of Claim.

1. The defendant on the day of , made his promissory note, whereby he promised to pay to the plaintiff or his order £ three months after date. Claim.

2. The note became due on the day of , 1874, and the defendant has not paid it.

Forms. *Appendix C. Pleadings.* Form 15.

The plaintiff claims :—

The amount of the note and interest thereon to judgment.

The plaintiff proposes that this action should be tried in the county of Kildare.

[Title.]

Statement of Defence.

Defence.

1. The defendant made the note sued upon under the following circumstances :—The plaintiff and defendant had for some years been in partnership as coal merchants, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, that the defendant should take over the whole of the partnership assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership books, and inquire into the state of the partnership assets and liabilities ; and he did accordingly examine the books, and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded £10,000, and that the liabilities of the firm were under £3,000, whereas the fact was that the assets of the firm were less than £5,000 and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the last paragraph induced the defendant to make the note now sued on, and there never was any other consideration for the making of the note.

[Title.]

Reply.

Reply.

The plaintiff joins issue on the defence.

Form 16.

No. 16.

Recovery of Land and Mesne Profits.

187 . B. No.

Recovery of land. Landlord and tenant.

In the High Court of Justice in Ireland,

Common Pleas Division.

Writ issued 3rd January, 1878.

Between A.B. . . . Plaintiff,

and

C.D. . . . Defendant.

Statement of Claim.

Claim.

1. On the day of the plaintiff let to the defendant a house, No. 52 -street, in the city of

Forms.
Appendix C. Pleadings.
Form 16.

Dublin, as tenant from year to year, at the yearly rent of £120, payable quarterly, the tenancy to commence on the day of .

2. The defendant took possession of the house and continued tenant thereof until the day of last, when the tenancy determined by a notice duly given.

3. The defendant has disregarded the notice and still retains possession of the house.

The plaintiff claims :—

1. Possession of the house.

2. £ for mesne profits from the day of .

The plaintiff proposes that this action should be tried in the county of the city of Dublin.

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187 , No.

In the High Court of Justice in Ireland,
Common Pleas Division.

Between A.B. . . . Plaintiff,
and
C.D. . . . Defendant,
(by original action),

And between C.D. . . . Plaintiff,
and
A.B. . . . Defendant,
(by counter-claim).

The defence and counter-claim of the above-named C.D.

Defence.

1. Before the determination of the tenancy mentioned in the statement of claim, the plaintiff A.B., by writing, dated the day of , and signed by him, agreed to grant to the defendant C.D. a lease of the house mentioned in the statement of claim, at the yearly rent of £150, for the term of twenty-one years, commencing from the day of , when the defendant C.D.'s tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the said agreement.

Counter claim.

2. By way of counter-claim the defendant claims to have the agreement specifically performed and to have a lease granted to him accordingly, and for the purpose aforesaid, to have this action transferred to the Chancery division.

Forms.

Appendix C. Pleadings.

Form 16.

187 . No.

In the High Court of Justice in Ireland,
Chancery Division.

(Transferred by order dated day of).

Between A.B. . . . . Plaintiff,
and
C.D. . . . . Defendant,
(by original action),

And between C.D. . . . . Plaintiff,
and
A.B. . . . . Defendant,
(by counter-claim).

Reply.

The reply of the plaintiff A.B.

The plaintiff A.B. admits the agreement stated in the defendant C.D.'s statement of defence, but he refuses to grant to the defendant a lease, saying that such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant has not kept the house in good repair, and the same is now in a dilapidated condition.

[Title.]

Joinder of Issue.

The defendant C.D. joins issue upon the plaintiff A.B.'s statement in reply.

Form 17.

No. 17.

Recovery of Land and Mesne Profits.

187 . B. No.

Recovery of land

In the High Court of Justice in Ireland,
Common Pleas Division.

Writ issued 3rd August, 1876.

Between A.B. and C.D. . . Plaintiffs,
and
E.F. . . . . Defendant.

Statement of Claim.

Claim.

1. K.L., late of Naas in the county of Kildare, duly executed his last will, dated the 4th day of April, 1870, and thereby devised his lands at or near [ ], and all other his lands in the county of [ ], unto and to the use of the plaintiffs, and their heirs, upon the trusts

therein mentioned for the benefit of his daughters Margaret and Martha, and appointed the plaintiffs executors thereof.

2. K.L. died on the 3rd day of January, 1875, and his said will was proved by the plaintiffs in the Court of Probate on or about the 4th day of February, 1875.

3. K.L. was at the time of his death seised in fee of a house at [ ], and two farms near there called respectively the [ ] farm and the [ ] farm, the [ ] farm containing [ ] acres, and the [ ] farm containing [ ] acres, both in the county of [ ].

4. The defendant, soon after the death of K.L., entered into possession of the house and two farms, and has refused to give them up to the plaintiff.

The plaintiffs claim :

1. Possession of the house and two farms.

2. £ for mesne profits of the premises from the death of K.L. till such possession shall be given.

The plaintiff proposes that this action should be tried in the county of [ ].

[Title.]

Statement of Defence.

Defence.

1. The defendant is the eldest son of I.L. deceased, who was the eldest son of K.L., in the statement of claim named.

2. By articles bearing date the 31st day of May, 1827, and made previous to the marriage of K.L. with Martha, his intended wife, K.L., in consideration of such intended marriage, agreed to settle the house and two farms in the statement of claim mentioned (and of which he was then seised in fee) to the use of himself for his life, with remainder to the use of his intended wife for her life, and after the survivor's decease, to the use of the heirs of the body of the said K.L. on his wife begotten, with other remainders over.

3. The marriage soon after took effect, K.L., by deeds of lease and release, bearing date respectively the 4th and 5th of April, 1828, after reciting the articles in alleged performance of them, conveyed the house and two farms to the use of himself for his life, with remainder to the use of his wife for her life, and after the decease of the survivor of them, to the use of the heirs of the body of K.L. on the said Martha to be begotten, with other remainders over.

4. There was issue of the marriage an only son Thomas

Forms. *Appendix C. Pleadings.* Form 17.

L and two daughters. After the death of Thomas L , which took place in February, 1864, K.L. on the 3rd May, 1864, executed a disentailing assurance, which was duly enrolled and thereby conveyed the house and two farms to the use of himself in fee.

[Title.]

Reply.

Reply. The plaintiffs join issue upon the defendant's statement of defence.

Form 18.

No. 18.

Trespass.

187 . No.

Trespass to land.

In the High Court of Justice in Ireland.

Division.

Writ issued 3rd August, 1878.

Between A.B. . . . . Plaintiff,

and

E.F. . . . . Defendant.

Statement of Claim.

Claim.

1. The plaintiff was on the 5th March, 1878, and still is the owner and occupier of a farm called [ ] Farm, in the parish of and county of [ ].

2. A private road, known as Highfield Lane, runs through a portion of the plaintiff's farm. It is bounded upon both sides by fields of the plaintiff's, and is separated therefrom by a hedge and ditch.

3. For a long time prior to the 5th March, 1878, the defendant had wrongfully claimed to use the said road for his horses and carriages on the alleged ground that the same was a public highway, and the plaintiff had frequently warned him that the same was not a public highway, but the plaintiff's private road, and that the defendant must not so use it.

4. On the 5th March, 1878, the defendant came with a cart and horse, and a large number of servants and workmen, and forcibly used the road, and broke down and removed a gate which the plaintiff had caused to be placed across the same.

5. The defendant and his servants and workmen on the same occasion pulled down and damaged the plaintiff's hedge and ditch upon each side of the road, and went upon the plaintiff's field beyond the hedge and ditch, and injured the crops there growing, and dug up and injured the soil of the road; and in any case the acts mentioned

in this paragraph were wholly unnecessary for the assertion of the defendant's alleged right to use, or the user of the said road as a highway. Forms. Appendix C. Pleadings.

The plaintiff claims :— Form 18.

1. Damages for the wrongs complained of.
2. An injunction restraining the defendant from any repetition of any of the acts complained of.
3. Such further relief as the nature of the case may require.

The plaintiff proposes that this action should be tried in the county [ ].

[Title.]

Statement of Defence.

1. The defendant says that the road was and is a public highway for horses and carriages ; and a few days before the 5th March, 1878, the plaintiff wrongfully erected the gate across the road for the purpose of obstructing and preventing, and it did obstruct and prevent the use of the road as a highway. And the defendant on the said 5th March, 1878, caused the said gate to be removed, in order to enable him lawfully to use the road by his horses and carriages as a highway. Defence.

2. The defendant denies the allegations of the fifth paragraph of the statement of claim, and says that neither he nor any of his workmen or servants did any act, or use any violence other than was necessary to enable the plaintiff lawfully to use the highway.

[Title.]

Reply.

The plaintiff joins issue upon the defendant's statement of defence. Reply.

No. 19. Form 19.

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Writ issued

Between A.B. and C.D. . . Plaintiffs,

and

E.F. and G.H. . . Defendants.

Statement of Claim.

1. In the month of [ ], Messrs. L. and Company, of Alexandria, caused to be shipped 6,110 ardebs of cotton seed on board the vessel "Ida," then Claim.

Forms.
Appendix C. Pleadings.
Form 19.

lying in Port Said (Egypt), and the then master of the vessel received the same, to be carried from Port Said to Cork, upon the terms of three bills of lading, signed by the master, and delivered to Messrs. L. and Company.

2. The three bills of lading, being in form exactly similar to one another, were and are, so far as is material to the present case, in the words, letters, and figures following, that is to say:—

"Shipped in good order and well conditioned by L. & Co., Alexandria (Egypt) in and upon the good ship called the 'Ida,' whereof is master for the present voyage Ambrozio Chiapella, and now riding at anchor in the port of Port Said (Egypt) and bound for Cork, six thousand one hundred and ten ardebs cotton seed, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Cork (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats so far as ships are liable thereto excepted), unto order or to assigns paying freight for the said goods at the rate of (19*s.*) say nineteen shillings sterling in full per ton of 20 cwt. delivered with £10 gratuity. Other conditions as per charter-party, dated London, 4th October, 1876, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which three bills being accomplished the other two to stand void. Dated in Port Said [ ]. 100 dunnage mats. Fifteen working days remain for discharging."

3. The persons constituting the firm of Messrs. L. and Company are identical with the members of the plaintiffs' firm.

4. The vessel sailed on her voyage to Cork, and duly arrived there on or about the [ ] day of [ ].

5. The cotton seed was delivered to the plaintiffs but not in as good order and condition as it was in when shipped at Port Said; but was delivered to the plaintiffs greatly damaged.

6. The deterioration of the cotton seed was not occasioned by any of the perils or causes in the bills of lading excepted.

7. By reason of the premises the plaintiffs lost a great part of the value of the said cotton seed, and were put to great expense in and about keeping, warehousing, and improving the condition of the said cotton seed, and in and about having the same surveyed.

The plaintiffs claim the following relief :—

1. £ for damages.
2. Such further relief as the nature of the case requires.(a)

Form 19.

[Title.]

Statement of Defence.

Defence.

1. They deny the truth of the allegations contained in the fifth, sixth, and seventh articles of the said petition.

2. The deterioration, if any, to the cotton seed was occasioned by the character and quality of the cotton seed when shipped on board the "Ida," and by the inherent qualities of the cotton seed, and by shipping water in a severe storm which occurred on the day of in latitude during the voyage, or by some or one of such causes.

[Title.]

Reply.

Reply.

The plaintiffs join issue upon the statement of defence.

Form 20.

No. 20.

Form of Demurrer.

In the High Court of Justice in Ireland.

Division.

A.B. v. C.D.

The defendant [plaintiff] demurs to the [plaintiff's statement of complaint *or* defendant's statement of defence, *or* of set-off, *or* of counter-claim], [*or* to so much of the plaintiff's statement of complaint as claims . . . . *or* as alleges as a breach of contract the matters mentioned in paragraph 6, *or as the case may be*], and says that the same is bad in law on the ground that [*here state a ground of demurrer*] and on other grounds, sufficient in law to sustain this demurrer.

Form 1

No. 21.

Memorandum of Entry of Demurrer for Argument.

1878. B. No.

In the High Court of Justice.

Division.

A.B. v. C.D.

Enter for the argument the demurrer of to

X. Y.,

Solicitor for the plaintiff [or, &c.]

(a) No statement in the above seems to connect the defendants with the transaction.

Forms.

Appendix D.

Form 1.

APPENDIX D.

Forms of Judgment.

1. *Default of Appearance and Defence in case of Liquidated Demand.*

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. . . . Plaintiff,

and

C.D. and E.F. . . Defendants.

30th November, 1878.

The defendants [*or* the defendant C.D.] not having appeared to the writ of summons herein [*or not having delivered any statement of defence*], it is this day adjudged that the plaintiff recover against the said defendant £ , and costs, to be taxed.

Form 2.

2. *Judgment in default of Appearance in Action for Recovery of Land.*

[Title, &c.]

30th November, 1878.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

Form 3.

3. *Judgment in default of Appearance and Defence after Assessment of Damages.*

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. and C.D. . Plaintiffs,

and

E.F. and G.H. . Defendants.

30th November, 1878.

The defendants not having appeared to the writ of summons herein [*or not having delivered a statement of defence*], and a writ of inquiry dated 1878, having been issued directed to the sheriff of , or an inquiry having been instituted before the chief clerk, at Chambers, or an inquiry having been instituted before

Forms.
Appendix D.
Form 3.

the master of the said court, to assess the damages which the plaintiff was entitled to recover, and the said sheriff, chief clerk, or master, having by his return [or certificate] dated the 1878, returned or certified that the said damages have been assessed at £ it is adjudged that the plaintiff recover £ , and costs to be taxed.

---

4. *Judgment at Trial by Judge without a Jury.* Form 4.

187 . B. No.

Division.

day of 18 .

[*If in Chancery Division, name of Judge.*]

Between A.B. . . . Plaintiff,

and

C.D., E.F., and G.H., Defendants.

This action coming on for trial [the day of and] this day, before in the presence of counsel for the plaintiff and the defendants [*or, if some of the defendants do not appear*, for the plaintiff and the defendant C.D., no one appearing for the defendants E.F. and G.H., although they were duly served with notice of trial as by the affidavit of filed the day of appears,] upon hearing the probate of the will of , the answers of the defendants C.D., E.F., and G.H., to interrogatories, the admission in writing, dated and signed by [Mr. the solicitor for] the plaintiff A.B. and by [Mr. the solicitor for] the defendant C.D., the affidavit of filed the day of , the affidavit of filed the day of , the evidence of taken on their oral examination at the trial, and an exhibit marked X, being an indenture dated, &c. and made between [parties], and what was alleged by counsel on both sides: This Court doth declare, &c.

And this Court doth order and adjudge, &c.

---

5. *Judgment after Trial by a Jury.* Form 5.

[Title, &c.]

15th November, 1878.

The action having on the 12th and 13th November, 1878, been tried before the Honorable Mr. Justice and a special jury of the county of , and the jury

Forms. *Appendix D.* Form 5.

having found [*state findings as in officer's certificate*], and the said Mr. Justice having ordered that judgment be entered for the plaintiff for £ and costs of suit [*or as the case may be*]: Therefore it is adjudged that the plaintiff recover against the defendant £ and £ for his costs of suit [*or* that the plaintiff recover nothing against the defendant and that the defendant recover against the plaintiff £ for his cost of defence, *or as the case may be*].

Form 6.

6. *Judgment upon Motion for Judgment.*

[Title, &c.]

30th November, 1878.

This day before Mr. X., of counsel for the plaintiff [*or as the case may be*], moved on behalf of the said [*state judgment moved for*], and the said Mr. X. having been heard of counsel for and Mr. Y. of counsel for the Court adjudged.

Appendix E. Form 1.

APPENDIX E.

Forms of Præcipe.

1. *Fieri facias.*

1878. B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. . . . . Plaintiff,

and

C.D. and others . . . Defendants.

Seal a writ of fieri facias directed to the Sheriff of to levy against C.D. the sum of £ and interest thereon at the rate of £ per centum per annum from the day of [and £ costs] to Judgment [*or* order] dated day of .

[Taxing master's certificate, dated day of .]

X.Y.,

Solicitor for

[*party on whose behalf writ is to issue.*]

2. *Elegit.*

187 . B. No.

In the High Court of Justice in Ireland.
Division.

Between A.B. . . . . Plaintiff,
and
C.D. and others . . Defendants.

Seal a writ of elegit directed to the Sheriff of against of in the county of for not paying to A.B. the sum of £ together with interest thereon, from the day of [and the sum of £ for costs], with interest thereon at the rate of £4 per centum per annum.
Judgment [*or* order] dated day of 18 .
[Taxing master's certificate, dated day of 18 .]

X.Y.
Solicitor for

Form 3.

3. *Venditioni Exponas.*

187 . B. No.

In the High Court of Justice in Ireland.
Division.

Between A.B. . . . . Plaintiff,
and
C.D. and others . . Defendants.

Seal a writ of venditioni exponas directed to the sheriff of to sell the goods and of C.D. taken under a writ of fieri facias in this action tested day of .

X.Y.,
Solicitor for .

Form 4.

4. *Writ of Sequestration.*

187 . B. No.

In the High Court of Justice in Ireland.
Division.

Between A. B. . . . . Plaintiff,
and
C.D. and others . . Defendants.

Seal a writ of sequestration against C.D. for not at the suit of A.B. directed to [*names of sequestrator or sequestrators*].

Order dated day of

Forms.

Appendix E.

Form 5.

5. *Writ of Possession.*

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. . . . . Plaintiff,

and

C.D. and others . . Defendants.

Seal a writ of possession directed to the sheriff of to deliver possession to A.B. of

Judgment dated day of .

Form 6.

6. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. . . . . Plaintiff,

and

C.D. and others . . Defendants.

Seal a writ of delivery directed to the sheriff of to make delivery to A.B. of .

Form 7.

7. *Writ of Attachment.*

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. . . . . Plaintiff,

and

C.D. and others . . Defendants.

Seal in pursuance of order dated day of an attachment directed to the sheriff of against C.D. for not delivering to A.B.

APPENDIX F.

Forms of Writs.

1. *Writ of Fieri Facias.*

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. . . . . Plaintiff,

and

C.D. and others . . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

We command you that of the goods and chattels of C.D. in your bailiwick you cause to be made the sum of £ and also interest thereon at the rate of £ per centum per annum from the day of * which said sum of money and interest were lately before us in our High Court of Justice in a certain action [*or* certain actions, *as the case may be*] wherein A.B. is plaintiff and C.D. and others are defendants [*or* in a certain matter there depending intituled "In the matter of E.F." *as the case may be*] by a judgment [*or* order, *as the case may be*] of our said Court, bearing date the day of adjudged [*or* ordered, *as the case may be*] to be paid by the said C.D. to A.B., together with certain costs in the said judgment [*or* order, *as the case may be*] mentioned, and which costs have been taxed and allowed by one of the taxing masters of our said Court at the sum of £ as appears by the certificate of the said taxing master dated the day of And that of the goods and chattels of the said C.D. in your bailiwick you further cause to be made the said sum of £ [costs] together with interest thereon at the rate of £4 per centum per annum from the day of ,† and that you have that money and in-

* Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

† The date of the certificate of taxation. The writ *must* be so moulded as to follow the substance of the judgment or order.

Forms. terest before us in our said Court immediately after the
Appendix F. execution hereof to be paid to the said A.B. in pursuance
Form 1. of the said judgment [*or* order, *as the case may be*]. And in what manner you shall have executed this our writ make appear to us in our said Court immediately after the execution thereof. And have there then this writ.

Witness, &c.

Form 2. 2. *Writ of Venditioni Exponas.*

187 . B. No.

In the High Court of Justice.(*a*)
Division.

Between A.B., . . . Plaintiff,
and
C.D. and others . Defendants.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the sheriff of greeting.

Whereas by our writ we lately commanded you that of the goods and chattels of C.D. [*here recite the fieri facias to the end*]. And on the day of you returned to us in the Division of our High Court of Justice, aforesaid, that by virtue of the said writ to you directed you had taken goods and chattels of the said C.D., to the value of the money and interest aforesaid, which said goods and chattels remained in your hands unsold for want of buyers. Therefore, we being desirous that the said A.B. should be satisfied his money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the goods and chattels of the said C.D., by you in form aforesaid taken, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Court of Justice immediately after the execution hereof, to be paid to the said A.B. And have there then this writ.

Witness ourselves at Dublin, the day of in the year of our reign.

(*a*) "In Ireland" omitted.

Forms.
Appendix F.
Form 3.

3. *Writ of Possession.*

187 . B. No.

In the High Court of Justice in Ireland.
Division.

Between A.B. . . . Plaintiff,
and
C.D. and others . Defendants.

Victoria, to the sheriff of , greeting: Whereas lately in our High Court of Justice, by a Judgment of the Division of the same Court [A.B. recovered] *or* [E.F. was ordered to deliver to A.B.] possession of all that with the appurtenances in your bailiwick: Therefore, we command you that you omit not by any reason of any liberty of your county, but that you enter the same, and without delay you cause the said A.B. to have possession of the said land and premises with the appurtenances. And in what manner you have executed this our writ make appear to the Judges of the Division of our High Court of Justice immediately after the execution hereof, and have you there then this writ. Witness, &c.

Form 4.

4. *Writ of Delivery.*

187 . B. No.

In the High Court of Justice in Ireland,
Division.

Between A.B. . . . Plaintiff,
and
C.D. and others . Defendants.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of greeting: We command you, that without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment, for the return of which execution has been ordered to issue*], to be returned to A.B. which the said A.B. lately in our recovered against C.D. [*or* C.D. was ordered to deliver to the said A.B.] in an action in the division of our said Court. And we further command you that if the said chattels cannot be found in your bailiwick, you distrain the said C.D. by all his lands and

Forms. *Appendix F.* Form 4.

chattels in your bailiwick, so that neither the said C.D. or any one for him do lay hands on the same until the said C.D. render to the said A.B. the said chattels; and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice, immediately after the execution hereof, and have you there then this writ. Witness, &c.

The like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on Defendant's Goods the assessed Value of it.

[*Proceed as in the preceding form until the *, and then thus:*] And we further command you, that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C.D. in your bailiwick you cause to be made £ [*the assessed value of the chattels*], and in what manner you shall have executed this our writ make appear to the Judges of the Division of our High Court of Justice at Dublin, immediately after the execution hereof, and have you there then this writ. Witness, &c.

Form 5.

5. *Writ of Attachment.*

187 . B. No.

In the High Court of Justice in Ireland.

Division.

Between A.B. . . . Plaintiff,

and

C.D. and others . Defendants.

Victoria, &c.

To the sheriff of , greeting.

We command you to attach C.D. so as to have him before us in the Division of our High Court of Justice wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you. Witness, &c.

6. *Writ of Sequestration.*

187 . B. No.

In the High Court of Justice,(*a*)
Division.

Between A.B. . . . Plaintiff,
and
C.D. and others . Defendants.

Victoria, &c.

To [*names of sequestrator or sequestrators*] greeting.

Whereas lately in the Division of our High Court of Justice in a certain action there depending wherein A.B. is plaintiff and C.D. and others are defendants [*or*, in a certain matter then depending, intituled "In the matter of E.F.," *as the case may be*] by a judgment [*or* order *as the case may be*] of our said Court made in the said action [*or* matter], and bearing date the day of , 187 , it was ordered that the said C.D. should [pay into Court to the credit of the said action the sum of £ , *or, as the case may be*]. Know, therefore, that we, in confidence of your prudence and fidelity, have given and by these presents do give to you full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever of the said C.D., and to collect, receive, and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements, and real estate, but also all his goods, chattels, and personal estates whatsoever; and therefore we command you that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements, and real estates of the said C.D., and that you do collect, take, and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said C.D. shall [pay into Court to the credit of the said action the sum of £ *or, as the case may be,*] clear his contempt, or our said Court make other order to the contrary. Witness, &c.

(*a*) "In Ireland" omitted.

Forms.
Appendix G.

APPENDIX G.

No. 1.—Cause Book.

Letter and Record No.	Names of Plaintiffs' Solicitors.	Parties' Names.	Appearances and Defendants' Solicitors' Names.	Writs.		Pleadings.	Memoranda of Service.	Orders and Judgments.		Certificates.	
								Date.	Reg. Lib.		Dates.

No. 2.

Form of General Summons in Chambers by Judge.

Form of general summons in Chambers by Judge.

In Queen's Bench [or Common Pleas or Exchequer Division.]

Between Joseph Wilson, . . Plaintiff,

against

William Jackson, ... Defendant.

Let all parties concerned attend before the Judge at Chambers, at the Four Courts, Dublin, on , the day of , at of the clock, in the noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application*].

Dated this day of , 1878.

Clerk of the Rules.

This summons was taken out by Messrs. A. and B., of No. , Sackville-street, Dublin, solicitors, for

To

The following note to be added to the original summons where proceedings originate in Chambers; and when the time is altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your solicitor, at the time and place above, mentioned [*or* at the place above mentioned, and at the time mentioned in the indorsement hereon,] such order will be made, and proceedings taken, as the Judge may think just and expedient.

Court Fees.

SCHEDULE OF COURT FEES.

Order of the 26th of December, 1877.

Rule I.—The fees and per-centages contained in the first Schedule hereto are fixed and appointed to be and shall be taken in the Chancery, Queen's Bench, Common Pleas, and Exchequer Divisions of 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 Divisions or in which any business connected with any of those Divisions is conducted, and by any officer paid wholly or partly out of public moneys who is attached to any of those Divisions of the Supreme Court, or any Judge of those Divisions or any of them, and the said fees and per-centages shall be taken by stamps. The fees and per-centages contained in the second Schedule hereto are fixed and appointed to be and shall be taken in the Probate and Matrimonial Division, and in any office which is connected with that Division, or in which any business connected with it is conducted, and by any officer paid wholly or partly out of public moneys who is attached thereto, or to the Judge thereof, and the said fees and per-centages shall be taken by stamps.

Rule II.—The fees and per-centages set forth in the column headed "Lower Scale" in the Schedule hereto are to be taken and paid in all cases in which the Lower Scale of fees defined by Rule VI. of this Order are to be taken and paid; and the fees and per-centages set forth in the column headed "Higher Scale" in the Schedule hereto are to be taken and paid in all other cases.

Rule III.—In causes and matters by the 36th section of the Supreme Court of Judicature (Ireland) Act, 1877, assigned to the Chancery Division:

The solicitor or party acting in person shall, on any proceeding in which he claims to pay fees according to the Lower Scale, file with the proper officer a certificate in the form hereunto set forth, of which certificate the officer is, at the request of any solicitor or any party acting in person in the cause or matter, to mark a copy without a fee:

On production of such copy of the certificate all officers of the Court are to receive and file all proceedings in the

cause or matter bearing stamps according to the Lower Scale: Court Fees.

In any case certified for the Lower Scale of Court fees, in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the Higher Scale of solicitors' fees, the deficiency in the fees of Court is to be made good:

In any case in which the fees have been paid upon the Higher Scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the Lower Scale of solicitors' fees, the excess of fees so paid may be allowed upon the taxation of costs, if the circumstances of the case shall, in the judgment of the taxing officer, justify such allowance.

RULE IV.—The said fees and per-centages shall not be payable in respect of proceedings before the Land Judges of the Chancery Division in matters which, if said Act had not been passed, would have been within the jurisdiction of the Landed Estates Court, or in matters within the 39th section of said Act:—

RULE V.—Notwithstanding the provisions of this Order, the following fees, per-centages, or stamp duties shall remain:—

(*a.*) The existing fees, per-centages, and stamp duties in respect of any of the jurisdictions which are not by the Supreme Court of Judicature (Ireland) Act, 1877, transferred to the High Court of Justice or the Court of Appeal.

(*b.*) The existing fees and per-centages, in respect of any matter at the time of the passing of the Supreme Court of Judicature (Ireland) Act, 1877, within the jurisdiction of the Court for Matrimonial Causes and Matters, and in respect of proceedings in the District Registries of the Probate Division.

(*c.*) The existing fees and per-centages in respect of any proceedings in the Landed Estates Court, or under the Record of Title Act (Ireland), 1865.

(*d.*) The existing fees and per-centages in respect of any criminal proceedings.

(*e.*) The existing fees authorized to be taken by any Sheriffs or officers of Sheriffs, or by the criers of Judges on Circuit.

(*f.*) The existing fees and per-centages which shall become due or payable before the commencement of the Supreme Court of Judicature (Ireland) Act, 1877.

Court Fees.

(*g.*) The existing fees payable in respect of the acknowledgment of deeds by married women.

(*h.*) The existing Stamp Duties payable in the office of the Registrar of Judgments in Ireland, pursuant to the 13th and 14th Vic., cap. 74.

Rule VI.—The following regulations as to fees and per-centages shall define the Lower and the Higher Scales of Court fees, which shall be taken and paid in respect of proceedings in the Supreme Court of Judicature (Ireland):—

1. There shall be taken and paid the fees and per-centages set forth in the column headed "Lower Scale," in the first Schedule hereto:—

(*a.*) In all actions for purposes to which any of the forms of indorsement of claim on writs of summons in Part II., Sections II., IV., and V. of Appendix A, referred to in the Orders of the Supreme Court of Judicature, Ireland, of the 18th of December, 1877, or other similar forms, are applicable (except as after provided in actions for injunctions):—

(*b.*) In all causes and matters by the 36th section of the Supreme Court of Judicature Act (Ireland), 1877, assigned to the Queen's Bench Division of the Court:—

(*c.*) In all causes and matters by the 36th section of the said Act assigned to the Common Pleas Division of the Court:

(*d.*) In all causes and matters by the 36th section of the said Act assigned to the Exchequer Division of the Court.

And also in causes and matters by the 36th section of the said Act assigned to the Chancery Division of the Court in the following cases (that is to say):—

(*a.*) By creditors' legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise) heirs-at-law or next of kin, in which the personal or real or personal and real estate for or against or in respect of which, or for an account or administration of which the demand may be made, shall be under the amount or value of £700.

(*b.*) For the execution of trusts or appointment of new trustees in which the trust estate or funds shall be under the amount or value of £700.

(*c.*) For dissolution of partnership or the taking of partnership or any other accounts in which the partner-

ship assets or the estate or fund shall be under the amount or value of £700. Court Fees.

(*d.*) For foreclosure or redemption, or for enforcing any charge or lien in which the mortgage whereon the suit suit is founded, or the charge or lien sought to be enforced, shall be under the amount or value of £700.

(*e.*) And for specific performance, in which the purchase money or consideration shall be under the amount or value of £700.

(*f.*) In all proceedings under the Trustees' Relief Acts, or under the Trustees Act, or under any such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of £700.

(*g*). In all proceedings relating to the guardianship or maintenance of infants in which the property of the infant shall be under the amount or value of £700.

(*h.*) In all proceedings by original special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of £700.

2. In all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringement of rights, easements, patents and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed "Lower Scale" are hereby made applicable, there shall be taken and paid the fees and per-centages set forth in the column headed "Higher Scale" in the Schedules hereto.

3. As to any fees set forth in the first Schedule hereto and to which the "Lower Scale" and the "Higher Scale" as defined by this Order do not apply, they shall be taken and paid for and in respect of the matters expressed in said Schedule.

Rule VII.—The existing rules and practice, applicable to proceedings by persons suing in *forma pauperis* shall continue and be applicable to proceedings to which this Order relates.

Rule VIII.—Save as otherwise provided by this Order, all existing fees, per-centages, and stamp duties which may

Court Fees.

be taken in any of the Courts whose jurisdiction is by the Supreme Court of Judicature (Ireland) Act, 1877, transferred to the High Court of Justice or Court of Appeal, or in any office which is connected with any of those Courts, or in which any business connected with those Courts is conducted, or 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, shall be and are hereby abolished.

RULE IX.—A folio is to comprise seventy-two words, every figure comprised in a column being counted as one word.

RULE X.—The provisions of the third section of the Supreme Court of Judicature (Ireland), Act, 1877, and of the Orders made under the provisions of that Act shall apply to this Order.

RULE XI.—This Order shall come into operation at the time of the commencement of the Supreme Court of Judicature (Ireland) Act, 1877.

FORM of CERTIFICATE for paying LOWER SCALE of COURT FEES above referred to—

(Title of Cause or Matter.)

I hereby certify that to the best of my judgment and belief the Lower Scale of Fees of Court is applicable to this case.

Dated, &c.

A. B.,
Solicitor for Plaintiff or Defendant.

THE FIRST SCHEDULE ABOVE REFERRED TO.

[An Order or Rule herein referred to by number shall mean the Order or Rule so numbered in the Rules of the "Supreme Court of Judicature (Ireland), of the 18th of December, 1877."]

	Lower Scale.			Higher Scale.		
SUMMONSES AND WRITS.	£	s.	d.	£	s.	d.
On sealing a writ of summons for commencement of an action, .	0	2	0	0	4	0
On sealing a notice for service under Order XV., Rule 18, . . .	0	1	0	0	1	0
On sealing a writ of mandamus or injunction, ...	0	2	0	0	5	0
On sealing a writ of subpœna for any number of persons, . . .	0	2	0	0	4	0
On sealing every other writ, except writs for the election of members of Parliament, or writs to supersede Justices of the Peace, . .	0	2	0	0	4	0
On sealing a summons to originate proceedings in the Chancery Division, ...	0	2	0	0	4	0
On sealing a summons issuing out of the Exchequer Division for recovery of legacy duty, . .	0	2	0	0	2	0
On sealing or issuing any other summons, ...	0	0	6	0	1	0
APPEARANCES.						
On entering an appearance for any number of persons included in the same memorandum, . . .	0	1	6	0	1	6
COPIES.						
For examining a written or printed copy and marking same as an office copy, for each folio, . . .	0	0	1	0	0	1
For making a copy and marking same as an office copy, for each folio, .	0	0	4	0	0	4
For a copy in a foreign language, the actual cost.						
For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost.						

Court Fees.

FIRST SCHEDULE—*continued.*

	Lower Scale.			Higher Scale.		
ATTENDANCES.	£	*s.*	*d.*	£	*s.*	*d.*
On an application, with or without a subpœna, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer), for each day, or part of a day, he shall necessarily be absent from Dublin, ...	0	10	0	0	10	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.						
FILING.						
On filing any pleading, except on summons or petition, . . .	0	1	0	0	1	0
On filing a special case, . . .	0	5	0	0	5	0
On filing an affidavit with exhibits (if any) annexed, submission to arbitration, award, bill of sale, warrant of attorney, cognovit, bail, satisfaction piece, and writ of execution with return, . .	0	1	6	0	1	6
On filing a scheme pursuant to the statute 30 & 31 Vic., c. 127, or the Liquidation Act, 1868, .	0	15	0	0	15	0
On filing a caveat, . . .	0	4	0	0	4	0

FIRST SCHEDULE—*continued.* Court Fees.

	Lower Scale.			Higher Scale.		
	£	*s.*	*d.*	£	*s.*	*d.*
On filing and enrolling recognizance, save recognizances for security for costs and giving certificate thereof,	0	10	0	0	15	0
On any vacate of recognizance, entering on rolls, and giving certificate,	0	5	0	0	10	0
CERTIFICATES.						
For certificate of pleading and proceedings, ...	0	1	0	0	2	0
For a certificate or report of any Master or Chief Clerk not the result of taking an account, .	0	3	0	0	5	0
SEARCHES AND INSPECTIONS.						
On an application to search an index and inspect a pleading, decree, order, or other record, upwards of three years old, unless otherwise expressly provided for by any Act of Parliament or this order, and to inspect documents deposited for safe custody or production pursuant to an order, for each hour or part of an hour occupied, ...	0	2	0	0	2	0
Not exceeding on one day, . .	0	7	6	0	7	6
EXAMINATION OF WITNESSES.						
For every witness sworn and examined by an Examiner or Chief Clerk in his office, for each hour,	0	5	0	0	5	0
For an examination of witnesses by any such officer away from the office, in addition to such sum as shall be expressed in the order as reasonable for travelling and other expenses, ...	1	0	0	1	0	0
The officer may require a deposit of stamps on account of fees, and a						

	Lower Scale.			Higher Scale.		
	£	*s.*	*d.*	£	*s.*	*d.*
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. These fees are not to apply to the examination of witnesses for the purpose of any inquiry, taxation of costs, or other proceeding before the officer.						
HEARING.						
For entering or setting down or re-entering or resetting down an appeal to the Court of Appeal, or a cause for trial or hearing in any court in Dublin or at any assizes, except a demurrer or special case, or a summons adjourned from chambers, or on a motion for judgment, after a trial before a Judge and jury, ...	0	10	0	0	10	0
JUDGMENTS, DECREES, AND ORDERS.						
For drawing up and entering a judgment or a decree or decretal 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, . . .	0	5	0	0	10	0

FIRST SCHEDULE—*continued.* Court Fees.

	Lower Scale.			Higher Scale.		
	£	*s.*	*d.*	£	*s.*	*d.*
For drawing up and entering any other order whether made in court or at chambers, ...	0	2	0	0	5	0
For copy of a plan, map, section, drawing, photograph, or diagram, required to accompany any order, the actual cost.						
ACCOUNTS.						
For taking and certifying the result of an account of a receiver, guardian, consignee, bailee, manager, provisional, official, or voluntary liquidator or sequestrator, or of an executor, administrator, trustee, agent, solicitor, mortgagee, co-tenant, co-partner, execution creditor, or other person liable to account, when the amount found to have been received without deducting any payment shall not exceed £200, ...	0	1	0	0	1	0
Where such amount shall exceed £200, for every £100, or fraction of £100, ...	0	0	6	0	0	6
But not to exceed £2.						
The above fee to cover the certificate of taking such account.						
PETITIONS.						
For every summary petition, . .	0	5	0	0	10	0
ADVERTISEMENTS.						
For signing an advertisement, .	0	5	0	0	10	0
SERVICES OF SUMMONSES, NOTICES, &c.						
Upon every notice or summons lodged for service in the notice department of the Chancery Division, ...	0	1	0	0	1	0
Upon each copy of such notice or summons transmitted through the						

Court Fees.

FIRST SCHEDULE—*continued.*

	Lower Scale.			Higher Scale.		
	£	*s.*	*d.*	£	*s.*	*d.*
said notice department, where the number of copies shall not exceed three, for each copy, . . .	0	0	6	0	0	6
For three copies or upwards, . .	0	1	6	0	1	6
PAYMENTS OF CASH AND TRANSFER OF STOCK.						
Upon the Accountant-General's drafts, exceeding £100, on every £100 or fractional part of £100, But not to exceed £5.	0	0	6	0	0	6
For every Accountant-General's certificate of cash or stock, . .	0	0	4	0	0	4
TAXATION OF COSTS.						
For taxing a bill of costs, and certifying the amount thereof, where the amount allowed does not exceed £20, ...	0	1	6	0	1	6
Where the amount exceeds £10, for every £5 allowed, or a fraction thereof, ...	0	0	4	0	0	4

ENROLMENTS.	£	*s.*	*d.*
On examining and signing enrolments of decrees or orders—			
If under the lower scale, . . .	0	10	0
If under the higher scale, . . .	1	0	0
For enrolment of patent of a duke, marquess, earl, viscount, or baron, ...	20	0	0
For enrolment of a patent of a lord chancellor, chief justice, or chief baron, . . .	10	0	0
For enrolment of a patent of a baronet, judge, attorney-general, solicitor-general, or sergeant-at-law, ...	5	0	0
For enrolment of every other patent, for each roll of ten folios, ...	1	10	0
For surrender of patent, ...	1	10	0
For enrolling any other deed or document, for each roll of ten folios or fractional part of ten folios, ...	0	10	0

WARRANTS.	£	*s.*	*d.*
Upon every warrant of the Lord Chancellor for election of a coroner, ...	0	12	6
THE CROWN AND HANAPER OFFICE.			
For every commission of the peace, . .	6	0	0
For every commission of inquiry, not being in lunacy, and commission for taking affidavits for the High Court, ...	1	0	0
For every copy of any order, ...	0	2	0
For office copies of records or any other document, per folio, ...	0	0	4
For every certificate, ...	0	2	6
For filing every writ, pleading, or other document, ...	0	3	0
For sealing every exemplification of orders, .	1	12	0
On every requisition to administer the oaths of office to all persons who shall be sworn before the Lord Chancellor, ...	0	10	0
For every patent of a duke, ...	20	0	0
For every patent of a marquess or earl, .	15	0	0
For every patent of a viscount, . . .	10	0	0
For every patent of a baron, ...	8	0	0
For every patent granting fairs and markets,	3	0	0
For every patent of a lord chancellor or judge, lieutenant of a county or city, or *custos rotulorum*, ...	5	0	0
For every patent of attorney-general, solicitor-general, sergeant-at-law, or other officer, .	5	0	0
For every patent of a pension, ...	3	0	0
For every patent of office not before enumerated,	3	0	0
For every patent of an annuity, per skin of 15 folios, ...	1	10	0
For every patent granting lands, ditto, . .	1	10	0
For every patent granting pardon (not in *forma pauperis*), ditto, ...	1	0	0
For every patent granting charter for cities and towns corporate, and denization of a private person, ditto, ...	1	10	0
For every patent not before enumerated, ditto,	1	10	0
For search for any record or document, and if found, for a copy or extract not exceeding 5 folios, ...	0	3	0
For copy, each additional folio, ...	0	0	4

Court Fees.

FIRST SCHEDULE—*continued.*

MISCELLANEOUS.	£	s.	d.
For every certificate directed or required by the Act of 11 and 12 Vic., cap. 120, including a duplicate thereof, . . .	0	1	0
For signing and certifying documents for proof, pursuant to the Act of the 14 and 15 Vic., cap. 99, for every folio, . . .	0	0	2
For every registration of a solicitor's licence, pursuant to the provisions of the 56 Geo. III., cap. 56, s. 67, ...	0	1	0
For every registration of indenture of apprenticeship, pursuant to the provisions of the 29 and 30 Vic., c. 84, ss. 12 and 16, . .	0	5	0
For filing and entering a bill of sale or copy thereof in the office of the Master of the Queen's Bench division, pursuant to the provisions of the 17 and 18 Vic., cap. 55, .	0	1	0
For liberty to search alphabetical index for bill of sale, under the same statute, for any search against one person, . . .	0	0	6
For liberty to make a similar search under the same statute in the numerical index, .	0	1	0
For filing and entering warrant to confess judgment, pursuant to the provisions of the 3 and 4 Vic., cap. 105, ...	0	1	0
For filing civil bill for recovery of poor rates, pursuant to the provisions of the 12 and 13 Vic., cap. 104, ...	0	2	0
On each memorial of assignment of judgment pursuant to the provisions of the 13 and 14 Vic., cap. 114, ...	0	7	6
For certificate of a judgment for registration in England or Scotland under the Judgment Extension Act, 1868, including affidavit, .	0	2	0
On filing for registration a certificate issued out of the Courts of Westminster or Court of Session in Scotland under the same Act, although more than one name may have to be registered under the same Act, . .	0	7	0
On every certificate of the entry of a satisfaction under the same Act, . . .	0	1	0
For a search made in one or both of the registers of English and Scotch judgments, for each name, ...	0	1	0

The Second Schedule above referred to.

Part I.

	£	s.	d.
Citations and Writs.			
On sealing a citation,	0	4	0
On sealing a subpœna for any number of persons,	0	4	0
On sealing any other writ,	0	4	0
Appearance.			
On entering or withdrawing appearance,	0	1	6
On amending an appearance,	0	1	6
Search for appearance,	0	1	0
Filing.			
On filing affidavit as to scripts,	0	2	0
On filing every script annexed to such affidavit, Not to exceed, for any number of scripts, £2.	0	5	0
On filing any pleading,	0	1	0
On filing petition,	0	1	0
On filing answer,	0	1	0
On filing reply, or any further writing to the petition,	0	1	0
On filing inventory,	0	1	0
On filing case for motion,	0	1	0
On filing certificate of Chairman of Quarter Sessions,	0	1	6
On filing special case,	0	5	0
On filing every affidavit or other document brought into Court and deposited in the Registry not otherwise specified,	0	1	6
Evidence.			
On filing interrogatories (for each set),	0	1	0
On filing deposition of each witness,	0	1	0
Hearing.			
For entering or setting down, or re-entering or resetting down, a cause for trial in any Court, except a demurrer or special case, or (after a trial by jury) a motion for judgment,	0	10	0

Court Fees.

SECOND SCHEDULE—*continued.*

	£	s.	d.
WITNESSES.			
On an examination of witnesses pursuant to the 31st section of the Probate Act, 1857, to be paid by the party having carriage of the order, ...	0	10	0
JUDGMENTS, DECREES, AND ORDERS.			
For drawing up and entering a judgment or a decree or decretal order, whether on the original hearing of a cause, and an order on the hearing of a special case or petition, .	0	10	0
For drawing up and entering any other order whether made in Court or at chambers, .	0	5	0
For copy of a plan, map, section, drawing, photograph, or diagram required to accompany any order, the actual cost.			
BONDS AND RECOGNIZANCES.			
Bonds or recognizances given by receiver or any other person for any purpose, . .	0	15	0
On assignment of bond, ...	0	5	0
TAKING EVIDENCE.			
On every commission issuing under seal of the Court, ...	1	0	0
Engrossing and collating such commission, per folio, ...	0	1	0
REFERENCE TO REGISTRAR.			
On each reference :—			
For the registrar's attendance, . . .	0	10	0
For every hour or part of an hour after the first hour, a further fee of, . . .	0	5	0
For the registrar's report, if five folios or under, ...	0	10	0
If exceeding five folios, for every additional folio, ...	0	2	0
SUMMONS.			
Summons to attend at chambers, . . .	0	2	0

SECOND SCHEDULE—*continued.* Court Fees.

	£	s.	d.
NOTICES.			
Filing every notice, ...	0	1	0
ATTENDANCES.			
On an application, with or without a subpœna, for any officer to attend as a witness, or to produce any record or document to be given in evidence (in addition to the reasonable expenses of the officer), for each day, or part of a day, he shall necessarily be absent from Dublin, ...	0	10	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.			
COPIES.			
For examining a written or printed copy and marking same as an office copy, for each folio, ...	0	0	1
For making a copy and marking same as an office copy, for each folio, ...	0	0	4
For a copy in a foreign language, the actual cost.			
For a copy of a plan, map, section, drawing, photograph, or diagram, the actual cost.			
PAYMENTS OF CASH AND TRANSFER OF STOCK.			
Upon the Accountant-General's drafts, exceeding £100, on every £100 or fractional part of £100, ... But not to exceed £5.	0	0	6
For every Accountant-General's certificate of cash or stock, ...	0	0	4

SECOND SCHEDULE—*continued.*

	£	s.	d.
ADVERTISEMENTS.			
For settling and signing an advertisement directed by the Court, ...	0	10	0
RECEIPTS.			
For every receipt for a document or documents delivered out of the Principal Registry, .	0	1	0
MISCELLANEOUS.			
For every certificate directed or required by the Act of 11 & 12 Vic., cap. 120, including a duplicate thereof, ...	0	1	0
For signing and certifying documents for proof, pursuant to the Act of the 14 & 15 Vic., cap. 99, for every folio, . . .	0	0	2
TAXATION OF COSTS.			
For taxing a bill of costs, and certifying the amount thereof, where the amount allowed does not exceed £20, ...	0	1	6
Where the amount exceeds £10, for every £5 allowed, or a fraction thereof, . . .	0	0	4

PART II.

FEES and PER-CENTAGES to be taken in Registry of the Probate and Matrimonial Division in non-contentious business.

The same as heretofore, except that in lieu of the fees heretofore taken for attendances, and for taxing costs, respectively, shall be taken the fees mentioned in the first part of this Schedule, provided that the probate or administration duty charged in any bill of costs shall, for purposes of taxation, not be considered as included in such bill in calculating the amount of fees for taxation.

INDEX.

INDEX.

ABATEMENT,
of action none, by death, bankruptcy, or marriage if cause of action survive, 654.
pleas in, abolished, 553.
none by misjoinder of parties, 534.

ABOLITION,
of office, on future vacancies, 480.
of terms, 97, 454.
bills of exceptions, 396.
general issue, 388.
exception as to not guilty, 554.
of new assignments, 553.

ACCEPTANCE
of sum paid into Court in satisfaction, 592.
form of, 701.
see Payment into Court.

ACCIDENT,
rules of equity to prevail, 325.

ACCOUNTANT-GENERAL,
consolidation of offices, 68, 478.

ACCOUNT,
actions for, 168.
application for, where writ indorsed for account, 53.
in default of appearance, 533.
audit of public, by Local Government Board, 112, 485.
assigned to Chancery Division, 38, 169.
attachment for disobedience of order for, 611.
further consideration on, or trial, 636.
indorsement in actions for, 507.
land judges bound to take, 147.
ordered at any stage of the proceedings, 613.
order for in default of appearance, 366, 533.
prolonged examination of, referred to arbitrator, 619
principal and agent, 168.
stated, form of claim, 706.

ACKNOWLEDGMENT
of deeds for enrolment and registry, 79.

ACTIO PERSONALIS MORITUR CUM PERSONA,
rules of equity follow the law, 326.

ACTION,
appearance to, 362.
assigned to wrong division, 176, 460.
assignment of choses in, 258.
binding parties in future, 205.
by and against absent parties, 534, 541.
by and against infants and married women, 538.
by and against lunatics, 549.
by and against principal and agent, 208.
by and against trustees and executors, &c., 537.
commenced by writ of summons, 176, 355, 501.
commenced in name of wrong plaintiff, 535.
common law not assigned to any division, 40, 174.
consolidation of, 30, 195, 661.
default of pleading in,
discontinuance of, 389.
dismissal for want of prosecution, 393.
distinguished by date, letter, and number, 356, 509.
form and commencement of, 355, 501.
interpleader, 426.
joinder of causes, 30, 225, 535, 546.
limitation to one or more claims,
meaning of the word, 353, 433, 663.
no abatement by change of parties, 654.
no abatement by misjoinder of parties, 534.
notice to officer on assignment to division, 176.
on bill of exchange, 346, 503.
other proceedings than, 354, 501.
parties to, 367.
partnership, rules of equity to prevail, 334.
pending, 343.
pleadings in, 375.
forms of, 706.
setting down on motion for judgment, 376.
stay of, where formerly injunction, 219, 450.
transfer of, 176, 427, 460, 470, 660.
trial of, 391, 620.

ACTION FOR ACCOUNT,
see account.

ACTION FOR DEBT,
special indorsement of claim, 506,
indorsement of debt and costs, 507.
default of pleading, 583.

ACTION CONCERNING LAND,
appearance in, 365, 524.
defendant may limit his defence, 524.
in possession, need not plead his title, 524.
foreclosure is not, 548.
joinder of causes in, when allowed, 547, 548.

ACTION CONCERNING LAND—*continued.*
landlord appearing in, 365, 522.
judgment, how enforced, 638.
in default of appearance, 527.
in default of pleading, 585.
person in possession let in to defend, 365.
service by writ of summons, 361, 514.
for possession, by mortgagors in their own name, 253, 452.
service of writ out of jurisdiction in, 518.
no appearance after time limited, 228.
writ of possession, 654.

ACTS OF PARLIAMENT,
see Statutes, &c., 475.

ADDRESS FOR SERVICE,
indorsement of,
on writ of summons, 508.
on memorandum of appearance, 365.

ADJOURNMENT
of trial, 624.

ADMINISTRATION,
actions assigned to Chancery Division, 38, 166.
by and against administrators or executors, 537.
title of, 505.
creditor's action, numerous parties, 374.
form of, 707, 708.
of oaths, commissioners for the, 78, 483.
of assets or insolvent estates, 228, 51, 451.
of assets legal and equitable, 327.
of after acquired property, 327.
title of cause on writ in action for, 356.
concurrent, of law and equity, 449.

ADMINISTRATOR,
actions by and against, 537.
joinder of claim by or against, with other claim, 548.

ADMIRALTY,
appellate jurisdiction in, transferred to Court of Appeal, 159.
jurisdiction to be transferred to the High Court on death of existing judge, 82.
rules of Court, in collision, to prevail over those of common law, 51, 303, 454.
existing judge of, 153, 438.
no successor to be appointed to existing judge, 82, 153.
court of, to be annexed to Probate Division, 153, 457.

ADMISSIONS,
notice to admit documents, 390, 612.
evidence of admission of documents, 613.
notice of admission of facts, 612.
pleading, 385.
application for relief on, in pleadings, 636.
form of admission, 704.

AFFIDAVIT,
at trial, without consent, 399.
by consent, 627.
evidence by, 60, 397, 629.
as to particular facts, 396, 627.
and answers, now taken within Queen's dominions, 79.
in foreign parts, 79.
may be partly in print, 673.
not by, if cross-examination is desired, 627.
for substituted service, 515.
for service out of jurisdiction, 520.
of service in default of appearance, 526.
of particulars, when liquidated claim not indorsed, 526.
" to show cause " when writ specially indorsed, 530.
of sum due before judgment by default, 584.
on application for discovery and inspection, 607.
confined to facts known, not hearsay or belief, 628.
plaintiffs and defendants, when filed, 629.
notice to cross-examine deponent, 630.
printing, 631.
not necessary to prefix interrogatories, 631
as to documents form of, 702.

AFFIRMATION,
oath included, 434.

AGENT,
account between principal and, 168.
form of claim, 693, 716.

ALTERNATIVE RELIEF,
against parties, 371, 534.
should be asked for in statement of claim, 387.
must not be inconsistent, 535.
contract or relation from letters, 558.

ALLEGATIONS,
of fact not denied, admitted, 554.
of fact, denial must be direct and substantial, 557.

AMENDMENT,
Court of Appeal, powers of, 420.
of indorsement of claim, 505.
notice of appeal, 411, 675.
of parties, 541.
writ of summons, 359, 577.
of pleadings, 389, 551, 572, 576.
application to disallow, 575.
statement of claim, 575.
statement of defence, 551.
leave to, by opposite side, 575.
of counter claim, 575.
time for, 576.
how made, 576.
date and order of, to be marked on pleading, 577
delivery of pleading, 577.
none, while demurrer pending, 581.

AMENDMENT OF LAW,
to be administered in High Court of Justice and inferior Courts, 50, 228
and declaration of law, 227, 451.
administration of assets of insolvent estates, 51, 228, 451.
statute of limitations not to apply to express trusts, 235, 452.
equitable waste, tenant for life impeachable of, 240, 452.
no merger by operation of law only, 247, 250, 452.
suit for possession of land by mortgagor in his own name, 253, 452.
debts on choses in action made assignable at law, 258, 453.
stipulations not of the essence of the contract, 272, 453.
injunctions and receivers may be granted, 287, 453.
damages by collision at sea as in Court of Admiralty, 51, 303, 454.
infants, rules of equity to prevail, 305, 454.

ANSWER TO INTERROGATORIES,
form of, 603, 702.
insufficient, 603.
time for, 603.
to be used on trial, 612.
now taken within the Queen's dominions or foreign ports, 79.

APPEAL, COURT OF—*see* Court of Appeal,

APPEAL,
intermediate Court of, 43, 436.
final Court of, 44, 425, 493.
from Lord Chancellor in Lunacy, 117.
no, in criminal proceedings except for error apparent, 155, 405, 467.
no, on decision of crown cases reserved, 155, 467.
from orders made in chambers, 157, 407, 670.
where no appeal lies, 159, 468.
when under new procedure, 349.
what orders are subject to, 404.
from Chancery division and Court of Chancery, 405.
no, from consent order, 406, 468.
orders as to matters of costs and matters of discretion, 406.
from whole or part of judgment, 408.
time to, 408.
time for, in statutory matters, 677.
in bankruptcy, 677.
time, ex-parte applications, 409, 677.
time, when extended, 410.
notice of motion of, 411.
service of, 675.
respondent not put to cross, 412.
notice for, 676.
time for, 677.
setting down and listing, 413.
security for costs, 413.
to be by way of re-hearing, 415, 675.
evidence how brought before the Court, 416, 677.
may receive further evidence, 418.
power of the Court of, as to amendments, 420, 675.
what judgment the Court may give, 420, 675.
power of the Court of, as to costs, 421, 468.

APPEAL—*continued.*
printing evidence for, 421.
interlocutory orders, unappealed from, not to prejudice, from final order, 622.
stay of proceedings, not, 422.
what Court an application should be brought in, 424.
from Court of Bankruptcy, 437.
power of Her Majesty's Court of, 447.
no Judge to sit on an, from his own order, 104, 469.
from orders in receiver matters, 485.
from Recorder and Chairman of Dublin, 682.
as to fines on jurors, &c., 671.
costs in, 421.

APPEAL TO THE HOUSE OF LORDS,
from Court of Appeal, 425, 44.
no direct appeal from subordinate Courts, 425.
time to, 425.
stay of execution, 426.
final, 44, 425, 493.

APPEARANCE,
defendant bound to appear, 363, 522.
without defence, 363.
time for, 363.
mode of, 364.
address for service, 365. 522.
entry of, 365, 522.
liberty to, and defend in ejectment, and by landlord, 365, 522.
default of, 365, 525.
judgment in default of, 366.
summary order for judgment after, 366, 529.
by third party to dispute plaintiff's claim, 544.
to summons for recovery of land, 522.
notice of, 523.
memorandum of, 523.
form of, 688.
of partners, 523.
by a firm, 523.
after time limited, 524.
default of, of one of several defendants, 526.
in Chancery actions, 528.
default of, pleadings and documents to be delivered or filed with officer, 560.
of third persons, 567.

APPLICATIONS,
in an action, stay of proceedings, 219, 450.
in general, and motions, 665.
to Judge to settle issues, 377. 571.
for new trial, 397.
to serve out of jurisdiction, 362, 456.
for account, where writ indorsed, 533.
for directions when third party served, 545.
to exclude counter-claim, 567.
to amend pleadings, 576.
to strike out interrogatories, 598.
proper, to be made at Chambers, 667.

APPRENTICES
to solicitors, admission of, 78, 488.
form of claim by, 693.

ARBITRATION,
provisions as to, 393, 470.
form of claim on, 693.

ARREST,
of judgment, motion for, to Divisional Court, 90, 92, 467.

ASSESSMENT
of damages, and trial of fact in Chancery actions, 463.

ASSESSORS,
remuneration of, 293, 470.
trial with, 292, 470, 626.

ASSETS,
administration of, of insolvent estates, Bankruptcy rules adopted, 51, 228.
Land Judges bound to take accounts and administer, 147.
administration of, legal and equitable, 327.
transfer of actions relating to, by Chancery Judge, 661.

ASSIGNMENTS,
of debts and choses in action, 258, 453.
of estates pendente lite, no abatement of action, 656.
the difference between legal and equitable, 263.
of bills of lading, 264.
of choses in action and debts must be absolute and complete, 264.
of actions to divisions, notice of, 510.
new, in pleadings not necessary, 553.

ASSIZE,
judges liable to serve on, 93, 442, 455.
jurisdiction on circuit, 154.
saving clause as to circuits, 93, 489.
winter (*see* Winter Assizes), 94, 473.
jurisdiction of courts of, transferred to High Court, 154.
clerks of, and Nisi Prius, 487.
notice of trial for, 623.

ATTACHMENT,
enforcement of judgments by, 401, 638.
solicitors liable to, in default of appearance, 523.
inspection and discovery by, 610.
book to be kept by proper officer, 650.
not to issue without leave, 646.
notice of motion for, 646.
contempt of Court for, 646.
writ of attachment, 750, 754.

ATTACHMENT OF DEBTS,
legal and equitable, rules of equity to prevail, 327.
preliminary examination of judgment debtor as to debts owing to him, 647.
order to attach debts of garnishee, 647.
service of notice to garnishee binds debt, 649.
what debts may be attached, 618.

ATTACHMENT OF DEBTS—*continued.*
execution for, 649.
trial of issues, 649.
claim of lien or charge, 650.
payment discharge to garnishee, 650.
attachment book, 650.

ATTENDANCE
of witnesses for cross-examination who have made affidavits, 397.

ATTORNEY-GENERAL,
name introduced as informant in an action, 535.

ATTORNEYS
to be styled solicitors, 487.
see Solicitors of Supreme Court.

AUDIT OF PUBLIC ACCOUNTS
to Local Government Board, 112, 485.

AUDITA QUERELA,
applications in nature of, 644.

AULA REGIS,
plan of Supreme Court probably taken from, 4.

BANC,
business proper to be transacted in, to be transacted by Divisional Courts, 90, 467.

BANK OF IRELAND,
payment into Court, money to be lodged in, 591.
distringas on stock, 652.

BANKRUPTCY,
jurisdiction of Court, not transferred, 3.
rules of Court of, untouched, 63, 437.
appeals from Court of, to Court of Appeal, 63, 159, 437.
time for appeal, 677.
set off of debts in, 192.
injunctions by Court of, 215.
judges' jurisdiction and appointment as before, 437.
unclaimed dividends in, 492.
claim by an assignee not to be joined with other claims, 548
title of trustee in, denied, 553.
of party no abatement of action, 654.
order to continue after, 658.

BELIEF
statements as to, in affidavits, 530, 628.

BENEFICIARIES,
represented by trustees, 527.

BILLS OF DISCOVERY,
actions in the nature of, 595.

BILLS IN EQUITY,
statement of claim substituted for, 501.

BILLS OF EXCEPTIONS
abolished, 142, 396, 676.

BILLS OF EXCHANGE ACT,
counter claim allowed in, 197, 205.
substitution of plaintiff by consent, 209, 503.
pending causes in, 346, 503.
personal service of writ of, summons necessary, 360, 503.
special indorsement of writ on a, 507.
form of pleadings in action on, 693, 718, 720.

BILLS OF PARTICULARS
when needed, 506.

BILLS OF PEACE
unassigned to any Division, 173.

BIRTH OF A CHILD,
change of interest by, 658.

BOARD OF WORKS,
actions against, 174.

BODY, UNINCORPORATED OR CORPORATE,
service upon, 360.

BOND,
form of claim, 693.

BOOKS AND DOCUMENTS,
transferred to Supreme Court, 489.
inspection of, 610.

BREACH OF COVENANT,
injunction against, 279.

BUSINESS,
arrangement of, of Court of Appeal, 102, 469.
certain Chancery, not assigned, 173.
distribution and arrangement of, generally, 92, 458.
re-distribution of, 37, 40, 164.
transfer of, 447.
of Divisional Courts, 90, 465.
in Chancery and Probate Divisions disposed of by single judge, 465.
future, assigned as heretofore, 466.
distribution of, among officers of Supreme Court, 477.
distribution of, among officers of Consolidated Offices, 478.
to be discharged in vacation, 681.

CANCELLING DEEDS,
action, assigned to Chancery Division, 170.
indorsement of claim for, 690.
other divisions may treat dead as cancelled, 218.

CASE ON APPEAL
abolished, 411.

CASES RESERVED
to be heard by Divisional Courts, 90, 92, 456.

CASE SPECIAL
after writ issued, 378.
form of, 614.
Court may direct, 615.
entry for argument, 617.
discharging order irregularly made, 616.
leave to set down in case of disability, 617.
printing, 615.
setting down, 617.
form of, 705.

CAUSE,
title of, 356.
affidavit to show, where writ specially indorsed, 530.

CAUSE BOOK,
copy of writ to be filed, and entered in, 509.
to be kept in the form of Appendix G, 510.
form of, 756.
entry of appearance in, 522.
copy of all pleadings to be filed within two days and entered in, 560.

CAUSE OF ACTION,
not essential to state it in any particular legal form, 386.
joinder of, 30, 225, 535, 546.
may be excluded when inconvenient, 549.

CAUSES, PENDING, 343.

CEMETERY,
turning land into a, legal waste, 241.

CERTIFICATE,
of officer of Notice Department, proof of service, 589.
judgment, immediate on, registrar's, 625.
form of, 706.
of counsel for new trial, 632.
of solicitor for lower scale of fees, form of, 762.

CERTIORARI,
writ of, 135.

CESTUI QUE TRUST,
accounts between, and trustee, 168, 232.
represented by trustees, 537.
may be ordered to be made parties, 537.
statute of limitations does not apply between, and his trustee, 231.

CHAIRMAN OF COUNTY,
first class, reduced from 33 to 21, and the 5 Recorderships merged, 50.
appointed after 14th of August, 1877, prohibited from practising at the Bar, 50.
of Dublin, appeals from, 682.

CHAMBERS,
sittings in, regulated by Rules of Court, 59, 471, 667.
jurisdiction of judges in, 155.
appeals from orders made by judges in, 90, 157, 407, 468, 670.
discharging orders at, 157, 670.
applications proper for, 667.
Court may direct what business to be disposed of at, 669.
practice at, 670.
counsel at, 670.

CHANCELLOR, LORD,
development of the equitable jurisdiction of, 5.
President of Supreme Court of Judicature, 55.
High Court of Justice, 82, 436.
Chancery Division, 84.
how appointed, 83, 435.
judicial functions of, 84, 102.
ex-officio Judge of Court of Appeal, 101.
President of the Court of Appeal, 102, 161, 441.
duty, authority and power generally, unaltered, 113, 489.
visitorial jurisdiction of, 114.
the lunacy jurisdiction of, 115.
statutory jurisdiction in lunacy, 120.
divesting of estates in lands of lunatic trustees, 127.
appointing persons to convey (in cases of lunatic trustees), 127.
divesting of estates and appointing new trustees, 128.
power vested in, in lunacy may be exercised by committee, 132.
authority over officers of Court of Appeal may be exercised by, 161.

CHANCERY, COURT OF—*see* Court of Chancery.

CHANCERY, COURT OF APPEAL—*see* Court of Appeal in Chancery.

CHANCERY DIVISION,
business of Judges of, 38.
Lord Chancellor President of, 84.
Judges of, 87, 457.
Judges of, may be included in Commissions of Assize, &c., 96.
transfer of actions from common law divisions and vice versâ, 177, 661.
name of Judge to be marked on writ in action in rotation, 466.
appeals from judgments and orders in, 405.
business assigned to, 166, 458.
assessment of damages and trial of fact in, 463.
business of to be disposed of by a single Judge, 465.
Judges of appeal may sit in, 87, 104, 469.
appearance to actions in, 528.
time for delivery of defence, 564.
default of appearance of one of several defendants, 587.
transfer of actions for trial or hearing only in, 660.
applications to be made in chambers, 668.
issuing and hearing of summonses as in Court of Chancery, 670.

CHANGE OF PARTIES BY DEATH, &c.,
no abatement if cause of action survive, 654.
application to issue execution, 643.
Court may order persons to be served with notice, 655.

CHANGE OF PARTIES BY DEATH, &c.—*continued.*
order in case of, 658.
service of order, 659.
appearance to, 659.
discharging order, 659.
like any person under disability, 659.

CHARACTER OF PARTIES,
indorsement of, 505.
form of, 698.

CHARGE,
disposal of lien or, 650.

CHARGING STOCK OR SHARES,
order, of debtor, 651.

CHARITABLE TRUSTS,
matters in, assigned to Chancery Division, 170.

CHARITY,
Lord Chancellor's jurisdiction as visitor, 114.

CHARTER PARTY,
pleadings on, 721.

CHATTELS, LEASEHOLD,
partition of, 171,
order for sale of, 663.

CHIEF BARON OF THE EXCHEQUER,
President of the Exchequer Division, 87, 457.
ex-officio Judge of the Court of Appeal, 101.
duty, authority and power generally unaltered, 113.

CHIEF JUSTICE OF IRELAND,
President of Queen's Bench Division, 88, 457.
ex-officio Judge of the Court of Appeal, 101.
duty, authority and power generally unaltered, 113.

CHIEF JUSTICE OF COMMON PLEAS,
President of the Common Pleas Division, 88, 457.
ex-officio Judge of the Court of Appeal, 101.
duty, authority and power generally unaltered, 113.

CHOSES IN ACTION,
divesting of stock, and of lunatic trustees and mortgagees, 127.
assignment of, debts and, 258, 453.
what are, 259.
confined to legal choses, 260.
how far assignable hitherto, 261.
future assignments effectual, 262.
is the statute compulsory, 263.
the assignment must be in writing under the hand of the assignor, 264.
must not be a bare right of action, but must be some substantial possession, 262.
the assignment must be absolute and complete, 264.
notice to debtor is essential, 265.
notice must be express and in writing, 267.
the assignment is effectual from date of service of notice, 269.
the assignment is "subject to all equities," 270.

CIRCUITS,
Circuits and Assizes to continue, 93, 489.
power to re-arrange, 94, 472.
allowance for Judges going, 443.
winter assizes, 94, 473.

CIVIL BILL COURTS,
certain rules of the J. A. 1877, apply to, 45, 488.
appeals to be heard before a single Judge, 56.
transfer of actions to Chancery Division, 48.
jurisdiction of, 46.
power to remit actions to be tried in, 427, 470.

CLAIMS,
both legal and equitable must be considered, 27, 451.
indorsement of, on writ of summons, 357, 505.
statement of, 562.
by or against husband and wife may be joined with other claims. 548,
by or against executor when joined, 548.
judgment for part of, 532.
liquidated, not endorsed affidavit of particulars, 526.
admission of, 612.

CLASS,
representatives of, for purpose of action, 374, 539.

CLERKSHIPS,
junior, open to competition, 481.

CLOSE OF PLEADINGS,
when deemed to be closed, 377, 571.
interrogatories after, 597.

CO-DEFENDANTS,
cross relief against, and third persons, 199.
cross relief against, must include relief against plaintiff, 202, 207.
collateral relief between, 203.

COLLISION,
at sea, standard of damages, Admiralty rule adopted, 51, 303, 454.
limit of liability by Merchant Shipping Act, 304.
of vessels—Preliminary Act, 559.

COMBINATION OF SUITS,
to form one action, 30, 195, 225.

COMMENCEMENT OF ACTION,
by writ of summons, 176, 355, 501.

COMMISSION,
Great Seal of Ireland in, 84, 490.

COMMISSIONS OF ASSIZE AND NISI PRIUS,
commissions to try questions of fact and law, 93, 455.
judges for ordinary, 95.
for Dublin, 96, 108.
payment for, 463.

COMMISSIONER,
to try causes, right of suitor to resort to, 156, 626.
for the administration of oaths, 78, 483.
appointed by Lord Chancellor, 482.

COMMITTAL
to enforce judgment, 401, 638.

COMMITTEE OF LUNATIC,
actions by and against, 549.

COMMON LAW DIVISION,
business of, 174.
transfer of actions from, to Chancery Division, and vice versâ, 177.
practice at chambers in, 670.
appeal from chambers in, 670.

COMMON PLEAS, COURT OF—*see* Court of Common Pleas.

COMMON PLEAS DIVISIONS,
business of, 39.
judges of, 88, 457.
assignment of business, 91, 175.
applications at chambers, 669.

COMPANY,
interrogating, 597.
service upon, 360.
see also winding-up.

CONCURRENT ADMINISTRATION OF LAW AND EQUITY,
rules for the, 33, 184, 449.

CONCURRENT WRITS,
issued within 12 months, 511.
within and without the jurisdiction, 511,

CONFESSION,
of defence by plaintiff, 561.
form of, 700.
judgment for costs, 562.

CONFIDENTIAL COMMUNICATIONS,
what are protected from discovery, 602.

CONFLICT,
law and equity, 9, 184.
as to waste, 244.
in merger of estates, 247.
mortgagor, 253.
in choses in action, 258.
as to contracts, 273.
in damages to ships by collision, 303, 454.
as to custody of infants, 312.
as to religious education, 316.
mistake in written agreements, 332.
as to retainer and preference none, 335.
in cases of conflict rules of equity are to prevail, 454.

CONSENT,
orders, no appeal against, 406.
to act as guardian filed, 538.

CONSOLIDATION OF ACTIONS
arising out of one instrument, 30.
in any division or divisions, 661.
jurisdiction as to, 661.
actions must be germane, 661, 662.

CONTEMPT OF COURT,
attachment for, 645, 646.

CONTRACTS,
stipulations not of the essence of the, 272, 453.
to be construed according to Equity, 273.
stipulations as to time and quantity, 273.
addition of defendant in actions for, 371.
transfer of action for breach of, to Civil Bill Court, 427.
service out of jurisdiction in actions for, 518.
bare denial of how construed, 551.
arising from letters how pleaded, 558.

CONTRIBUTION,
between co-debtors, co-sureties, and co-contractors, 328.

COPIES,
two, of writ required for officers of the Court, 509.
of all pleadings to be left with officer within two days, 560.
two, of pleadings to be lodged on entry for trial, 623.

COPYRIGHTS,
unassigned to any Division,
injunctions against violation, 285.
infringement, claim on, 696.

CORPORATION,
service of summons on, 360.
application to serve interrogatories on, 597.
discovery by officer, 598.

COSTS,
to be regulated by rules of Court, 59, 471.
under a Judge's order may be the subject of a set-off, 193.
if plaintiff's claim is reduced by counter claim to be decided under County Courts Act, 195, 402.
taxation of, of witnesses, 336.
for misjoinder of parties, 368.
of prolixity, 396.
generally in discretion of Court, 402, 468.
of action tried by Jury, 402.
statutes limiting, remain in force, 403, 468.
of trustees and mortgagees unaffected, 403, 468.
party and party costs may include solicitors, 403.
security for costs in appeals, 413.
security in action, 672.
power of Court of Appeal as to, 421.
order for, may be varied by a Divisional Court, 468.
of needless traverses of fact, 565.

COSTS—*continued.*
of demurrer when allowed, 581
of interrogatories, 597.
appeal for, not, 406.
of appeal, 421.

COSTS, SCALE OF,
lower in what action, 758.
higher, 758.
Court may allow either, 758.

COUNCIL OF JUDGES,
to be convened by the Lord Chancellor, 55.
annual report, 57, 474.
majority necessary, 60.
extraordinary, 58.

COUNSEL,
signature of, not necessary to pleadings, 377.
certificate of, for new trial, 632.
at Chambers costs of, 670.

COUNTERCLAIM,
relief by set off and, 190, 192, 449, 550.
must not be incongruous, 196.
how far confined to same transaction, 198.
should relate to original subject of suit, 200.
must include relief against the plaintiff, 202.
no, by third persons, 204.
by way of interpleader, 204.
to raise, in pending actions, 347.
defence, set off and, 376.
facts in, 553.
involving new parties, title of, 566.
service of, on third person, 566.
reply to, 567.
application to exclude, 567.
judgment for balance of, 567.
withdrawal of, by leave, 569.
amendment of, 575.

COUNTERMAND,
of notice of trial by leave or consent only, 623.

COUNTY COURT,
sketch of judicature of, 45.
equitable jurisdiction conferred, 45, 47.
rules of Court of Judicature as to pleading, practice, and procedure, made applicable, 46.
jurisdiction generally, 47, 49.
jurisdiction limited to £500 cash and £30 per annum, 48.
appeals from, 48.
transfer of causes to the Chancery Division, 48.
injunctions by judge of, 215.

COURT,
meaning of the word, 37, 108.
payment of money into, 388, 390, 590.
additional costs of moving in, disallowed, 669.
may direct what business disposed of at chambers, 669.

COURT OF JUDICATURE, SUPREME—*see* Supreme Court of Judicature.

COURTS,
diversity of, 11.
the former, have ceased to exist, 55.
duly constituted during any vacancy in the office of a judge, 87, 440.
may sit at any time or place, 98.
statutes relating to former, apply under this Act, 475.

COURT OF ADMIRALTY, HIGH,
to be annexed to Probate Division, 153, 438.
jurisdiction to be annexed to High Court on the death of existing judge, 82, 438.
appellate jurisdiction transferred to Her Majesty's Court of Appeal, 159, 438.
rules of the, to prevail in cases of collision over those of common law, 51.
existing judge of, 438.
no successor to be appointed to existing judge, 82, 153, 438.

COURT OF APPEAL, HER MAJESTY'S, IRELAND,
A superior Court of Record, 27, 158.
business of, 43.
appeals from, to House of Lords, 44, 425.
jurisdiction of, 43, 56, 158, 345, 446.
constitution of, 101, 439, 469.
constituent members of, 101.
arrangement of business of, 102, 469.
no judge to sit on appeal from his own order, 104, 469.
where no appeal lies, 159.
primary jurisdiction, 160.
number of Judges to constitute a Court, 161, 469.
interim orders in vacation, 161.
may receive further evidence, 418.
powers of the, as to amendment, 420.
powers as to costs, 421.
Judges of, 101, 439.
Lord Chancellor President of, 440.
has all the power of the High Court, 447.
jurisdiction transferred to, to be exercised as nearly as may be as heretofore, 448.
power of a single Judge in, 161, 469.

COURT OF APPEAL IN CHANCERY,
jurisdiction transferred to Her Majesty's Court of Appeal, 43, 158, 446.
pending causes in, to be continued in Her Majesty's Court of Appeal, 344.

COURT OF BANKRUPTCY—*see* Bankruptcy.

COURT OF CHANCERY, HIGH,
jurisdiction as a common law court or as an equity court transferred to High Court, 106.
all jurisdiction of masters in, transferred to High Court, 108.
appointment of new trustees by, 120.
jurisdiction of, in lunacy, 115, 132.

COURT OF CHANCERY, HIGH—*continued.*
territorial limits of the power of, in lunacy, 131.
common law jurisdiction of, 134.
pending business of, transferred to Chancery Division, 165.
Chancery business not assigned, 173.
pending causes how continued, 350.
what decrees may be appealed from, 405.

COURT OF COMMON PLEAS,
jurisdiction transferred to High Court, 106.
pending business of, transferred to Common Pleas Division, 165.

COURT, MATRIMONIAL CAUSES AND MATTERS,
jurisdiction transferred to High Court, 106.
pending business of, transferred to Probate and Matrimonial Division, 165.

COURT OF EXCHEQUER,
jurisdiction as a court of revenue as well as a common law court, transferred to High Court, 106.
pending business of, transferred to Exchequer Division, 165.

COURT OF EXCHEQUER CHAMBER,
jurisdiction transferred to H.M. Court of Appeal, 43, 158, 446.
pending business transferred to, 165.

COURT, HIGH, OF JUSTICE—*see* High Court of Justice.

COURT FOR LAND CASES RESERVED,
jurisdiction transferred to H.M. Court of Appeal, 43, 158, 446.
questions reserved for the Court of Appeal, 159, 467.

COURT, LANDED ESTATES—*see* Landed Estates Court.

COURT OF PROBATE,
jurisdiction transferred to High Court, 106.
pending business of, transferred to Probate and Matrimonial Division, 165.
Admiralty Division to be annexed, 438.

COURT OF QUEEN'S BENCH,
jurisdiction transferred to High Court, 106.
pending business of, transferred to Queen's Bench Division, 165.

COVENANT, form of claim, 697.

CREDITOR,
what is a secured, 230.
a judgment is not an assignee, 264.
indorsement of claim by, 689.

CRIMINAL,
business to be regulated by Rules of Court, 59, 471.
jurisdiction transferred to High Court, 154.
no appeal in, matters, unless for error apparent, 405, 467.

CRIMINAL PROCEEDINGS,
subject to future Rules, the, procedure remains unaltered, 154, 340, 473, 500.
no appeal in, except for error apparent, 155, 159, 467.

CROSS-CLAIM,
when dispensed with, 189.
where have been allowed, 195, 198.
also *see* Counter Claim.

CROSS-EXAMINATION,
orders for, of witnesses, who have made affidavits, 397, 630.

CROSS RELIEF—*see* Relief.

CROWN CASES RESERVED,
to be heard by at least five Judges of the High Court of Justice, 36, 155, 467.
decision final, 155, 467.
practice and procedure to remain unaltered, 340.

CROWN SIDE OF QUEEN'S BENCH DIVISION,
practice and procedure to remain unaltered, 340, 500.

CUSTODY,
of infants and their estates, 51, 172.
and education of infants, 305, 51.
right to, of an infant at law and in equity, 312.

DAMAGES AND OTHER CLAIMS,
indorsements—*see* Forms, p. 695.

DAMAGES,
unliquidated, may be the subject of a set off, 193.
by collision of ships at sea, 303, 454, 559.
assessment of, and trials of facts in Chancery Division, 463.
where, to be assessed on demurrer, 622.

DATE,
numbers and sums to be expressed in figures, 387.
writ of summons, 513.
pleadings to be marked with, of delivery, 560.
of judgment, 638.

DEATH,
no abatement of action if cause continues, 654, 658.

DEBTS,
set off of, 191.
and liabilities, what are, 230.
assignment of, and legal choses in action, 258, 453.
attachment of, 327, 647.
special endorsement of liquidated demand, 506.

DEBTOR,
in cases of conflicting claim may interplead, or pay debt into court, 259, 271, 453.
assent of, not necessary for a good assignment, 969.
a joint, may be sued together with the executor of deceased debtor, 331.
judgment, may be examined as to debts owing to them, 647.

DECEASED PERSONS—Also *see* Administration.
where no personal representative, 541.

DECLARATION
of rights unassigned to any Division, 173.

DECREE,
included in judgment, 434.

DEEDS,
rectification or cancellation of (assigned to Chancery Division), 170.
power of Masters in Chancery to execute, 109.
fraud in, 330.

DEFAULT,
of appearance, 365, 525.
of appearance of one of several defendants, 526.
of appearance in actions for recovery of land, 527.
of appearance, pleadings to be delivered to officer, 560.
judgment in, 366.
of statement of claim, 375, 583.
of statement of defence, 376.
of reply, 377, 587.
of pleading to issue with third party, 587.
of appearance of plaintiff or defendant at trial, 395.
of appearance, filing documents in, 589.
setting aside, judgment by, 624.

DEFENCE,
equitable, good in the High Court, 30, 186, 449.
equitable, to equitable claim, 187.
appearance without, 363.
default of, 376.
set-off and counter-claim, 376.
withdrawal of, by leave, 390, 569.
delivery of statement of, 550, 564.
leave to enter on terms, 533.
leave to enter, when writ specially indorsed, 532.
in ejectments, 554.
limited, in ejectments, 524.
true ground of, must be raised by pleadings, 555.
arising, after action brought, 561.
pleading after delivery of, 561.
voluntary, may be delivered within eight days, 565.
demurrer and combined, 579.
default of, to liquidated claim, 583.
pleading payment into Court in, 590.
also *see* statement of defence,

DEFENDANTS,
interpretation of term, 434.
joinder of, 535.
need not be interested in all the relief, 536.
joined in case of doubt, 536.
new must be served with amended writ, 542.
appearance by, 365.
when bound to appear, 522.
may disclose facts entitling to defend, 532.
default of appearance, 587.
when bound to file statement of defence, 376.

DEFENDANTS—*continued.*
in ejectment need not plead his title, 554.
counterclaim by, 195, 449.
indemnity from third person, 205, 449.
affidavits for trial, when filed, 629.
notice of trial by, 394.
non-appearance at trial, 395, 623.
judgment as to one of several, 526, 533, 584, 585.
judgment for, on counterclaim, 567.
application for injunction by, 294.
costs of misjoinder, 368.
withdrawing defence, 568.

DELIVERY,
of statement of claim, time for, 562.
of statement of defence, 550, 564.
date of, to be marked on pleadings, 560.
of notice in lieu of statement of claim, 563.
of newly entitled counterclaim to all the parties, 566.
of pleading subsequent to reply within four days, 571.
of amended pleadings, 577.
of documents how effected, 589.
interrogatories, time for delivery of, 593.
writ of, 753.
form of præcipe for, 750.

DEMURRAGE
binding third party to claim for, 206.

DEMURRER,
when to be filed, 378, 552.
may be taken to any pleading, or part of, 577.
must state how much it is taken to and ground of, 578.
delivery of, 579.
and defence combined, 479.
leave to plead and to demur to same pleadings, 579.
entry of, for argument within ten days, 580, 582.
no amendment of pleading without leave, while, pending, 581.
costs of, when allowed, 581, 582.
allowance of, pleadings struck out, 582.
pleading after overruled, 582.
where damages to be assessed on, 622.
form of demurrer, 745.
form of memorandum of entry, 745.

DENIAL,
general, not permitted, 388, 557.
costs of needless, of allegations of fact, 565.

DEPOSIT,
on appeal, not without special order, 413, 678.

DEPOSITION,
Court may allow, to be read at trial for special reasons, 60, 390.

DETENTION,
of goods, default of appearance, 527.
of goods, interlocutory judgment for, 584.
order for, and sale or inspection, 663.

DEVOLUTION,
of title no abatement, 655.

DIRECTING JURY,
see Trial, and, 398.

DISCHARGE
of garnishee, 650.
orders made in chambers, 90, 407, 468
of orders to bind parties in case of change of parties to actions, 659.

DISCLOSURE AS TO PARTIES, &c.,
as to names of firm, 512.

DISCONTINUANCE OF ACTION,
option of plaintiff, on receiving a counter claim, in pending causes, 348, 568.
when plaintiff may give notice of, 389, 568.
judgment for costs, 570.

DISCONTINUANCE OF DEFENCE,
by leave only, 568.

DISCOVERY,
unassigned to any division, 38.
rules of equity to prevail, 329.
and evidence, 390.
if plaintiff claim is for, only statement of claim should show it, 397.
and inspection, 593,
order for, of documents, 604.

DISCRETION,
no appeal from, 406, 468.

DISMISSAL FOR WANT OF PROSECUTION,
for default of pleading, 583.
for failure to give discovery or inspection, 610.
in default of plaintiff giving notice of trial, 393, 621.

DISSOLUTION OF PARTNERSHIP,
actions, assigned to Chancery Division, 38, 167.

DISTRIBUTION OF BUSINESS,
arrangements generally of, 92, 458.
re-distribution, 37, 40, 164.
by general orders, 165.
partial, by the Judicature Act, 165, 458.
pending at the passing of the Act, 165.
in the future, which would have been attached to former Courts, 165, 466.
among officers of Court, 67, 69.

DISTRINGAS,
charging of stock or shares, and, 651.

DIVIDENDS,
payment of unclaimed, in bankruptcy, 492.

DIVISIONAL COURTS,
for what business, 90, 464.
in Chancery business, 90.
how constituted, 91, 464.
attendance of judges, 91.
arrangements as to business, 91.
jurisdiction of, 92.
appeals from, to Court of Appeal, 92.
power of, to vary orders, 392.
application to, for new trial, 397.
President of, senior judge, 464.
for business of Common Law Divisions, 465.
all judges bound to take part in, if required, 465.
Cases and points reserved for, 466.
new trial motions to be to, 397, 467.

DIVISIONS OF HIGH COURT,
each, virtually different Courts, 37.
the five Divisions of the High Court, 456, 87.
(1). Chancery, 87, 457.
(2). Queen's Bench, 88, 457.
(3). Common Pleas, 88, 457.
(4). Exchequer, 88, 457.
(5). Probate and Matrimonial, 88, 457.
one Division cannot prohibit proceedings in another, 139.
marking name of Division on writ, 176, 356, 460, 501.
actions brought in the wrong, 176, 460.
transfer of actions from one to another, 176, 461, 660.
notice to officer of assigning action to, 510.

DOCUMENTS,
all, books, papers, &c., of transferred Courts, &c., transferred to Supreme Court, 64, 489.
mistakes in rules of equity to prevail, 332.
order for production of, 604.
order for discovery of, 595, 604.
time to make application concerning, 605.
enforcing inspection, 609.
notice of willingness to allow, 609.
issues, or questions decided preliminary to order to inspect, 610.
requisition to admit, 612.
date of judgment from production of requisite, 637.
lodged on entering appeal, 676.
sufficient to set forth the effect of, 557.
delivery how effected, 589.
form of affidavit, 702.
of notice to produce, 705.
of notice to admit, 704.

DOUBT,
joinder of defendants in case of, 536.

DOWER,
abolished as a real action, 39.

DUBLIN,
Commissions and sittings at Nisi Prius, 96, 108, 456, 463.
sittings of judges during vacation, 99.
Nisi Prius sittings to be continuous, 99.

DUBLIN—*continued.*
general lists for trial, 394.
one judge for commission, 463.
entry for trial by opposite party, 623.
notice of trial in, continuous, 622.
Nisi Prius sittings in, 671.

EDUCATION,
custody and, of infants, rules of equity to prevail, 51, 305, 321.
religious, of infants, 316.

EFFECT OF NON-COMPLIANCE.
of notice to produce documents, 608.
generally as to rules, 679.

EJECTMENT,
liberty to appear and defend in action of, 365.
transfer of actions of, to Civil Bill Court, 427, 470.
application to remit for non-payment of rent, 682.
limited defence to, 524.
rent may be joined with, 547.
defendant need not plead title to, 544.

ELECTION PETITIONS,
rota of judges for, 100, 464.
jurisdiction in, transferred to Common Pleas Division, 100, 174,

ELEGIT,
writ of, 639.
form of præcipe for, 749.
how far obsolete, 639.

EMBARRASSING,
statements to be struck out, 573.

ENROLMENT,
of decrees in Chancery Division, how far necessary, 405.

ENTRY
of appearance, 365, 522.
of demurrer for argument and notice thereof, 580.
of special case for argument, 617.
notice of action for trial, 622.
of findings by Registrar, 625.
judge may order, of judgment, 625.
of actions for trial, 394.
of judgments, 399.

EQUITABLE CLAIMS,
entertained in all divisions, 184, 212, 224, 449.

EQUITABLE DEFENCES,
good in Common Law Divisions, 30, 186, 449.
to equitable claims, 187.
in lieu of injunctions and legal claims, 213.

EQUITABLE WASTE,
by tenant for life, 240, 452.
restrained, 243.
conflict between, and legal waste, 244.

EQUITIES,
assignments subject to all, 270.
between assignees, 270.
incidental, 211, 450.
EQUITY,
the development of law, 8.
conflict between law and, 9.
concurrent administration of law and, 33, 184.
supposed fusion of law and, 33.
matters of, to be pleaded where formerly an injunction would have been granted, 216, 450.
set off in, 191.
rules to prevail over those of law, 51, 324.
general prevalence of the rules of, 324.
EQUITY TO A SETTLEMENT,
whether wife's to prevail in every division, 330.
ERROR,
writ of, from Q. B. Division to House of Lords, 154, 160, 473.
writ of, to the Court of Appeal, by way of appeal, 160.
bail in, stay of execution, 426.
writs of, otherwise abolished, 676.
ESSENCE OF CONTRACT,
stipulations not of, disregarded, 272, 453.
ESTATES,
merger of, in law and equity, 247.
no merger by operation of law only, 247, 250, 452.
EVIDENCE,
rules of, not affected by act, 60, 394, 473.
on motion, petition, or summons, 627.
order for examination of deponent, 628.
by oral examination of witnesses at trials by jury not affected by rules, 60, 396, 473, 627.
on hearing of pending suits, 350.
not to be pleaded, 381.
discovery of, 390.
trials on, 525.
rejection of, on, 398, 499.
when to be reported by short-hand writer, 394.
on other trials than by jury, how taken, 397.
by affidavits, 397, 629.
how brought before the Court of Appeal, 416.
Court of Appeal may receive further, 418.
printing for appeals, 421.
of renewal of writ of summons, 514.
EXAMINATION,
oral, of witnesses not affected, 390.
order for, of deponent, 628.
EXCEPTIONS,
formal bills of, abolished, 396, 676.
right to have case properly submitted to jury enforced by motion or by appeal, 396, 466.
to directions, party may move either a Divisional Court or the Court of Appeal, 396, 404.
from general orders, 682.

EXCHEQUER CHAMBER,
jurisdiction of, transferred to Court of Appeal, 446.

EXCHEQUER, CHIEF BARON—*see* Chief Baron.

EXCHEQUER COURT—*see* Court of Exchequer.

EXCHEQUER DIVISION,
business of, 39, 174, 460.
judges of, 88, 457.
arrangement of business, 91.
revenue side of, unaffected by the Act, 500, 683.
application to be made at chambers, 669.

EXECUTION,
judgment and, 399, 638.
right to immediate, 401.
writ of, 640.
how enforced, 638.
of judgment against partners, 640.
within six years from judgment, 643.
existing rights of, unaffected, 644.
"issuing execution," meaning of, 639.
relief subject to conditions, order for, 639.
of judgment against partners, 640.
indorsement of writ, with name of solicitor, 641.
indorsement with amount to be levied, 642.
poundage, fees, and expenses, 641.
renewal of writ of, 643.
writ, how long in force, 643.

EXECUTORS,
actions by and against, 537.
claims by and against when to be joined, 548.
title denied, 553.
statement of character in writ, 698.
represent the estate, 537.
joinder of actions, 548.
by severing a legacy from the estate constitutes himself a trustee, 236.
of a joint debtor may be sued together with surviving debtor, 331.

EXPERIMENTS,
inspection and samples for purpose, 663.

EXPRESS TRUSTS,
statutes of limitations do not apply to, 231, 452.
what are, 234.
personal representatives of express trustees, 232.

EXTRAORDINARY COUNCIL OF JUDGES,
may be convened at any time by the Chancellor, 58, 475.

EXTRAORDINARY DUTIES,
of judges, saved, 112, 442.

FACTS,
power of single judge to try matters of, and law, 156, 455.
material facts and not evidences to be pleaded, 381,
assessment of damages and trial of, in Chancery Division, 463.

FACTS—*continued.*
right to have questions of, tried by jury, 618.
findings of, to be entered by registrar, 625.
evidence by affidavit of particular, 627.
affidavits confined to, known, 628.
allegations of denial must be direct, 557.
allegations not denied admitted, 554.
defendant may disclose, entitling him to defend, 532.
in counter claim, 553.
material to case, interrogatories on, 600.
pleading material, 551.
admission of, 612.
costs for unnecessary denial of, 565.

FEES,
to be regulated by rules of Court, 471.
fixing and collecting, in Supreme Court, 490.
poundage, and expenses of execution, 641.
in pauper suits, 761.

FIDUCIARY RELATIONS,
other than those acting under an express trust, 238. 509.

FIERI FACIAS,
writ of, 645.
form of, 748, 751.

FILING,
copy of the writ of summons to be filed and numbered, 358.
copy of notice of appeal, 413.
of copies of pleadings within two days, 560.
documents in default of appearance, 589.

FINAL APPEAL,
to House of Lords, 44, 425, 493.

FINAL JUDGMENTS,
in default of appearance on specially endorsed writ, 526.
summary application for, after appearance, 529.
as to part, and interlocutory as to rest, 585.

FIRM,
disclosure as to names of, 512.
appearance by, 523.
partners to sue and be sued in name of, 540.
sueing a, 540.

FOLIOS,
in schedule of fees, 762.

FORECLOSURE OF MORTGAGES,
relief of, 38.
assigned to Chancery Division, 169.
form of endorsement for, 689.
of pleadings, 726.

FORFEITURE,
relief against, 278.

FORM OF ACTION,
to be regulated by rules of Court, 58.

FORMA PAUPERIS,
fees in respect, 761.

FORMS,
of notice to produce documents, 609.
of affidavit on application for order for discovery, 607.

FORUM,
collision of the, 23.
competition of the, 20.
insufficiency of the, 21.
uncertainty of the, 16.

FRAUD,
must be specially pleaded in deeds, 330, 555.
and malice how alleged, 558.
statute of, must be pleaded, 556.
action for misrepresentation pleadings, 732.

FURTHER CONSIDERATION,
adjourning trial for, 625.
trial, or account, 636.

FURTHER STATEMENT OF CLAIM,
and particulars, 564.

FUSION OF LAW AND EQUITY,
popular idea of, 33.

FUTURE ACTIONS,
binding the parties in, 205.

GARNISHEE,
equitable debts may be attached under, order, 327.
order to attach debt of, 647.
who may be, 648.

GENERAL DENIAL,
not permitted, 388, 551.

GENERAL ISSUE,
abolished, 388.
except not guilty by statute, 388, 554.

GAOL DELIVERY,
commissions not affected, 489.

GOOD FRIDAY,
not counted in limited time, 673.

GOODS, DETENTION OF,
order for, 663.

GREAT SEAL,
in commission, 84, 490.
jurisdiction under, not transferred, 446.

GUARANTEE,
notice to guarantor, or co-guarantor to defend action, 542.
special indorsement on, action, 694.
form of pleadings on, 734.

GUARDIANS,
by nature, 305.
for nurture, 306.
by testament, 308.
by election, 310.
of illegitimate, 310.
appointed by Chancery, 311.
to be appointed at the discretion of the Judge, 311.
effect of contracts and acquiescence of, 318.
concurring in special case for infant, 616.
appointing special, for special case, 676.
ad litem appointed, 525.

GUILTY, NOT BY STATUTE,
defence of, restored, 388, 551.

HEARSAY EVIDENCE,
excluded from affidavits, 628.

HIGH COURT OF ADMIRALTY—*see* Court of Admiralty.

HIGH COURT OF JUSTICE,
constitution of, 435, 445.
only sits as a single Court to hear Crown cases reserved, 36.
jurisdiction of, 56, 106, 345, 445.
Lord Chancellor president of, 82, 436.
judges of, 81, 435.
permanent number of judges of, 82.
divided into five divisions, 87, 457.
jurisdiction not transferred to, 113, 446.
appeals from, to H.M. Court of Appeal, 158, 447.

HIGHER SCALE,
Court fees, 749.

HIRE,
form of claim for negligence, 693.

HOLIDAYS,
when time expires on, it is extended, 674, 680.

HOUSE OF COMMONS,
judges not to sit in, 441.

HOUSE OF LORDS,
final appeal through H. M. Court of Appeal, 44, 493.
writs of error to, 154, 160, 473.

HUSBAND AND WIFE,
concurring in special cases, 616.
claims, by and against, may be joined with, 548.
other claims, 548.

IDIOTS—*see* Lunatics.

INCIDENTAL EQUITIES,
Court may recognize, 211, 450.

INDEMNITY,
notice of claim for, 542.

INDORSEMENT,
of claim on writ of summons, 357, 504.
for form—*see* Appendix, 689.
not essential to set forth precise ground of complaint, 505.
special, for liquidated demand, 506.
of address, 508.
of time of service, 515.
of name and abode of solicitor on writ of execution, 641.
of amount really due and interest on writ of execution, 642.

INFANT,
consent of guardians of, to have evidence taken by affidavit, 339.
rules of equity to prevail, as to, 454.
concurrence of, in special case through guardian, 616.
leave to set down special case for argument, 617.
default of appearance, 525.
actions by and against, 538.
wardship of, and care of their estates assigned to Chancery Division, 38, 172.
custody and education of rules of equity to prevail, 51, 305, 321.
jurisdiction of Master in Chancery to execute deeds for, 110.
trustee, 124.
how, becomes ward of Court, 172.
several kinds of guardians, 305.
responsible, when, 307.
power of, to elect guardians a place of residence, 309.
illegitimate, 310, 312.
guardians appointed by Chancery, 311.
mother's right of access, 311.
guardianship of, at the discretion of the judge, 311.
religious education, 316.
powers of a Court of Equity as to the religion of, 317.
effect of contracts and acquiescence of guardians of, 318.
conditions on which the Court will interfere, 322.

INFERIOR COURTS,
rules of law to apply to, 488.
prohibition to,
remitter of actions to, 682.

INFORMATION,
how to be instituted, 501.
name of Attorney-General used, 535.

INFRINGEMENT,
of certain legal rights, unassigned, 38.
of right of way, 696.
of pasture, 696.
sporting, 696.
patents, 696.

INJUNCTIONS,
by Probate Division, 31.
where formerly granted, matter may be relied on as a defence, 32, 213, 216, 450.

INJUNCTIONS—*continued.*
not by one division against another, 180, 214.
exceptions to this provision, 214.
from bankruptcy, 215.
by High Court in England, 216.
stay of proceedings, by way of, 219.
may be granted at any stage of the proceedings, 281, 453.
under the Common Law Procedure Act, 284.
mandatory, 285.
under the Judicature Act, 287, 453.
against waste or trespass, 288.
in protection of legal rights, 292.
application for, 293.
application for, by defendant, 294.
not against third persons, 294.
order for an, made on terms, 295, 453.
married women may sue for, in cases of separate estate, 336.
indorsement of claim in actions for, 358, 505.
form of, 697.

INJURIES TO PROPERTY,
interlocutory orders as to, 662.

INNKEEPER,
form of indorsement of claim, 697.

INQUIRIES AND ACCOUNTS,
may be ordered at any stage of the proceedings, 613.

INSOLVENT,
administration of estates, 51, 228, 451.

INSPECTION,
documents, inspection of, 604.
liability of party not complying with order, 610.
issues, or questions decided preliminary to order, 610.
notice of willingness to allow, 609.
enforcing, 609.
order for, of premises, 663.
and discovery, 593.

INSUFFICIENT ASSETS OR ESTATE—*see* Administrator and Winding-up.

INTEREST,
rate of, 330.
indorsement of amount of, due on writ of execution, 142.

INTERIM ORDERS,
for preservation of property, 662.

INTERLOCUTORY JUDGMENT,
for damages, 584.

INTERLOCUTORY ORDERS,
unappealed from, not to affect appeal from final order, 422.
notice of appeal from, 411.
as to injunctions or interim preservation of property, 662.

INTERLOCUTORY STEPS
to be taken in the Division to which the cause is attached, 460,

INTERPLEAD,
trustees and debtors (in cases of choses in action) may require, 259. 271, 453.

INTERPLEADER,
counterclaim by way of, 204.
binding parties in future actions by way of, 209.
continued and extended, 426.

INTERPRETATION CLAUSES
of Supreme Court of Judicature Act (Ireland) 1877, 432, 683.
of orders, 683.

INTERROGATORIES,
rules of equity to prevail as to, 329.
examination by, at any time, 396.
to disprove opponent's case, 601
time to answer by affidavit, 603.
objection taken to answering by affidavit, 603.
order to answer or answer further, 604.
liability of party failing to answer, 610.
using answers to, 612.
time for delivery of, 593.
at discretion of parties, 594.
only one set by each party, 597.
costs and forms of, 597.
striking out, application for, 598.

IRREGULARITY,
how dealt with, 679.

ISSUE GENERAL,
abolished, 388.
exception, not guilty of statutes, 554.

ISSUES,
power of single Judge to try, of fact and law, 156.
application to Judge to settle, 377, 388, 571, 551.
right to have, left to Jury with proper directions, 395, 466.
as far as possible to be tried in place where cause of action arises, 391, 456.
on questions to be tried preliminary to order for inspection, 610
setting down on motion for judgment of, 635.
joinder of, to close pleadings, 571.

ISSUING,
sealing and writ of summons, 358, 509.
execution, meaning of, 639.

JOINDER,
of causes of action, 30, 225, 535, 546.
of rent with ejectment, 547.
of several claims, 548.
of issue, 556, 571.

JOINDER OF PARTIES,
defendants need not be interested in all the relief, 536.
of defendants jointly and severally, 536.
of defendants in case of doubt, 536.
of parties, amendment of statement of claim, 542.

JUDGE OF COURT OF PROBATE,
on next vacancy in office of, Admiralty causes to be transferred, 439

JUDGE OF THE (HIGH) COURT OF ADMIRALTY,
the existing, unaffected, 438.
appeals from, to Court of Appeal, 438.
no successor to existing, 438.
jurisdiction to be vested in a judge of High Court, 438.

JUDGES OF THE COURT OF APPEAL (*also see* Justices of Appeal),
may act as judges of High Court, 87, 104, 469.
ordinary, may be included in commissions of assizes, &c., 96, 103, 463.
ex-officio, 101, 439.
ordinary, 101, 439.
additional, 101, 439.
authority of, 102, 440.
vacancies in the offices of, 103, 440.
qualifications and disabilities of, 103.
precedence of, 103.
no judge to sit on appeal from his own order, 104, 469.
number of judges to constitute a Court of Appeal, 161, 469.
jurisdiction of single judge, 161, 469.
interim orders in vacation, 161.

JUDGES OF THE HIGH COURT OF JUSTICE,
Judges of Chancery Division have power to recall or set aside probate, 29.
rights and patronage how far preserved, 74, 83, 94, 96, 441.
style and authority of, 82, 85, 436.
obligations of existing and future, 83, 91, 93, 441.
appointment of chief, 85, 435.
other, 85, 435.
qualification to be, 86, 440.
oaths of office, 86, 441.
tenure of office, 86, 441.
incapacities of, 86, 441.
precedence of, 86, 103, 441.
salaries and pensions of, 86, 443.
office of, vacated by resignation, 86, 440.
distribution of, to Divisions, 87.
transfer of, from one Division to another, 89, 458.
for ordinary commissions and sittings at Nisi Prius, 95.
for Nisi Prius sittings in Dublin, 99.
to sit in vacation, 99, 680.
rota for election petitions, 100, 464.
power of a single, 108, 155, 175, 464.
land judges to assist in Chancery business, 144, 437.
land judges, 144, 436.
vacancies not to be filled, 436.
Land Judges to exercise former jurisdiction, 436.
going on Assizes, 442.
extraordinary duties of Judges of former Courts, 442.
allowance for Circuit, 443.
pensions of future, 444.
going winter Assize, 444.
salaries and pensions how paid, 444.
number of, 457.
future vacancies, 458.

JUDGES OF THE HIGH COURT OF JUSTICE—*continued.*
junior, of Queen's Bench to assist in Common Pleas, 460.
single Judge to dispose of business in Chancery and Probate Divisions, 465.
Council of, 55, 57, 474.

JUDGMENT,
pending causes fully heard but not perfected, 343, 447.
perfected, but not executed, 344, 448.
signing, in default of appearance, 365, 366.
summary, after appearance, 366.
in default of defence, 376.
order for, 396, 399.
and execution, 399, 638.
motion for, 399, 638.
entering, reserving leave to move to set it aside, 400, 625, 634.
motion to set aside, 400.
how enforced, 400.
for recovery of land, 401.
orders enforced as, 401.
appeal from whole or part of, 408.
power of Court of Appeal to give full and proper, 420.
by default set aside, 624.
judge may direct, to be entered, 625.
immediate on registrar's certificate, 625, 638.
when no direction, plaintiff may set down action for, 634.
entered motion to set aside, 635.
motion to set aside, after partial trial, 635.
entry and date of, 637.
of nonsuit, effect of, 638.
execution of, against partners, 640.
creditors, 647.
interlocutory for damages, 584.
on specially indorsed writ in default of appearance, 526.
final, after appearance, 529.
for part, 532.
as to one of several defendants, 533, 584, 585.
for defendant on counter claim, 567.
by default, affidavit of sum due, 584.
final as to part, interlocutory as to rest, 585.
setting aside on terms, 588.

JUDICATURE ACT, 1877,
how far retrospective, 341.

JUDICATURES,
consolidation of, not of Jurisdictions, 34.

JURIES,
law as to unaffected, 473.

JURISDICTION,
modern enlargement of, 24.
one Court of universal, 26.
of High Court, 106, 445.
of Court of Appeal, 158, 446.
analogous to that in lunacy, 118.
of single judges, 108, 155.
service of writ out of, 362, 456, 504.
statutory, transferred, 475.

JUROR,
precept for, 671.
qualified to act, 671.

JURY,
law relating to, and jurymen unaffected, 60.
right to have issues left to, with proper directions, 395, 466.
also see Trial with Jury.

JUS. ACCERESENDI,
rule of equity to prevail, 331.

JUSTICES OF APPEAL,
two ordinary judges of the Court of Appeal to be styled, 101.
also the additional judges consisting of ex-judges, 101.
the existing Lord Justice of Appeal in Chancery, first ordinary judge, 101.
the Lord Justice retains all his privileges, 101.

LACHES,
doctrine of, 239.

LAND, ACTIONS CONCERNING
service of writ generally, 361, 514.
of writ out of jurisdiction for, and stock, 518.
appearances to summons for recovery of, 365, 522, 524.
appearance by lease, 365, 522, 524.
defendant may limit his defence, 524.
as landlord, 365, 522.
default of appearance in, actions, 527, 585.
no appearance in actions, after time limited, 526.
form of pleading in action, 738.
default of pleading, 586.
form of pleading in action for, 735.
joinder of other actions with, 518.
judgment enforced, 638.
writ of possession for, 401, 514.
cases, assigned to Chancery Division, 461.
action of trespass, to form of pleadings, 742.
when mortgagor may bring, 253.

LAND CASES RESERVED—*see* Court for Land Cases Reserved.

LANDED ESTATES COURT,
jurisdiction (including control of the Record of Title Office) transferred to High Court, 106.
judges of, transferred to Chancery Division, 143, 437.
jurisdiction of, 143.
land judges to assist in chancery business, 144, 437.
jurisdiction of land judges, 144, 436.
rules and orders of, retained (subject to alterations), 144, 437.
separate seal of, 144, 437.
title given by the, absolute, 145.
auxiliary to other courts, 145.
bound to determine incidental controversies, 146, 461.
procedure in, to be settled by rules of Court, 147, 462.
binding parties, 147, 462.
judges to take account and administer assets, 147, 462.
appeals from, to Court of Appeal, 149.
all business in, transferred to Land Judges of Chancery Division, 165.
all future business respecting, to be addressed to the land judges, 166, 461.

LAND JUDGES,
jurisdiction of, 112, 144, 146, 147, 436.
transferred to Chancery Division, 143, 437.
junior to transact Receiver Master's duties, 111, 148.
appeals from, to Court of Appeal, 149.
proceedings before as to receivers, 461.
application to extend receiver, 462.
proceedings before unaffected by the Act, 500, 683.

LANDLORD,
appearance of, to defend action for recovery of land, 522.

LAW,
inferences of, 396.
questions of special case, 611.
presumptions of, not to be pleaded, 559.

LAW AND EQUITY,
fusion of, 33.
concurrent administration of, 33, 184, 449.
rules for, 34.

LEAVE,
to serve out of jurisdiction, 504.
to defend where writ specially endorsed, 529.
to defend actions for recovery of land, 365, 524, 526.

LEGAL AND EQUITABLE CLAIMS,
must be considered, if properly brought forward, 27, 222, 223.

LEGAL RIGHTS,
Court to give effect to, 222.

LEGATEE,
action to administer assets, 689.

LETTERS,
contracts arising out of, how pleaded, 558.

LETTERS PATENT,
jurisdiction as to unassigned, 38,
injunctions in actions for infringement, 284.

LIABILITIES,
and debts what are, 230.

LIABILITY,
of party not answering interrogatories, 610.
of solicitor not apprising client of order to inspect, 612.

LIBEL,
discovery as to, 602.

LIEN,
equitable rules will not apply to legal estates acquired by direct devise, 331.
sale of estates for, transferred to Chancery Division, 170.
attachment of debts, when, or charge is set up, 650.
disposal of, or charge, 650.
payment into Court of amount of, claimed, 665.

LIGHT,
action for obstruction of, 696.

LIMITATIONS, STATUTE OF
inapplicable to express trusts, 51, 235, 452.
not to bar action where renewed writ is allowed, 513.
when relied on, must be pleaded, 555.

LIMITED DEFENCE,
to ejectments, 524.

LIQUIDATED CLAIM,
not indorsed, affidavit of particulars, 526.
default of defence, 586.

LIQUIDATED DAMAGES,
what is a penalty and what, 276.
and option of party, 279.

LIQUIDATION,
time for appeals in cases of, 677.

LOCAL GOVERNMENT BOARD,
Audit of Public Accounts transferred to, 111, 485.
jurisdiction of Receiver Master may be transferred, 486.

LOCAL VENUE—*see* Venue.

LONG VACATION,
how fixed, 41.
no pleading to be delivered in, 674.
duration of, 680.

LORD CHANCELLOR—*see* Chancellor.

LORD CHIEF JUSTICE—*see* Chief Justice.

LORDS COMMISSIONERS—*see* Commissioners.

LORDS, HOUSE OF,
appeal to from Court of Appeal, 44,, 493.
writ of error to, 473.
see House of Lords.

LORDS JUSTICE OF APPEAL IN CHANCERY.
one of first ordinary Judges of Court of Appeal, 101, 439.
rank, title, &c., remain as if Act had not passed, 441.

LUNACY,
the, jurisdiction, 115.
common law jurisdiction of Lord Chancellor, 117.
appeals from Lord Chancellor, 117.
jurisdiction of common law analogous to that in, 118.
statutory jurisdiction of the Lord Chancellor, 120.
divesting estates of lunatic trustees in Chancery, 124.
trustees in, 126.
divesting of estates in lands of lunatic trustees by Lord Chancellor, 127.
appointing persons to convey (in case of lunatic trustees) 127.
divesting of stock or choses in action do. 127.

LUNACY—*continued.*
appointing of trustees of personalty, 131.
territorial limits of the powers of Chancery, &c., 131.
power vested in Lord Chancellor may be exercised by Committee, 132.
appointing receivers in, 485.
committee may concur in special case, 615.
default of appearance, 525.
actions by and against lunatics, 549.

MALICE,
and fraud how alleged, 558.

MANDAMUS,
injunction and receiver, 281.
prerogative, 282.
statutory action of, 282.
under the Judicature Act, 283. 453.
indorsement of claim on writ, 505.
form of, 697.

MARKING,
the name of division on the writ, 40, 176.

MARRIAGE,
rectification of settlements, 170.
no abatement to action, 654.

MARRIED WOMEN,
separate estate, 335.
actions by and against, 538.
appearance of, 365.
leave to set down special cases, 617.
joinder of actions by and against, 548.

MASTER,
jurisdiction of, in Chancery transferred to High Court, 108.
power of, to execute deeds, 109.

MASTER OF THE ROLLS,
ex-officio Judge of Court of Appeal, 101.
jurisdiction of, 110, 142.
invested with the authority of Masters in Chancery, 110.
duty, authority, and power generally unaltered, 113.
the record jurisdiction of, 114.
common law jurisdiction of, 142.

MASTERS,
attached to Supreme Court, 476, 477.
duties regulated by rules, 477.
receiver Master, 483.

MATTERS,
in Chancery, Receiver Master's office, 111.
to be pleaded, 380.

MEADOW,
ancient, how character acquired, 241.

MEMORANDUM,
of appearance, 523.
form of, 688.

MERGER,
and extinguishment of estates, 247.
no, now by operation of law only, 247, 250, 452.
of estates at law, and in equity, 248.
of estates legal or equitable, 250.
as to, of charges on an estate, 252.

MESNE PROFITS,
indorsement of claim, 697.
form of pleadings in action for, 738.
and land, default of appearance, 528.

MISDIRECTION,
new trial not granted for, 398, 499.
unless substantial miscarriage, 398, 499.

MISJOINDER,
no action to be defeated by, of parties, 367.
see Parties.

MISTAKE,
in law, 333.
in case of mistake of Division, action to be transferred, 28.
in written agreements, 332.

MODE OF TRIAL,
different, 392, 620.
judge may order different times and, 392, 620.

MONEY DEMAND,
pleading payment into Court, 388, 390.

MONTHS,
unless expressed to be lunar, mean calendar, 673.

MORTGAGE,
claim for payment combined with claim for possession, 30.
redemption or foreclosure actions assigned to Chancery Division, 38.
accounts in redemption and foreclosure of, 169.
form of claim for, 689.

MORTGAGEE,
divesting of stock and choses in action of lunatic trustees, &c., 127.
position of, in law and equity, 254.
receiver appointed against, in possession, 298.
cost of trustees and, unaltered, 403, 468.

MORTGAGOR,
possessory suit by, 253, 452.
position of, at law, 254.
statutory powers conferred (by this Act), 256, 452.
exceptions to these powers, 257.
termination of the power, by notice from mortgagee, 258.
form of claim for redemption, 689.

MOTIONS,
for new trials and arrest of judgment, or to enter a nonsuit, 90, 92, 467, 633.
for judgment in default of defence, 376.
for judgment, 399, 633, 586.
to set aside judgment, 400, 635.
notice of, of appeal, 411.
evidence on, how taken, 627.
none to set aside judgment after a year, 635.
for judgment after partial trial, 635.
and other applications, 665.
notice of, to be given, 665.
for final judgment on writ specially indorsed, 530.

MULTIFARIOUSNESS
in pleading, 547.

MULTIPLICITY
of legal proceedings to be avoided, 27, 224, 369.

NE EXEAT REGNO,
writ of, 142.

NEGLIGENCE,
form of pleadings in action, 736.

NEW ASSIGNMENT.
none now necessary or permitted, 553.

NEW PARTIES,
may be added to actions, 369.
new defendant served with amended, writ, 542.

NEW TRIAL,
motions for, 90, 92, 633.
application for, to Divisional Courts, 397, 467.
for admission or rejection of evidence, when granted, 398, 631.
as to part, without disturbing rest, 398.
time for service of order for, 633.
order for, stay of proceedings, 633.

NEXT FRIEND,
or plaintiff not added, without his consent, 370.

NISI PRIUS,
the Judge at, constitutes a Court, 156.
jurisdiction of Courts of, 154, 156.
clerks of Assize and, 487.
sittings in Dublin, 671.

NON-COMPLIANCE
with rules, effect of, 679.

NON-SUIT,
motion for entry of, to Divisional Court, 90, 92, 467.

NOT GUILTY BY STATUTE,
plea of, restored, 388, 554.

NOTICE OFFICE,
consolidation of offices, 68.

NOTICE,
in lieu of service of writ, 361, 687.
of appearance, 523.
to parties added to action, 373.
to third persons liable to contribute, 205, 542.
form of, 699.
of trial, 392, 394, 620.
of application to direct mode and place for trial, 393, 620.
of trial by defendant, 394, 629.
form of notice of trial, 706.
appeal by way of, 411.
service of, of motion, by way of appeal, 411.
to officer on assigning action to Division, 510.
in lieu of statement of claim when writ specially indorsed, 563
of discontinuance of action, 568.
of service, copy to be left, 588.
notices and documents, originals to be filed, 589.
how alleged in pleading, 558.
to produce documents, 609.
admitting claim, 612.
to admit documents, 613.
to dismiss action, 621.
to cross-examine deponent, 630.
of motion, 665.
interval of time between, and motion, 666.
in writing or in print, 672.
of respondent for cross appeal not necessary, 676.
of entry of demurrer for argument, 580.
of payment into Court and of acceptance, 591.
forms of, 701.
of future claims, 205.
to quit, by mortgagor in his own name, 257.
to person chargeable, of assignment of choses in action, 265.
assignments effectual from date of service of, 269.
aliunde to subsequent assignee, 269.
of application for mandamus and injunctions, 393.

NUISANCE,
order for inspection of, 663.
form of claim for, 696.

NUMBERS,
to be expressed in figures, 387.

OATHS,
Commissioners to administer oaths, without limit of place, 78, 483.
what to be taken by judges, 441.

OFFICE,
consolidation of certain, 68, 478.
future vacancies in, 74, 481.

OFFICERS,
transfer of existing staff to Court of Judicature, 65, 476.
rank and position of, transferred, retained, 65, 476.
how attached to Divisions, 66, 477.

OFFICERS—*continued.*
personal, of Judges, 67, 76, 78, 477.
transfer of, from Divisions, 67, 478.
duty of, to be settled by rules of Court, 59, 471.
whose duties are not provided for, 69, 478.
Lord Chancellor may alter duties and designations of certain, 69.
Appeal Court, 70.
retirement of, 72.
consent of existing, 73, 479.
compensation for loss of rights, &c., of existing, 73, 479.
increase of salary, with duty, 73, 479.
reorganization of official staff, 73, 480.
distribution of business among, 477.
junior clerkships filled by open competition, 75, 481.
appointment of divisional officers, 75, 481.
removal of, 76, 482.
authority over, how exercised, 77, 482.
salary of, appointed under the Act, 77, 487.
entitled to pensions, 77.
solicitors, of the Court of Judicature, 78, 488.
in Receiver Master's office, 80, 486.
to assist Local Government Board, 81.
succession of, in Chancery, Registrars', and Law Court Offices, 66, 476.
analogous duties of, 69. 479.
appointment of general officers, by the Lord Chancellor, 76, 482.
in Lunacy Department, attached to Lord Chancellor, 84, 117.
of circuit, 94.
compensation exceeding limit of Superannuation Act, 480.
appointment to Chancery Division, 481.
officers power to appoint, repealed, 482.
qualification to be, preserved, 482.
approval of Lord Lieutenant to certain, 482.
release of, on compensation, scale of, 479.
"proper officer," meaning of, 683.

OFFICES,
open when, 680.

OPTION,
of plaintiff to choose his division, 40, 165, 176, 460.
of plaintiff to abandon his action on receiving counterclaim, 348.

ORAL EXAMINATION
of witnesses, evidence by, 396, 627.

ORDER,
for transfer of actions, made by a judge, 182.
special, for new procedure in pending causes, 346, 352.
summary, for relief before pleadings, 366.
for judgment, 396, 399, 644.
enforced as judgment, 401.
what, subject to appeal, 404.
no appeal from consent orders, 406, 468.
as to costs and matters of discretion, 406.
appeal from, made in chambers, 90, 407, 468.
renewal, 513.

ORDER—*continued.*
to answer interrogatories, or to answer further, 604.
for production, or discovery of documents, 604.
for examination of deponent, 628.
enforcing, by third person, 644.
to bind in cases of change of parties to actions, 659.
for interim custody and preservation of property, 662.
for sale of chattels, 663.
not to apply to Court of Probate, 682.

ORDERS IN COUNCIL,
preliminary rules, 58.

ORDINARY JUDGES OF APPEAL,
see Judges of Court of Appeal.

PAPER,
for pleadings, affidavits, &c., 673.

PARAGRAPH,
distinct claim in new, 552.
numbering of, 387.

PAPERS—*see* Documents.

PARLIAMENT,
orders and rules to be laid before, 62, 472, 474.

PART PERFORMANCE,
takes the case out of the statute of frauds, 335.

PARTICULARS,
affidavit of, when liquidated claim not indorsed, 526.

PARTIES,
to be regulated by rules of Court, 58.
binding the, in a future action, 205.
relief between all interested, 224, 450.
joinder of, 224, 367.
joinder of new in pending suits, 348.
no action to be defeated by misjoinder of, 367.
may be added at any time, 369.
who are added must be served with notice, 373.
may be struck out, 373.
representative of numerous, 374.
and parties, costs may include solicitors and clients' costs, 403.
character of should appear in indorsement, 505.
change of, no abatement to action, 654.

PARTITION,
and sale of estates assigned to Chancery Division, 38, ¶171.

PARTNERS,
co-partners may sue and be sued in the name of their firms, 334, 540.
appearance by, 523.
execution of judgment against, 640.

PARTNERSHIP ACTIONS,
assigned to Chancery Division, 38, 167.
exceptions, 167.
form of claim in, 689.
rules of equity to prevail, 334.

PASTURE,
infringement, claim for, 696.

PATENTS,
Also see Letters Patent.
unassigned to any Division, 38.
infringement of claim, 696.

PAUPERS,
old rule prevails as to fees, 761.

PAYMENT INTO COURT,
and out of court, to be deemed provisions relating to practice and procedure, 60.
by trustees or debtors, 259, 271, 453.
pleading, 388, 590.
when defendant may make, 390.
of debt and costs, stay of proceedings, 507.
how made, 591.
form of notice, 696.

PENALTIES,
relief against, 275.
what are liquidated damages and what are, 276.
are questions of law to be decided by the judge, 277.
imposed by statute, 280.

PENDING BUSINESS,
in old suits and actions transferred, 343.

PENDING CAUSES,
causes fully heard, but judgment not perfected, 343, 447.
judgments perfected, but not executed, 344, 448.
in error, and appeals in Appeal Court, 344.
other proceedings to be continued and concluded in High Court, 344.
jurisdiction of new Courts, to deal with old causes transferred, 345.
form and manner of procedure as to old causes, 345, 448.
mode of continuance of, 345, 448.
special orders for new procedure, 346, 352.
when the defendant desires to raise a counterclaim, 347.
introduction of new parties in, 348.
to change the nature of the action, 349.
appeals when under new procedure, 349.
in Chancery Division in England, 349.
before notice of motion for decree or replication, 350.
setting down, hearing, and evidence, 350.
after notice of motion for decree or replication, 351.
other matters than causes, 351.

PERCENTAGE—*see* Fees.

PERPETUATION OF TESTIMONY,
unassigned to any division, 38, 173.

PERSONS OF UNSOUND MIND,
see Lunacy.

PERSONAL REPRESENTATIVE,
when necessary, 360.
in actions where there is no, 541.

PERSONAL SERVICE,
necessary in action on bills of exchange, 360, 503.

PETITION,
not included in the term action, 354.
evidence on, 627.

PETITION OF RIGHT,
counter claim allowed in a pending, 347.

PETITIONS, ELECTION,
Judges to be appointed for trial, 100.

PLACE OF TRIAL,
to be named in summons, 391, 456, 502, 617.
issues to be tried in place where cause of action arises, 391, 456.

PLAINTIFF,
option of, to choose his Division, 40, 176, 165, 460.
misjoinder of plaintiffs, 367.
joinder of, 368, 534.
adding name of, where allowed, 369.
A, or next friend not added without his consent, 370.
when, is bound to file statement of claim, 370.
should name county or place of trial, 391, 456, 502, 617.
default of appearance of, at trial, 395, 624.
interpretation of, 433.
entitled to equitable relief, 449.
affidavit of, when filed, 629.
to set down judgment when no direction, 634.
action commenced in name of wrong, 533.
may confess and claim costs, 562.
may apply for direction when third party served, 545.

PLEADINGS,
to be regulated by rules of Court, 58, 471.
summary relief before, 366.
statement of claim, when necessary, 375.
generally, 375.
printing, when necessary, 377, 552.
no, after reply, 377.
close of, 377, 571.
forms of 378.
new rules of, substituted former ones, 379, 552.
what matters are to be pleaded, 380.
to contain material facts and not evidence, 381.
should not anticipate, 383.
admissions, 385, 636.
should not contain inferences of law, 386.
should be as brief as possible, 386.
paragraphs in, to be numbered, 387.

PLEADINGS—*continued.*
general denials in, not permitted, 388.
payment into Court, 388, 552.
amendment of, 389, 551, 575.
incidental proceedings between, and trial, 389.
two copies to be lodged on entry for trial, 394, 623.
interpretation of, 434.
production of documents referred to in, 608.
not to be delivered or amended in long vacation, 674.
power to extend time of, 674.
and demurring by leave to same, 579.
after demur overruled, 582.
of payment into Court in satisfaction, 590.
of material facts, 551.
must raise true ground of defence, 555.
must be consistent, 556.
to be delivered to officer in default of appearance, 560.
to be marked with date of delivery, 560.
copy of, to be filed within two days, 560.
pleading matters arising pending the actions, 561.
date and order of amendment to be marked, 577.
demur may be taken to any, or part of, 577.
to be struck out when demurrer allowed, 582.
default of to issue with third party, 587.
reply and subsequent, 570.
forms of, 706.

PLEAS,
scire facias, 141.
in abatement abolished, 553.

PLEDGE,
negligence, claim, 693.

POLICY OF INSURANCE,
claim on, 692.

PORTIONS,
suits as to raising, assigned to Chancery Division, 38, 169.
for form of indorsement, 689.

POSSESSION, WRIT OF,
when obtained, 654.
form of, 753.
præcipe for, 750.

POSTPONEMENT,
of trial, 624.

POUNDAGE,
levied under writ of execution, 641.

PRACTICE,
present to remain in force where no other provision, 338.
to be regulated by rules of Court, 58, 471.
Chancery, as to summons continued, 670.

PRÆCIPE,
of writ of execution to be filed, 641.

PRECEPTS,
for return of jurors, 671.
forms of,

PREFERENCE,
administrators and executors right of, and retainder, 335.

PRELIMINARY ACT,
in actions for damages by collision, 559.

PRESERVATION,
of property, interim order for, 663.

PRESIDENT,
Lord Chancellor of Supreme Court, 55, 457.
right of appointing officers by the, of Divisions, 75.
Lord Chief Justice of Queen's Bench Division, 457.
Lord Chief Justice of Common Pleas, of Common Pleas Division, 457.
Lord Chief Baron of the Exchequer Division, 457.

PRESUMPTION OF LAW,
need not be pleaded, 559.

PRINCIPAL AND AGENT—*see* Agent.

PRINTING,
pleadings when necessary, 377, 552.
evidence for appeals, 421.
special case, 615.
affidavits, 631.
notices in writing or in, 672.
on special paper with margin, 673.

PRIVILEGED COMMUNICATION,
what is, 602.

PROBATE,
power of Judges of Chancery Division to recall or set aside, 29.
stay of action pending, 30.

PROBATE AND MATRIMONIAL DIVISION,
judge of, 88, 457.
judge of, can grant injunctions, 31.
business of, 40, 461.
Court of Admiralty to be annexed in future, 88.
jurisdiction, 149.
establishment of wills within the exclusive jurisdiction of, 150.
rules and orders of, adopted by Supreme Court, 152, 473.
transfer of actions to, 181.
business to be transacted by single judge, 465.
not affected by rules under this Act, 500.

PROCEEDINGS,
other than actions (subject to rules) unaltered, 340.
incidental, between pleadings and trial, 389.
application to stay, 450.

PROCEDURE,
to be regulated by rules of Court, 58, 471.
the new, 338.
pre-existing, how far preserved, 338, 474.
scope of rules as to, 339.
pending causes, 343.
new actions, 353.
writ of summons, 355.
service of writ, 360.
Council of Judges to consider, and administration of justice, 57, 474.

PROCTORS,
may become solicitors, 487.

PRODUCTION,
of witnesses for viva voce examination, 397.
for cross examination after affidavit, 397, 628.

PRODUCTION FOR INSPECTION OF DOCUMENTS,
form of notice for, 704.
order for, time to apply, 406.
referred to in pleadings and affidavits, 608.
notice of, to be served on solicitor, 611.
order for, how enforced, 610.

PROHIBITION,
writ of, 138.

PROLIXITY,
costs of, to be borne by party chargeable with same, 386, 502.

PROMISSORY NOTE,
action upon form of pleadings, 737.

PROPER OFFICER,
meaning of, 683.

PROSECUTION,
action dismissed for want of, 393, 621.

PUBLIC ACCOUNTS,
audit of, by Local Government Board, 112.

QUEEN'S BENCH, COURT OF—*see* Court of Queen's Bench.

QUEEN'S BENCH DIVISION,
business of, 39, 173, 489.
Judges of, 88.
junior Puisne Judge constituted a member of Common Pleas Division, 88, 459.
arrangement of business, 91.
Crown side of, unaffected by the Act, 500, 683.
application to be made at Chambers, 669.

QUESTIONS OF FACT,
authority of commissioner to try, 156, 455.
right to have, tried by jury, 618.

QUESTIONS OF LAW,
authority of commissioners to try, 156, 456.
special cases, form of, 614.

QUIA TIMET,
bills of, unassigned to any division, 173.

REAL ESTATE,
partition and sale of (assigned to Chancery Division), 171.

REAL PROPERTY LIMITATION ACT,
provisions of, 237.

RECEIVER,
appointment of, unassigned to any Division, 38.
duty and business of, appointed in lunacy transferred,
application to appoint, 148, 300, 461, 484.
references to appoint, 148.
extending, 148, 302, 462.
grounds for the appointment of, 296.
over personal estate, 299.
the Division to which the application should be made, 300.
may be appointed by any judge, 301.
immediate appointment of, 301.
security for, 301.
appeals from orders as to, 302, 485.
appointment of, 281, 295 453.
on interlocutory motion, 662.
appointing, in lunacy, 485.
money in the hands of, to be paid into Court, 485.
claim for, should appear on the writ, 505.

RECEIVER MASTER,
no successor to be appointed, 80, 483.
officers in, office, 80, 486.
Chancery business in office of, 111.
general business in office, 111, 484.
duty of, in lunacy, &c., transferred to junior Lord Judge, 118, 148, 486.
power and duty as to receivers, and land transferred to Land Judges, 484.
other matters among Chancery Judges, 484.
jurisdiction transferable to Local Government Board, 486.
general orders relating to, 486.
immediate discharge of existing, 483, 487.

RECORD, COURTS OF
Courts of Probate (A.D. 1857), 2.
Courts of Matrimonial Causes and Matters (A.D. 1870), 2.
the Landed Estates Court (A.D. 1849), 2.
the High Court of Admiralty (A.D. 1867), 3.
Her Majesty's High Court of Justice in Ireland (superior), 27.
Her Majesty's Court of Appeal in Ireland (superior), 27.

RECOVERY OF LAND,
see Land.

ECOVERY OF PROPERTY,
other than lands, how enforced, 654.

RECTIFICATION,
of instruments in case of mistake, &c., 332.
form of indorsement of claim, 690.

RE-DISTRIBUTION
of business, 37, 67, 69.

REDEMPTION SUIT,
assigned to Chancery Division, 38, 169.
form of claim, 689.

REGISTRAR,
right of succession in Chancery Office, 66, 476.
findings to be entered by, 625.
judgment immediate on certificate, 625.

RE-HEARING,
all appeals are by way of, 415.

RELEASE,
of claim must be specifically pleaded, 555.

RELIEF,
by set off and counter claim, 190, 449.
cross relief against co-defendants and third persons, 192.
collateral, between co-defendants, 203.
plenary, 223, 451.
between all parties interested, 224, 450.
must be properly claimed, 226.
against penalties, 275.
against forfeiture, 278.
summary orders for, before pleading, 366.
statement of claim must ask for, 387.
alternative, 371.
application for, on admissions in pleadings, 636.
subject to conditions, order for execution, 639.
defendant need not be interested in all the relief, 536.
prayed, 551.

REMITTING ACTION,
from one Division to another, 176.
to Civil Bill Courts, 427, 48, 470.
order for made by Judge in Chambers, 31, 182.
ground for, 177.
pending, relating to same subject, 181.

RENEWAL
of writ of summons, 512.
of writ of execution, 643.

RENT, ACTION FOR
application to remit ejectments for non-payment of, 682.
may be joined with ejectment, 547.
orm of claim, 697.
form of pleadings in action for, 735.

REPLY,
time for, 371.
default of, 377.
no pleading after, 377.
to be divided into paragraphs and numbered, 378.
affidavit in, when filed, 630.
to counter claim, 567.
and subsequent pleadings, 570.
time for delivery of pleadings after, 571.
default of, 587.

RESPONDENT
not put to cross-appeal, 412.

RETAINER,
administrators and executors right of, 335.

RULES,
of equity, to prevail over those of law, 51, 324.
preliminary, 58.
of Court, 58, 470.
of evidence not affected, 60, 394, 473.
cannot alter the law relating to jurymen or juries, 60.
may alter statutory provisions, 60, 474.
future, of Court, 60, 472.
regard to be had to English, 61, 472.
parliamentary sanction to all, of Court, 62, 472, 474.
Schedule Rules, 62, 494.
Probate Court, adopted, 62, 152, 473.
of Courts, transferred, 63.
and orders of Court of Bankruptcy unaffected, 63.
other powers as to making, unaffected, 472.
force and effect of Judicature Rules, 64.
majority of Judges necessary to make rules, 60.
of Landed Estates Court, retained (subject to alterations), 144, 147.
scope and effect of, as to procedure, 339.
exceptions from the, 340.
the new, when retrospective, 341.
new, of pleading, substituted for former ones, 379, 552.
of law to apply to inferior Courts, 488.
exceptions from, 500.

RULES TO SHOW CAUSE,
abolished, 665.

SALE,
and distribution of proceeds, subject to any lien, assigned to Chancery Division, 38.
of lands, power of Masters in Chancery to execute deeds, 109.
order for, of chattels, 663.

SAMPLES
ordered to be taken by interlocutory order, 663.

SATISFACTION,
notice of payment in, 701.
acceptance, 701.

SCANDALOUS,
matters, to be struck out, 573.

SCHEDULED RULES,
to regulate procedure, 472.
38, contained in the Act, 62, 494.

SCIRE FACIAS,
writ of, 141.

SEALING,
every writ of summons is to be sealed, when it is to be deemed issued, 358.

SECURITY FOR COSTS,
amount to be fixed by officer, 672.

SEPARATE ADMINISTRATION,
by divisions, 36.

SEPARATE ESTATE,
actions to declare a charge on, unassigned to any division, 173.
of married women, 335.

SEQUESTRATION,
writ of, to enforce judgment for chattels, 639.
writ of, for non-payment of money into Court, or other contempt, 652.
summons to approve of sequestrator, 653.
form of writ, 749, 755.

SEQUESTRATOR,
appointment of, 653.

SERVICE,
of writ of summons in same manner as process of former Courts, 360, 514.
substitution of, of writ of summons, 361, 515.
of writ, out of jurisdiction, 362, 456, 504, 517.
disputed, of writ, 362.
irregular, of writ, 362.
address for, 365.
of notice on parties added to action, 373.
of notice of motion by way of appeal, 411.
title of affidavit for, out of jurisdiction, 504.
of writ for recovery of land, 514.
accepting, 514.
of copy of order for new trial, 633.
notice in lieu of, 521.
affidavit of, in default of appearance, 526.
of notice on third persons, 543.
through post-office, 588.
certificate of, 589.
of third persons, 589.

SET OFF,
relief by way of, and counter claim, 190, 550.
by Common Law Statutes, 190.
in equity, 191.
under the present Act, 192.

SETTING ASIDE DEEDS,
rectification and assigned to Chancery Division, 170.

SETTING DOWN,
cases on motion for judgment in default of a defence, 376.
and listing appeals, 413, 416.
of special case, 705.

SHERIFFS,
fees to be regulated by rules of Court, 59.

SHIP,
form of pleading about, 743.

SHORT-HAND WRITERS,
when allowed, 58, 394, 681.
expenses how borne, 681.

SITTINGS,
substitution of, for terms, 41, 454.
of Courts, to be regulated by rules of court, 58, 98, 455, 471.
Courts may sit at any time or place, 98.
for trial by Jury in Dublin to be continuous, 456.
at chambers at stated times, 667.

SOLICITORS OF SUPREME COURT,
under the jurisdiction of the Supreme Court, 36, 56, 78, 488.
costs to be regulated by rules of Court, 59, 471.
to be called "Solicitors of the Court of Judicature," 487.
apprentices, 78, 488.
appearance by, 365.
costs may be included in party and party costs, 403.
to prepare, &c., writs of summons, 509.
and plaintiffs bound to disclose name of firms, 512.
liable to attachment in default of appearance, 521.

SPECIAL CASES,
after writ of summons is issued, 378, 552.
form of, 614.
Court may direct, 615.
printing, 615.
discharging order irregularly made, 616.
leave to set down in case of disability, 617.
entry for argument, 617.
for opinion of court, 552.
setting down, 705.

SPECIAL INDORSEMENTS,
for receiver mandamus, or injunction, 358, 505.
for liquidated demand, 506.
for a bill of exchange, 507.
claim for an account, 507.
of writ, final judgment in default of appearance, 526.
of writ, leave to defend, 529.
of writ, notice in lieu of statement of claim, 563.
forms of, 697.

SPECIAL TRIBUNALS,
advantages of, 13,

SPECIFIC CHATTELS,
writ of delivery of, 527.

SPECIFIC PERFORMANCE
of contracts (assigned to Chancery Division), 38, 171.
form of claim, 690.

STAMPS,
office, on proceedings,
see Schedule, p. 758.

STATEMENTS,
embarrassing, to be struck out, 573.

STATEMENT OF CLAIM,
amendment of, 28, 575.
when necessary, 375.
default of, 375, 583.
should not anticipate defence or reply, 383.
to be divided into paragraphs and numbered, 387.
should state relief, and may ask for general relief, 387.
delivery of, 550.
when to be delivered, 562.
notice in lieu of, when writ specially indorsed, 563.
further, and particulars, 564.

STATEMENT OF DEFENCE,
where, is necessary, 376.
default of, 376, 583.
set-off and counter claim, 553.
to be divided into paragraphs and numbered, 387.
delivery of, 550.
see Further Defence.

STATUTES,
construed as applying to the High Court, 107, 475.
amendment of Bankrupt and Insolvent Act (1857), 492.

STATUTES OF LIMITATIONS,
not to bar transferred actions, 29.
not applicable to express trusts, 231, 452.
not to affect an action where a renewed writ has been granted, 513.
when relied on, must be pleaded, 555.

STATUTORY,
provisions may be altered by rules of Court, 60, 474.
jurisdiction of Courts transferred, 475.
injunction by person claiming interest in stock, 652.

STAY OF EXECUTION,
by an appeal of a common law judgment to House of Lords, 426
by Court of Appeal, of Chancery Division, judgment, 426.

STAY OF PROCEEDINGS,
as a remedy by way of injunction, 219.
application for, 219, 450.
proper Division to apply to, 220.
appeal is no, 422
if defendant pay debt and costs, 507.
for want of disclosure of names of firm, 512.
order for new trial, 633.

STIPULATIONS NOT OF THE ESSENCE OF THE CONTRACT,
as to time and quantity follow the rules of equity, 272, 453.

STRIKING OUT,
pleading power of Court, 568.
pleadings when demurrer allowed, 582.
of scandalous matters, 573.

SUBPÆNA AD TEST,
for cross-examination, 631.

STOCK—*see* Charging Stock.

SUBSTITUTED SERVICE
in writs of summons, 361, 515.

SUIT,
combination of, 225.
meaning of, 353, 433.
see Action.

SUMMONS, WRIT OF—*see* Writ of Summons.

SUMS
to be expressed in figures, 387.

SUNDAY
not to be reckoned in time when less than six days, 673.
offices not open, 680.

SUPPORT,
wrongful removal claim for, 696.

SUPREME COURT OF JUDICATURE,
Supreme Court of Judicature and its constituents, 155, 435.
consists of two permanent divisions—Her Majesty's High Court of Justice in Ireland; and H.M.'s Court of Appeal in Ireland, 27, 56, 435.
has no existence as a Court of Justice, 36.
duty of, 36.
"supreme" a misnomer, 55.
president of, 55.
jurisdiction of, 56.
transfer of pending causes to, 164, 447.
jurisdiction transferred to be exercised as nearly as may be as heretofore, 448.

SURETY,
form of claim by, 692.

TAXATION—*see* Costs.

TAXING OFFICE—*see* Costs.

TERMS,
abolished for judicial purposes, but used as measure of time, 97, 454.
interpretation of, 432, 683.
see Sittings.

TESTE,
of writ of summons, 356, 502.
form of, 684.
and forms of writ of execution, 641.

THIRD PERSONS,
cross relief against co-defendants and, 199.
cross relief against, must include relief against the plaintiff, 202.
no counter claim by, 204.
cannot be made co-defendants in cases of tort, by the defendant, 210.
no injunction against, 294.
enforcing orders by, 644.
service of counter claim on, 566.
default of pleadings to issue with, 587.
service on, 589.
notice to, liable to contribute, 542.
form of, 699.
appearance by, to dispute plaintiff's claim, 544.
binding, 544.
appearance of, 567.

TIME,
stipulations as to, in contracts, 273, 453.
for appealing, 408.
for *ex-parte* applications, 409.
extending, for appealing, 410.
for appealing, how computed, 409.
for appealing to House of Lords, 425.
enlarged or abridged after time expired, 674.
for delivery of claim, 562.
for delivery of defence, 564.
appearance after, limited, 524.

TIME TABLE—p. xxv.

TITLE,
receiver appointed in case of disputes of, 299.
of Court and Division on writ of summons, 356.
in actions for, service of writ, 361.
in defending ejectments, need not be pleaded, 554.
trustees, title denied, 553.

TRADE MARKS,
infringements unassigned to any division, 38.
injunctions against fraudulent imitations, 285.

TRANSFER OF ACTIONS,
brought in wrong Divisions, 28, 41, 176, 460.
by order of a Judge in Chamber, 31, 182.
grounds for, 177.
relating to the same subject, 181.
from Civil Bills Court to Chancery Division, and vice versâ, 48.
to Civil Bill Courts, 427, 407.
in Chancery Division, for hearing only, 660.

TRANSFER OF BUSINESS,
all pending causes transferred to Supreme Court, 164, 447.

TRANSFER OF OFFICERS,
existing staff transferred to Court of Judicature, 65, 476.
also *see* Officers and Offices.

TRANSFER,
all books, papers, documents, &c., to Supreme Court, 489.

TRAVERSING,
cost of, needless facts, 565.

TRAVERSE,
no general, 551.

TRESPASS,
injunctions against, 288.
distinction between waste and, 288.
form of claim, 696.
form of pleadings, 742.

TRIAL,
mode and place of, to be settled by rules of Court, 58.
one, and judgment, 195.
incidental proceedings between pleadings and, 389.
and evidence, 391.
county and place of, to be named in summons, 391, 456, 502, 617.
unless the trial is without jury, 392, 502.
different modes of, 392, 620.
notice of, 392, 622.
form of, 706.
judge may order different modes and times of, 392, 621.
notice of trial other than by jury, 393, 620.
notice of, by defendant, 394, 620.
notice of, can only be countermanded by consent or leave, 394, 623.
general list for, in Dublin, 394, 623.
record of proceedings at, 394.
certificate for judgment, form of, 706.
default of appearance of plaintiff or defendant at, 395, 623, 624.
exceptions to directions at, 396.
applications for new, 397.
new, not unless substantial miscarriage, 398.
new, as to part without disturbing the rest, 398.
commission to judges to try questions of fact or law, 93, 455.
in Dublin and on circuit, 463.
assessment of damages and of fact in Chancery Division, 463.
application for new, to Divisional Court, 397, 467.
with assessors, 292, 470, 626.
entry for, by opposite party, 623.
on entry for, two copies of pleadings to be lodged, 623.
adjournment of, 624.
judge may order before a jury, 625.
before commissioners, 626.
withdrawal of action entered for, 569.

TRIAL WITH JURY,
short-hand writer, when allowed to be settled by rules of Court, 58.
rules of evidence not affected, 390.

TRIAL WITH JURY—*continued.*
right of, unaffected, 390, 502.
vivâ voce examination of witnesses at, 396, 627.
costs of actions, 402.
sittings for, in Dublin, to be continuous, 456.
writ must name place of trial, 502.
right to, of questions of fact, 618.
notice of, 620.
to be before a single judge, 621.
judge may order, 625.

TRUSTS,
execution of charitable and private, assigned to Chancery Division, 38, 170.
express, statute of limitation inapplicable to, 51, 235, 452.
form of claim, 689.

TRUSTEE RELIEF ACTS,
paying money into Court under, 453.

TRUSTEES,
Chancery appointment of new trustees, 120.
divesting estates of lunatic, in Chancery, 124.
in lunacy, 126.
in cases of lunatic trustees, 127.
divesting of estates, and appointing new, 128.
accounts between, and cestui que trust, 168, 231.
executors constituting themselves trustees, 236.
costs of, and mortgagees unaltered, 403, 468.
title denied, 553.
actions by and against, 537.

UNCLAIMED DIVIDENDS
in bankruptcy, payment of, 492.

UNDERTAKING,
to appear, solicitors liable to attachment on default, 523.

VACATIONS,
long and short vacations to be fixed by Lord Lieutenant and Privy Council on the recommendation of the Judges, 41, 59, 98, 454.
sittings in, 58, 94, 455.
no pleadings to be delivered in, 674.
not to be reckoned for filling or amending pleadings, 674.
duration of, 680.
business discharged in, 681.

VACATION JUDGES,
sittings to be regulated by rules of Court, 60.
to hear cases in Dublin during vacations, 99, 680.
reversing order of, 681.

VENDITIONI EXPONAS,
issued in aid of fi. fa. or elegit, 645.
form of præcipe, 749
form of writ, 752.

VENUE,
to be named in summons, 391, 456, 502, 617.
where cause of action arises, 391, 456.

VICE-CHANCELLOR,
vested with the jurisdiction of Masters in Chancery, 110.

VIVA VOCE EXAMINATION
of witnesses at trials by jury, 396, 627.

VOLUNTEER,
position of, in assignments of choses in action, 271.

WANT OF PROSECUTION,
see Dismissal for Want of Prosecution.

WARD OF COURT,
see Infant.

WARDSHIP,
of infants, suits as to, assigned to Chancery Division, 172.
also *see* infants.

WASTE,
equitable waste by tenant for life, 240, 452.
at common law, 240.
legal, when restrained in equity, 241.
meliorating, 242.
tenants dispunishable of, 242.
equitable, restrained, 243.
permissive, 244.
conflict between the rules of law and equity as regards, 244.
injunction against, 288.
distinction between, and trespass, 288.

WATERCOURSE,
claim for diverting, 696.

WAY,
right of, claim for, 696.

WILLS,
establishment of, exclusively assigned to Probate Division, 150.
evidence concerning, at trial, 151.
the heir-at-law is entitled to a trial by jury, 152.

WINDING-UP,
application to stay proceedings, 220.
rule in bankruptcy to prevail, 228.
rule in bankruptcy not retrospective, 230.
transfer of action relating to, by Chancery judge, 661.
time for appeals in, 677.

WINTER ASSIZES,
Winter Assizes Act (1876) extended to Ireland, 94, 173.
allowance for judge going, 444.

WITHDRAWAL,
of action entered for trial, 569.
of defence or counterclaim, 569.

WITNESS,
remuneration of, to be settled by rules of Court, 59.
costs of, qualifying himself for examination, 336.
vivâ voce examination of, at trials by jury, 396.

WORK DONE,
form of claim, 696.

WRIT,
to be marked with the name of the Division, &c., 40.
to be regulated by rules of Court, 68.
a seal office to be consolidated with Record and Writ Office, 68.

WRIT OF ATTACHMENT,
to enforce judgments, 369.
to enforce persons to do or abstain from an act, 639.
to have the same effect as those formerly issued out of Chancery, 645.
not to be issued without leave, 646.

WRIT OF CERTIORARI,
issued from Chancery, 135.

WRIT OF DELIVERY,
to enforce judgment for recovery of chattels, 639.
issued as heretofore, 654.
for specific chattels, 527.

WRIT OF DE CORONATORE ELIGENDO ET EXONERANDO
how issued, 114.

WRIT OF DISTRINGAS,
charging stock or shares, 651.

WRIT OF ELEGIT,
to enforce sum due under a judgment, 642.
executed as heretofore, 645.

WRIT OF ERROR,
in criminal cases on appeal from Q. B. D. transferred to H.M. Court of Appeal, 43, 158, 160.
in civil actions abolished, in criminal, 134, 154, 160, 473.

WRIT OF EXECUTION,
several writs of, 639.
officer must be satisfied of date of entry, before issuing, 640.
indorsement of name and abode of solicitor on, 641.
teste and forms, 641.
indorsement of amount really due and interest on, 642.
writ in force for a year, 643.
renewal of writ, 643.
order in which, are issued not affected, 644.

WRIT OF FIERI FACIAS,
to enforce sum due under a judgment, 642.
executed as heretofore, 645.

WRIT OF HABEAS CORPUS,
ad testificandum, 136.
ad faciendum, 136.
ad subjiciendum, 137.

WRIT OF INQUIRY,
in default of appearance, for detention of goods, 527, 584.

WRIT OF NE EXEAT REGNO,
issued from Record and Writ Office, 142.

WRIT OF PROHIBITION,
issued in Chancery as well as by Common Law Courts, 138.
appeals from, to H.M. Court of Appeal, 141.

WRIT OF POSSESSION,
to enforce judgment for possession of land, 638.
may be issued with order, 654.

WRIT OF SEQUESTRATION,
to enforce judgment for payment of money into Court, 638.
to enforce judgment of chattels, &c., 639.
for non payment of money into Court or other contempt, 652.
summons to approve of sequestrator, 653.

WRIT OF SUMMONS,
all actions commenced by, 355, 176, 501.
preparation of, 355, 501.
form of, 355, 502, 684, 685.
for service out of jurisdiction of, 686.
notice in lieu of, 687.
title of Court and Division on, 356.
title of cause, date and teste, 356, 502.
indorsement of claim on, 357, 505.
precise ground of complaint not essential, 357, 505.
sealing and issuing, 358, 509.
copy filed and action distinguished by number, 358.
amendment of, 359, 577.
service of, 360, 514.
substituted service of, 361, 515.
service of, out of jurisdiction, 362, 504, 456, 517.
disputed service of, 362.
appearance to, 363.
county or place of trial to be named on, 391, 502.
unless the trial is without jury, 392.
two signed copies to be left with officers, 509.
concurrent, issued within twelve months, 511.
solicitor bound to avow, 512.
renewal of, 512.
under Bills of Exchange Act, 685.

WRIT OF VENDITIONI EXPONAS, 645, 752.

WRIT TO JUDGE TO SIGN BILLS OF EXCEPTIONS
under Statute of Westminster, 141.

WRITS GENERALLY,
to be dated day of issue, 502.

WRITTEN AGREEMENTS,
mistakes in, rule of equity to prevail, 332.

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