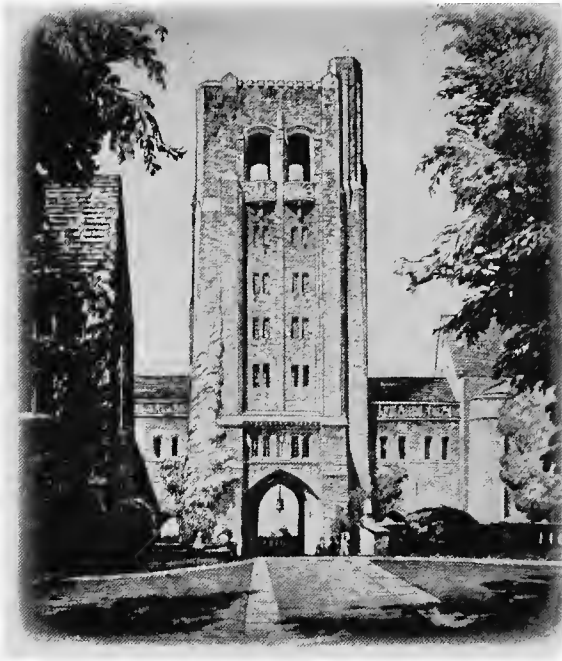

THE

PRACTICE IN EQUITY

BEING THE

EQUITY ACT OF 1880

AND THE

RULES OF COURT ISSUED THEREUNDER

CRITICALLY EXAMINED AND COMPARED WITH THE PRESENT ENGLISH PRACTICE, WITH FULL REFERENCES TO THE ENGLISH AND COLONIAL CASES.

BY

W. GREGORY WALKER,

OF LINCOLN'S INN, BARRISTER-AT-LAW, B.A., AND LATE SCHOLAR OF EXETER COLLEGE, OXFORD.

SECOND EDITION.

BY

W. GREGORY WALKER

AND

G. E. RICH,

BARRISTER-AT-LAW, M.A., SYDNEY, CHALLIS LECTURER IN EQUITY IN THE UNIVERSITY OF SYDNEY.

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PREFACE TO THE SECOND EDITION.

In the preparation of this Edition I have had the good fortune to secure the co-operation of my friend, Mr. G. E. Rich, by whom the present Rules were consolidated, and to whose labour and assiduity is largely due whatever improvement this Edition may exhibit; but, as I retained a general supervision of the work, the responsibility for any errors must rest with me.

W. GREGORY WALKER.

November, 1891.

PREFACE TO THE FIRST EDITION.

It is somewhat singular that so important a statute as the Equity Act of 1880 has not previously been edited. It is true that not a few of its sections are but re-enactments of the former practice; but, on the other hand, many of its provisions are wholly or in part imported from English Acts or Rules of Court which have never been re-enacted or re-ordered here, and which consequently introduce a procedure novel to the colony. It seemed to me that a book might not be unacceptable which should give at one view the case-law upon the different sections of the Act, and so save the practitioner the trouble of frequent piece-meal reference to various English text-books. To supply this want, however imperfectly, is the object of the following pages. The recent issue of the Equity Rules, consisting in part of old, but in large part of new, provisions, created a like want, which I have endeavoured to supply by the like means.

I need hardly say that I have not attempted an exhaustive treatment of all the points of Equity Practice covered by the Act and Rules. To have done so would have necessitated a treatise the very bulk of which would have defeated my intention, which was simply to provide the Profession with a manual which should point out concisely the chief details of the new practice, its operation, and (with regret be it added) its difficulties and ambiguities, adding at the same time, with all deference, and in no carping spirit, some few criticisms and suggestions.

My task has not been very easy, and errors both of omission and commission will no doubt be discovered in what I have written. I invite members of the Profession to point these out, and to communicate to me any *addenda* or *corrigenda* which may occur to them.

The English Consolidated Rules and Orders have been cited as Cons. Ord., r.; the Rules and Orders issued under the Judicature Act as O., r.; the Rules recently issued under our own Equity Act as R.

W. GREGORY WALKER.

February, 1884.

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Page 8, note s. 8, add *Aylward* v. *Lewis*, 1891, 2 Ch. 51.

Page 34, notes to s. 33, add *Mangan* v. *Metropolitan Electric Supply Company*, 1891, 1 Ch. 551.

Page 41, s. 41, second line, *for* of *read* by.

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Page 47, notes to s. 47, add *Williams* v. *Frere*, 1891, 1 Ch. 323.

Page 53, in notes to s. 51, eighth line from foot of page, *for* with *read* of.

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THE

PRACTICE IN EQUITY.

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44 VICT., No. XVIII.

An Act to amend the Law respecting the Procedure and Practice of the Supreme Court in its Equitable Jurisdiction. [Assented to 12 July, 1880.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:—

Jurisdiction of the Judge in Equity.

Appointment and jurisdiction of Judge.

1. It shall be lawful for the Governor with the advice of the Executive Council to appoint one of the Judges of the Supreme Court to be the Primary Judge in Equity hereinafter called the Judge and as such Judge to exercise the jurisdiction of the said Court in Equity And the Supreme Court shall be holden by the Judge so appointed for the determination of all proceedings in Equity and the disposal of motions and matters in relation thereto respectively and every decree or order of the Judge made in Equity (unless appealed from in manner hereinafter provided) shall be as valid and binding as if made by the Full Court.

Judge's absence or illness.

2. In case of the absence from Sydney or illness of the Judge so appointed it shall be lawful for any of the other Judges (during such absence or illness) to sit alone and determine all such matters as aforesaid in like manner as the Judge so being ill or absent might have done but subject nevertheless to the like appeal.

By 50 Vict., No. 36 notwithstanding anything contained in the Equity Act of 1880 any Judge of the Supreme Court may at the request of the Primary Judge in Equity or of the Chief Justice sit alone and hear and determine all causes or matters depending in Equity and shall have while so acting co-ordinate jurisdiction with and all the powers of the Primary Judge subject however to the same right of appeal as now exists from the decision of the Primary Judge.

The word "Court."

3. Wherever in this Act the word "Court" is used it shall be taken to mean the Court holden before the Judge so appointed as aforesaid or the Judge acting under the last preceding section in his stead unless the context shall require a different construction.

Power to decide legal titles, &c.

4. In any suit or proceeding in Equity wherein it may be necessary to establish any legal title or right as a foundation for relief the Court shall itself determine such title or right without requiring the parties to proceed at law to establish the same and whenever any question now cognizable only at law shall arise in the course of any proceeding before him the Judge shall have cognizance thereof as completely as if the same had arisen in a Court of Law and shall exercise in relation to such title right or question all the powers of the Supreme Court in its Common Law Jurisdiction and no suit in Equity shall be open to objection on the ground that the remedy or appropriate remedy is in some other jurisdiction.

This section is to a great extent compounded of the following English enactments—(1) 15 and 16 Vict., c. 86, s. 62: "in cases where, according to the present practice of the Court of Chancery, such Court declines to grant equitable relief until the legal right or title of the party or parties seeking such relief shall have been established in a proceeding at law, the said Court *may* itself determine such title or right without requiring the parties to proceed at law to establish the same;" (2) 25 and 26 Vict., c. 42, s. 1: "in all cases in which any relief or remedy within the jurisdiction of the said Courts of Chancery [*i.e.*, the High Court of Chancery and the Court of Chancery of the County Palatine of Lancaster] respectively is or shall be sought in any cause or matter instituted or pending in either of the said Courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact cognizable in a Court of Common Law, on the determination of which the title to such relief or remedy depends, *shall* be determined by or before the same Court."

In the former edition of this work the difficulties of this section, which had not then been judicially interpreted, were discussed at some length, and the necessity of limiting the generality of its language was pointed out. Such limitation has since been imposed by authority. "I think that s. 4 must be read in connection with s. 32. The latter section only gives the Court a limited power to grant damages. If this Court, under s. 4, had power to entertain suits in respect of breaches of contract in the same way as Courts of Common Law, it would have been unnecessary to have conferred the powers under s. 32. But as those powers are expressly given, and only to a limited extent, I think the Court's jurisdiction as to damages must be measured by the limits under s. 32, and not by the plenary powers under s. 4. . . . If the plaintiff has an *equitable* right at the time of filing his statement of claim, the Court will entertain the suit. Where the law provides an adequate remedy, the Court of Equity ought not to interfere; but where there is no such remedy, and the plaintiff is entitled to equitable relief, the measure of which is damages, this Court will itself ascertain those damages" (*per* Owen, C.J. Eq., *Horsley* v. *Ramsay*, 10 N.S.W.R. Eq. 45, 46). Accordingly, a suit for damages for breach of a guarantee given by partners, in which it was desired to proceed not only against the surviving partners, but also

against the executors of a deceased partner, was entertained because the estate of the deceased partner was liable only in equity (*S.C.*); *secus*, where the plaintiff could recover damages at law (*Fell* v. *N.S.W. Shale & Oil Co.*, *ibid.* 255-263). Again, "if this were merely a cause of action at law, I should hold that it could not be tried before me sitting as Primary Judge. To enable me to deal with questions of law it is not enough to allege an untenable equity in the statement of claim. If that were so, any action at law could be brought into equity by alleging some equity which was wholly untenable, but which was alleged only to give a colourable pretext for bringing the case before the Judge in Equity, instead of before a jury at law" (*per* Owen, C.J. Eq., *Want* v. *Moss*, 12 N.S.W.R. Eq.). "Section 4 does not make this Court a Court of Law. The Primary Judge sits in this Court to exercise the jurisdiction of the Supreme Court in Equity, and it is only for that purpose that he can sit here; but under s. 4 his powers in any suit or proceeding in Equity are extended so as to enable him to deal incidentally with matters arising in an Equity suit which, but for that section, must have been dealt with by the Common Law Courts" (*per eundem*, *Cameron* v. *Cameron*, 12 N.S.W.R. Eq.).

Judge or Judges assisting.

5. In any cause or matter the Judge may sit with the assistance of any two other Judges of the Supreme Court. Provided always that in every such case where three Judges sit the decision of the majority shall be taken to be that of the Full Court.

This section enables the Judge, when called upon to decide legal points, to invite the assistance of a Judge or Judges who may perhaps be more conversant with such matters. The first part of the section, if it stood alone, would seem to preclude the Primary Judge from calling in *one* assistant Judge only; but the proviso clearly contemplates that *one* or *two* assistant Judges may be invited at the Primary Judge's option, and with this the marginal note agrees.*

* As to the authority of marginal notes to Acts of Parliament, see *Claydon* v. *Green*, 3 C.P. 511; *re Venour's S.E.*, 2 C.D. 525 (but the dictum in this case was subsequently corrected in *Sutton* v. *Sutton*, 22 C.D. 513); *A.G.* v. *G.E.R. Co.*, 11 C.D. 465.

Statement of Claim.

6. After the commencement of this Act all persons seeking equitable relief shall instead of proceeding by bill of complaint file in the office of the Master in Equity a statement of his case to be termed the statement of claim which shall contain as concisely as may be a narrative of the material facts and circumstances on which the plaintiff relies but not the evidence by which they are to be proved such narrative being divided into paragraphs numbered consecutively and each paragraph containing as nearly as may be a separate and distinct statement or allegation and shall pray specifically for the relief which the plaintiff may consider himself entitled to and also for general relief. Form of initiatory pleading.

See R. 151, with the notes.

Where an injunction was obtained on a Court holiday, the statement of claim and affidavits, which could not then be filed, were ordered to be filed as on the day on which the injunction was granted (*Jennings* v. *Blunt*, 4 N.S.W. W.N. 128).

7. It shall not be competent to any defendant to take any objection for want of parties in any case to which the rules next hereinafter set forth extend and such rules shall be taken as part of the law and practice of the Court and any law or practice inconsistent therewith is hereby annulled. Rules as to parties.

Rule 1. Any legatee devisee or next of kin may without serving the remaining legatees devisees or next of kin have a decree for the administration of the real and personal estate of a deceased person.

Rule 2. Any one of several *cestui que trust* under any deed or instrument may without serving any other of such *cestui que trust* have a decree for the execution of the trusts of the deed or instrument.

Rule 3. In all cases of suits for the protection of property pending litigation and in all cases in the nature of waste one person may sue on behalf of himself and of all persons having the same interest.

Rule 4. Any executor administrator or trustee may obtain a decree against any one legatee next of kin or *cestui que trust* for the administration of the estate or the execution of the trusts.

Rule 5. In all the above cases the Court if it shall see fit may require any other person or persons to be made a party or parties to the suit and may if it shall see fit give the conduct of the suit to such person as it may deem proper and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 6. In all the above cases the persons who according to the present practice of the Court would be necessary parties to the suit shall be served with notice of the decree and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit and they may by an order of course have liberty to attend the proceedings under the decree and any party so served may within such time as shall in that behalf be prescribed by the general order of the Supreme Court apply to the Court to add to the decree.

See RR. 181-183.

Rule 7. In all suits concerning real or personal estate which is vested in trustees under a will settlement or otherwise such trustees shall represent the persons beneficially interested under the trust in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit but the Court may upon consideration of the matter on the hearing if it shall so think fit order such persons or any of them to be made parties.

This section is taken from the 42nd section of the 15 & 16 Vict., c. 86. Rule 1 *supra* is condensed from rr. 1, 2, 3, of the English enactment; accordingly rr. 2, 3, 4, 5, 6, 7, correspond respectively with the English rr. 4, 5, 6, 7, 8, 9. See on these rr. Walker and Elgood's "Administration Actions."

Absence of personal representatives.

8. If in any suit or proceeding in Equity it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative it shall be lawful for the Court either to proceed without any person representing the estate of such deceased person or to appoint some person to represent such estate for the purposes of the suit or proceeding on such notice (if any) as the Court shall think fit either specially or generally by public advertisement and every order made in reference to the matter and every order consequent thereon shall bind the estate of such deceased person in the same manner as if there had been a duly constituted legal personal representative of such deceased person and such representative had been a party to the suit or proceeding and had appeared

and submitted his rights and interests to the protection of the Court.

On this section (which corresponds with the 44th section of the 15 & 16 Vict., c. 86) see Daniell's Ch. Pr., 5th ed., p. 181; Walker's "Executors and Administrators," 2nd ed., p. 84.

Misjoinder of plaintiffs.

9. No suit shall be dismissed by reason only of the misjoinder of persons as plaintiffs but wherever it shall appear to the Court that notwithstanding the conflict of interest in the co-plaintiffs or the want of interest in some of the plaintiffs or the existence of some ground of defence affecting some or one of the plaintiffs the plaintiffs or some or one of them are or is entitled to relief the Court may grant such relief and modify its decree according to the special circumstances and for that purpose may direct such amendments if any as may be necessary and at the hearing before such amendments are made may treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit and the other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record and where there is a misjoinder of plaintiffs and the plaintiff having an interest has died leaving a plaintiff on the record without an interest the Court may at the hearing order the cause to stand revived as may appear just and proceed to the decision of the cause if it shall see fit and may give such directions as to costs or otherwise as to the Court shall seem meet.

This section is taken from s. 49 of 15 & 16 Vict., c. 86.

The language of this section is explicit, and the new doctrine is not left to the discretion of the Court; it is imperative on the Court to follow it, and, if it applies to cases where the parties are named on the record, it applies equally where a plaintiff sues on behalf of himself and all others; accordingly, on a bill by one member of a company on behalf of himself and all others except the defendants, praying an account of the receipts and payments of the defendants on behalf of the company and payment of what

should be found due to the plaintiff, where it appeared that there were circumstances which made the interest of some of the persons whom the plaintiff purported to represent different from his, the Court held that the case was within the section, and that the Court could treat the absent plaintiffs as defendants, and a decree for an account was made, and liberty given to certain shareholders to attend the proceedings under the decree (*Clements* v. *Bowes*, 1 Dr. 684, 694; see *per* Romilly, M.R., *Williams* v. *Page*, 24 Beav. 669; and *Hallows* v. *Fernie*, 3 Ch. at p. 471).

The fact that the plaintiff is the representative of a person who could not have sued, as well as of a person who could, is, under this section, no objection to a suit (*Carter* v. *Sanders*, 2 Dr. 248).

As to husband and wife co-plaintiffs, see *Hope* v. *Fox*, 1 J. & H. 456; *Smith* v. *Etches*, 1 H. & M. 558; *Beardmore* v. *Gregory*, 2 H. & M. 491; *Roberts* v. *Evans*, 7 C.D. 830; *Startin* v. *Pye*, 11 N.S.W.R. Eq. 191; *See* v. *Reynolds*, *ibid.* 219.

It is said that the bill is open to objection (once said Turner, L.J.) on the ground of misjoinder, some of the plaintiffs having interests adverse to those of others of them. But for what purpose was the Chancery Amendment Act passed? Was not one of its purposes to enable the Court to deal with cases according to justice, notwithstanding any formal objections on the ground of multifariousness? (*Evans* v. *Coventry*, 5 De G. M. & G. 918).

Absence of persons interested.

10. It shall be lawful for the Court to adjudicate on questions arising between parties notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen or that the property is comprised with other property in the same instrument without making the other parties interested in the property or interested under the same instrument parties to the suit and without requiring the whole trusts and purposes of the instruments to be executed under the direction of the Court and without taking the accounts of the trustees or other accounting parties or ascertaining the particulars or amount of the property touching which the question may have arisen Provided always that if the

Court shall be of opinion that the application is fraudulent or collusive or for some other reason ought not to be entertained it may refuse to make the order prayed.

This section corresponds with the 51st section of the 15 & 16 Vict., c. 86.

Under it the Court can direct the administration of one or more of several specific trusts created by the same instrument, without directing the performance of the whole of the trusts (*Parnell* v. *Hingston*, 3 Sm. & G. 337), and can make a decree for the purpose of carrying into effect an arrangement as to a part of the estate of a testator, without administering the estate or executing the trusts of the will generally (*Prentice* v. *Prentice*, 10 Ha. App. xxii.). But it does not enable the Court to decree foreclosure or sale in the absence of a person entitled to a share in the equity of redemption (*Caddick* v. *Cook*, 32 Beav. 70); and it only applies in cases where there are before the Court some of the parties interested in every point of view, and so it is inapplicable (*e.g.*) where, the question being between surviving children and the representatives of deceased children, the latter class are unrepresented (*Swallow* v. *Binns*, 9 Ha. App. xlvii.).

The section applies to special cases (*Re Brown*, 29 Beav. 401).

A party will not be allowed under this section to strike the names of some of the defendants, who are out of the jurisdiction, out of the record, and proceed without them (*Lanham* v. *Pirie*, 2 Jur. N.S. 1201).

The section does not render the decision of the Court binding on the absent parties (*Doody* v. *Higgins*, 9 Ha. App. xxxii.).

In *Wilson* v. *Church*, 9 C.D. 552, in an interlocutory application, with which some of the parties to the action who had no interest in such application were not served, an order *nisi* was made to be binding on the absent parties three days after service, unless they showed cause against it; see also *Commissioners, &c.*, v. *Gellatly*, 3 C.D. 610.

Defendant not interested as to all the relief.

11. It shall not be necessary that every defendant to the statement of claim shall be interested as to all the relief thereby prayed for but the Court 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 suit in which he may have no interest.

This section is borrowed from O. XVI., r. 4 (1875), r. 5 (1883). Under it a statement of claim is not open to demurrer on the ground that the demurring defendant is not interested in all the questions raised (*Cox* v. *Barker*, 3 C.D. 359). In such a case it is competent to the Court to direct that those questions in which alone a particular defendant is interested be tried first (see *per* James, L.J., *S.C.* 371).

As to next friend, &c.

12. Before the name of any person shall be used in any suit as next friend of any infant married woman or other party or as relator in any information such person shall sign a written authority to the solicitor for that purpose and such authority shall be filed with the statement of claim.

This section takes security that a person's name shall not be used as next friend without his consent, for a statement of claim is not to be filed unless such person's written consent be filed therewith. But it is further necessary that a person shall not lend his name as next friend without the authority of the person for whom he purports to act; and if, when challenged to show such his authority, he does not show any, the suit will be dismissed with costs to be paid by his solicitor (*Schjott* v. *Schjott*, 19 C.D. 94).

As to an inquiry whether a suit is for the benefit of infant plaintiffs, see *McLaughlin* v. *Moore*, 5 N.S.W.R. Eq. 111.

Apart from this section, a defendant can call on the plaintiff's solicitor on the record to produce the authority on which he acts (*Hawkins Hill G. M. Co.* v. *Briscoe*, 8 N.S.W.R. Eq. 123), where a solicitor instituted a suit and obtained an *ex parte* injunction on behalf of the company against the defendants proceeding with an action at law; on the motion to continue the injunction, the defendants took the objection that the solicitor had no authority to institute the suit; Sir W. Manning, P.J.,

overruled the objection, but, on appeal, it was held that the defendants had a right to call on the solicitor to produce the authority, and that as he had failed to do so, the injunction must be dissolved and the suit dismissed with costs as between solicitor and client, to be paid by the solicitor. A motion in plaintiff's name for leave to appeal to the Privy Council was also refused on the same ground (*S.C.*, 4 N.S.W. W.N. 132).

Service of Statement of Claim.

Service of statement of claim.

13. No writ of subpœna or other process to appear to and answer any statement of claim shall be required but the defendant shall be served with a written copy of such statement of claim according to the practice now in force respecting the service of bills of complaint together with an endorsement thereon in the form or to the effect set out in the first Schedule to this Act with such variations as circumstances may require stamped with the proper stamp by one of the Clerks of the Supreme Court.

See R. 65 and notes.

Effect of filing statement of claim.

14. The filing of a statement of claim shall have the same effect as the filing of a bill of complaint now has and the service upon the defendant of a written copy of such statement of claim shall have the same effect as the service of a bill of complaint now has.

Copies of Statement of Claim.

Delivering copies of statement of claim.

15. The plaintiff in any suit in Equity instituted after the commencement of this Act shall deliver to the defendant or his solicitor upon application for the same such a number

of copies of the statement of claim as he shall require upon being paid for the same at such rate as shall be prescribed by any general rule.

Amendment of Statement of Claim.

16. Upon the amendment of any statement of claim the provisions hereinbefore contained with respect to filing and serving and delivering copies thereof shall so far as may be extend to the statement of claim as amended Provided that where according to the present practice of the Court an amendment of a bill may be made without a new engrossment thereof or under such other circumstances as shall be prescribed by any general rule a statement of claim may be amended by written alterations therein as filed. Proceedings upon amendment.

By s. 82 "statement of claim" includes "information." An amended information must be signed by the Attorney-General, (*A.-G.* v. *Try*, 7 N.S.W. W.N. 72.)

As to amendment, see RR. 151-159.

Decree in Cases not Disputed.

17. If the defendant does not dispute that the plaintiff is entitled to the relief prayed by his statement of claim he may appear either personally or by counsel or solicitor before the Judge sitting in Chambers as hereinafter provided at the time fixed by the endorsement on the statement of claim and may then or at a future day to be appointed by the Judge submit to a decree or order as prayed or with such modification and variation as the Judge may direct and for that purpose the statements of fact in the statement of claim Proceedings where defendant does not dispute plaintiff's claim.

shall unless contradicted be taken to be true and the defendant may give such evidence as he may be advised and the Judge may call for such further proof either orally or by affidavit as he may think proper Provided that the Judge may if he thinks fit refuse to make any decree thereon and may make such order with respect to the further prosecution of the suit and the costs as the circumstances of the case may require.

This section introduces a novel practice, which will be found very useful, enabling parties in undisputed or simple cases to get a speedy decree or order. It is, however, difficult to see what evidence a defendant who submits should either desire, or be entitled, to offer.

As to the practice under the section, see notes to R. 62.

Appearance in Defence.

Proceedings in reference to defence.

18. If the defendant does not admit that the plaintiff is entitled to the relief prayed he shall when he enters an appearance to the statement of claim or at such later period as the Judge shall allow file a memorandum to the effect that he disputes the plaintiff's claim and shall within the time limited by a general rule in that behalf file in the office of the Master in Equity a demurrer plea or statement of defence to the statement of claim but after that time no defendant shall put in a demurrer plea or statement of defence without leave of the Judge Provided that the power of the Court to grant further time for demurring pleading or defending upon the application of any defendant shall remain in full force and that where the Judge shall grant further time to any defendant for demurring pleading or stating a defence the plaintiff's right to move for a decree under the provisions hereinafter contained shall in the meantime be suspended.

See, as to filing memoranda of dispute, R. 67 ; demurrers, RR. 78-89 ; pleas, RR. 90-96 ; statements of defence, RR. 97-103 ; reply and subsequent pleadings, RR. 104-107.

The old rule that a defendant cannot demur to what he has previously answered is no longer in force. Leave to amend his statement of defence authorises a defendant to put in a demurrer (*Powell* v. *Jewesbury*, 9 C.D. 34). If he has obtained an order extending the time within which to put in his defence, he may demur within such extended time (*Hodges* v. *Hodges*, 2 C.D. 112).

Interrogatories and Statement of Defence.

Interrogatories to examine defendant abolished but answer (*sic*) to be upon oath.

19. No interrogatories shall hereafter be filed for the examination of any defendant except by leave of the Court but every statement of defence shall as heretofore be verified upon oath.

See RR. 109-112.

The practice as to interrogatories in England is now regulated by O. XXXI., r. 1 (1883), which provides that except in cases of fraud or breach of trust interrogatories are not to be administered without the leave of the Court. A further check upon the improper administration of interrogatories is imposed by r. 3, which provides that if interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the interrogatories and the answers thereto shall be paid by the party in fault. The object of requiring the leave of the Court is to prevent needless expense and the use of the power of discovery where it is not necessary (*Aste* v. *Stumore*, 13 Q.B.D., at p. 329 ; *Martin* v. *Spicer*, 32 C.D. 592).

The practice adopted here upon an application for leave to file interrogatories is to annex a copy of the proposed interrogatories to the summons.

It is much to be regretted that statements of defence are (contrary to the English practice) required to be on oath. The requirement is a *damnosa hœreditas* from the old practice, in which a defendant's answer constituted not only his pleading but his

answer to the interrogatories which were regularly delivered to him. A statement of defence being now in no sense a discovery, but simply a pleading (*i.e.*, a statement of the defendant's case), there is no reason why it should be verified on oath any more than the statement of claim: to require such verification seems to spoil without cause the symmetry of the new system of pleading.

Form of statement of defence.

20. The statement of defence shall state all facts which constitute the ground of the defence together with such statements as the defendant may think it necessary or advisable to set forth in ordinary language and as concisely as is possible consistent with clearness and shall be divided into paragraphs numbered consecutively each paragraph containing as nearly as may be a separate and distinct statement and all facts stated in the statement of claim and not expressly and in terms denied in the statement of defence shall be deemed to be admitted for the purpose of the suit.

This section (with one exception) corresponds with the English practice, being compounded of several Rules or parts of Rules under the Judicature Acts. The exception referred to is the omission *per incuriam*, after the word "denied," of the words "or not admitted." There are many allegations which defendants, especially if trustees, may be hardly warranted in denying, and yet cannot safely admit. The difficulty has, however, been got over by the useful decision that, notwithstanding this section, an allegation in a statement of claim, which by the defence is not expressly and in terms "denied," but only "not admitted," is not to be deemed admitted for the purpose of the suit (*Bourke* v. *Wright*, 4 N.S.W.R. Eq. 9). The difficulty has also been subsequently met by R. 102.

See further R. 151, with the notes.

A defendant who, though he has filed a memorandum of dispute, omits to file a statement of defence, will be treated as admitting the facts stated in the statement of claim, and cannot give evidence to contradict them (*Rundle* v. *Short*, 4 N.S.W. R. Eq. 47).

21. A defendant may in his statement of defence set off or set up by way of counter-claim against the claim of the plaintiff any right or claim and such set-off or counter-claim shall have the same effect as a statement of claim in a cross suit so as to enable the Court to pronounce a final judgment in the same suit both on the original and on the cross claim But the Court may on the application of the plaintiff before trial refuse permission to the defendant to avail himself of such set-off or counter-claim if in the opinion of the Judge such set-off or counter-claim cannot be conveniently disposed of in the pending suit or ought not to be allowed. Counter-claims by defendant.

This section corresponds with O. XIX., r. 3 (1875), except that it omits the words "whether such set-off or counter-claim sound in damages or not," which in the English r. occur after the words "any right or claim." The omission no doubt limits the application of the section; but a counter-claim may be properly made for such damages as are mentioned in the 32nd section of the Act. In England a counter-claimant has an express power (under s. 24 (3) of the Judicature Act, 1873), to name as defendants to his counter-claim not merely the plaintiff, but third persons not parties to the original suit; but no such power exists in the colony, and consequently a defendant can only counter-claim here against the plaintiffs or some of them.

A new procedure is introduced by this section designed to prevent the necessity of bringing a cross-suit in all cases where the counter-claim may conveniently be tried in the original suit; it does not give a right of set-off where it did not exist before (*Re Milan Tramways Co.*, 22 C.D. 122).

Courts of Equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases, where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded, at the time, upon the existence of some debts due by the crediting party to the other. Where there are cross-demands between the parties of such a nature that if both were recoverable at law they would be the subject of a set-off, then and in such a case, if either of the demands be a matter of

equitable jurisdiction, the set-off will be enforced in equity (Story, 1st Eng. ed., 1435, 1436a; see also *per* Jessel, M.R., in *Re Whitehouse & Co.*, 9 C.D., p. 597; *per* Bramwell, L.J., in *Pellas* v. *Neptune, &c., Co.*, 5 C.P.D., p. 39; *Government Newfoundland* v. *Newfoundland Railway Co.*, 13 App. Cas., p. 213).

The same defendant may make separate counter-claims against different plaintiffs (*Manchester, &c., Co.* v. *Brooks*, 2 Ex. D. 243). A mere formal defendant may counter-claim (*Hodson* v. *Mochi*, 8 C.D. 569).

Relief can be given on a counter-claim in respect of a cause of action accrued to the defendant since the filing of the statement of claim (*Beddall* v. *Maitland*, 17 C.D. 174, in which *Original, &c., Co.* v. *Gibb*, 5 C.D. 713, was not followed; *Toke* v. *Andrews*, 8 Q.B.D. 428).

Whether the issues raised by a claim and counter-claim shall be tried together or separately is a matter of convenience. Where the Court was of opinion that it would be more convenient that the claim and counter-claim should be tried separately, on the ground that the questions raised by them were distinct and independent, it was held that on the trial of the claim the defendant's counsel should confine his cross-examination of the plaintiff's witness to the questions raised by the claim, and that on the trial of the counter-claim he might call the plaintiff's witness, but must examine him in chief as his own witness (*Thompson* v. *Woodfine*, 26 W.R. 678). Where the issues of fact on the claim and counter-claim were identical, it was held that, the evidence on the claim having been closed, the plaintiff was not entitled to adduce fresh evidence in reply on the counter-claim (*Green* v. *Sevin*, 13 C.D. 589).

A counter-claim is an independent suit, and not part of the original suit, though for convenience the two are tried together; and consequently, though the original suit be discontinued, a defendant may proceed on his counter-claim (*Beddall* v. *Maitland, ubi sup.; McGowan* v. *Middleton*, 11 Q.B.D. 464, over-ruling *Vavasseur* v. *Krupp*, 15 C.D. 474; *Winterfield* v. *Bradnum*, 3 Q.B.D. 326; *Stooke* v. *Taylor*, 5 Q.B.D. 576).

By O. XIX., r. 10, 1875 (which is partly incorporated in R. 101), 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. But such facts, where they have been already stated on the pleadings, need not be stated all over again. A defendant bringing a counter-claim may say, "I rely on the facts stated in the 3rd, 4th, and 5th paragraphs of the statement of claim, and the 7th, 9th, and 11th paragraphs of the statement of defence;" it is quite enough if he refers to them, and thereupon counter-claims (*per* Jessel, M.R., *Birmingham Estates Co.* v. *Smith*, 13 C.D. 509; see *per* Fry, J., *Green* v. *Sevin*, 13 C.D. 597). A defendant alleged that a certain writ had been improperly issued, and claimed damages, in one and the same paragraph of the statement of defence, which was numbered consecutively with the others, but was not headed separately as a counter-claim: held that the pleading was good as a counter-claim (*Lees* v. *Patterson*, 7 C.D. 866).

An application to exclude a counter-claim may properly be made on motion (*Naylor* v. *Farrer*, W.N., 1878, 187; 26 W.R. 809). There is nothing in the Act indicating in what cases a counter-claim should be disallowed, but the Court will doubtless follow the decisions that have been pronounced in England, where the Judges had at first less to guide them in the matter than the colonial Court now has. Counter-claims, then, or parts of counter-claims, will be excluded, where their subject-matter is not sufficiently connected with the subject-matter of the original suit (see *Padwick* v. *Scott*, 2 C.D. 736; *Harris* v. *Gamble*, 6 C.D. 748; *Naylor* v. *Farrer*, *ubi supra*; *contra*, *Gray* v. *Webb*, 21 C.D. 802; and distinguish *Hodson* v. *Mochi*, 8 C.D. 569; *Quin* v. *Hesson*, 40 L.T. 70; *Huggons* v. *Tweed*, 10 C.D. 359); where the plaintiff is made a defendant to a counter-claim in a different character from that in which he sued (*McDonald* v. *Carington*, 4 C.P.D. 28; and see *The Sir Charles Napier*, 42 L.T. 167); or where the counter-claim will unduly delay the original suit (*Gray* v. *Webb*, 21 C.D. 802; but see *Bartholomew* v. *Rawlings*, W.N. 1876, 56); and, where a judgment had been obtained at law, which was not to be enforced without leave of the Judge in the Chancery Division, it was held improper for a defendant (the judgment creditor) to apply for such leave by counter-claim (*Birmingham Estates Co.* v. *Smith*, 13 C.D. 506).

Although the question whether a counter-claim shall be excluded is not so entirely in the discretion of the Judge of first

instance as to preclude an appeal, he has a discretion which will not be interfered with except in a very strong case (*Huggons* v. *Tweed*, 10 C.D. 359).

See R.R. 101, 103, 165.

Court may decree in favour of defendant.

22. Where in any suit a set-off or counter-claim is made available as a defence against the plaintiff's claim the Court may if the balance is in favour of the defendant make a decree in favour of 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.

This section is adopted from O. XXII., r. 10 (1875).

It is a matter for the discretion of the Judge whether judgment shall be entered for the defendant for the balance, or for the plaintiff on the claim and the defendant on the counter-claim. The usual course is to enter judgment for the balance; but in whichever way the judgment be entered, the rule with respect to taxation of the costs is the same *per* Lord Esher, M.R., *Shrapnel* v. *Laing*, 20 Q.B.D. at p. 338; *Finska, &c.*, v. *Brown, &c., Co.* (W.N. (1891) 116).

Where the plaintiff's claim and the defendant's counter-claim are both dismissed with costs, the plaintiff is to pay to the defendant the general costs of the suit, and the defendant is to pay to the plaintiff only the amount by which the costs have been increased by reason of the counter-claim (*Saner* v. *Bilton*, 11 C.D. 416; *Mason* v. *Brentini*, 15 C.D. 287). On the same principle, where both claim and counter-claim are successful, the plaintiff, in the absence of any special directions to the contrary, is entitled to the general costs of the suit, notwithstanding that the result of the litigation is in favour of the defendant. There will be no apportionment of such costs as would have been duplicated had the counter claim been the subject of an independent suit, but the plaintiff is not to recover as costs of the suit any costs fairly attributable to the counter-claim (*Ward* v. *Morse*, 23 C.D. 377).

No costs were given by Sir W. Manning, P.J., in *Marks* v. *Ogg*, 1 N.S.W. W.N. 81, where the plaintiff's claim was dismissed and the defendant's counter-claim was successful.

See R. 165.

Defendant's Interrogatories.

23. Any defendant (but where he has been required to answer interrogatories not until after he shall have put in a sufficient answer thereto) may in like manner by leave of the Court file interrogatories for the examination of the plaintiff to which interrogatories shall be prefixed a concise statement of the subjects on which a discovery is sought and he shall deliver a copy of such interrogatories to the plaintiff or his solicitor and such plaintiff shall on oath answer such interrogatories and the practice with reference to excepting to answers for insufficiency or for scandal shall extend to answers put in to such interrogatories Provided that in determining the materiality or relevancy of any such answer or of any exception thereto the Court shall have regard to the statements contained in the statement of claim and in the statement of defence thereto by the defendant exhibiting such interrogatories Provided also that a defendant if he shall think fit may instead of filing interrogatories for the examination of the plaintiff institute against him a suit for the purpose of discovery. Discovery at instance of a defendant.

This section is taken from s. 19 of 15 & 16 Vict., c. 86, *mutatis mutandis.*

See RR. 110, 112, as to a defendant's interrogatories, and compare notes to s. 19, *ante.*

The 23rd section, it will be noticed, gives the plaintiff a prior right to discovery, but he will lose his priority by not filing his interrogatories within the proper time (*Garwood* v. *Curteis*, 12 W.R. 509).

A defendant may file interrogatories for the examination of the plaintiff, after notice of motion for decree has been given, and the plaintiff has filed his affidavits; and proceedings in the suit will be stayed until the plaintiff has answered, provided that there has not been any excessive delay (*Brancker* v. *Carne*, 2 Eq. 610).

The Court will give leave to amend a concise statement with interrogatories, after the answer to the interrogatories has been put in, where the defendant states that the amendment is important for the purpose of making out his case (*Crossly* v. *Dixon*, 6 Eq. 332).

As to the sort of discovery to which a defendant is entitled, see *Hoffmann* v. *Postill*, 4 Ch. 673; *Commissioners, &c., of London* v. *Glasse*, 15 Eq. 302; *Bidder* v. *Bridges*, 29 C.D. 29.

Where a corporation was plaintiff, the defendant could not on a concise statement interrogate its officers, when they were not parties to the suit, but had to institute a cross suit, making the officers co-defendants for the purpose of discovery (*Imperial, &c., Association* v. *Whitham*, 3 Eq. 89; and see *per* Turner, L.J., *U. S. A.* v. *Wagner*, 2 Ch. 592). In England the clumsy expedient of making an officer of a corporation against whom no relief is claimed a defendant for the purpose of discovery was abolished by the new procedure, O. XXXI., r. 45 (1875), providing that "if any party to an action be a body corporate or a joint stock company, whether incorporated or not, or any 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 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" (see *Wilson* v. *Church*, 9 C.D. 554), and the equivalent of this order has now been introduced into the practice here by R. 111.

Where the plaintiff is a foreign state suing in its own name, the defendant may apply to such plaintiff to name some person who may for the purpose of discovery be made a defendant to a cross suit; if such information be refused, the Court may stay proceedings in the original suit, until the means of discovery are secured in the cross suit (*U.S.A.* v. *Wagner*, 2 Ch. 582).

Where a defendant seeks relief as well as discovery, he should, instead of proceeding by way of concise statement, institute a cross suit, as provided by the above section, or deliver a counterclaim under s. 21.

Exceptions.

24. Except in the case of answers to interrogatories the practice of excepting to statements of defence for insufficiency and to statements of claim statements of defence and other proceedings for impertinence is hereby abolished Provided that the Court may direct the costs occasioned by any impertinent matter introduced into any proceeding to be paid by the party introducing the same. Exceptions for insufficiency or impertinence.

This section is inexactly worded. The provision that, "except in the case of answers to interrogatories the practice of excepting to statements of defence for insufficiency is hereby abolished," is based upon a confusion between the old answer, which (see note to s. 19) combined discovery with pleading, and a statement of defence, which is a pleading only. Obviously there can be no such thing as excepting to a defendant's *pleading* for insufficiency: the more insufficient or imperfect it is, the better for the plaintiff.

However, the intention of the section is pretty clear. Answers to interrogatories—including (s. 23) answers to interrogatories filed by a defendant—may be excepted to on the ground of either insufficiency or scandal; but statements of claim and defence and other proceedings may not be excepted to for impertinence, though, as the prohibition does not extend to exceptions for scandal, it is presumed that exceptions on this ground *may* still be filed to pleadings and other proceedings, as much as to answers to interrogatories, though such a course would be ill-advised, as a more direct and efficacious procedure is provided by RR. 58, 151, 223.

As to the distinction between scandal and impertinence, scandal consists in the allegation of anything which is unbecoming the dignity of the Court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause, to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous; there are many cases, however, in

which, though the words in the record are very scandalous, yet, if they are material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered as scandalous. Although nothing relevant can be scandalous, matter may be impertinent without being scandalous. Impertinences are described by L. C. B. Gilbert, to be "where the records of the Court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question, as where a deed is unnecessarily set forth *in hæc verba*" (Daniell's Ch. Pr., 5th Ed., 292).

In England, since the Judicature Act, exceptions to answers have been abolished, the matter in dispute being brought before the Court on motion or summons (O. XXXI., rr. 9, 10) (1875).

As to the time for filing exceptions to answers, see R. 113, which, however, refers in terms only to exceptions for insufficiency, not for scandal. It is presumed, however, that the Court would apply the R. to both classes of exceptions. See also R. 114.

Production of Documents.

Production of documents by a defendant.

25. The Court may on the application of the plaintiff in any suit make an order for the production by any defendant on oath of such documents in his possession or power relating to any matter in question in the suit as the Court shall think right and the Master in Equity shall have the like power under references to him and the Court or Master (as the case may be) may deal with such documents when produced in such manner as shall appear just.

The like by plaintiffs.

26. The Court may on the application of any defendant (but where he has been required to answer interrogatories not until after he has put in a sufficient statement of defence thereto) make an order for the production by the plaintiff on oath of such documents in his possession or power relating to any matter in question in the suit as the Court

shall think right and the Master in Equity shall have the like power under references to him and the Court or Master (as the case may be) may deal with such documents when produced in such manner as shall appear just.

These two sections are taken substantially from the 18th and 20th sections of the 15 & 16 Vict., c. 86, and *Cf.* O. XXXI., r. 11 (1875), r. 14 (1883); in that rule the words "possession or power" for the purpose of production mean sole legal possession, a right and power to deal with the documents in question (*Kearsley* v. *Philips*, 10 Q.B.D., p. 40; on appeal *ibid.*, 465). In the same rule the words "relating to any matter in question" have been interpreted in *Compagnie, &c.*, v. *Peruvian Guano Co.*, 11 Q.B.D., p. 63; *Bustros* v. *White*, 1 Q.B.D., p. 425; *Hutchinson* v. *Glover*, *ibid.*, p. 141.

An arbitration which has been made a rule of Court is not such a proceeding that the parties to it can apply for production of documents (*Re Anglo-Austrian Bk.*, 10 L.T. N.S. 369).

Applications for production should be made in chambers (see s. 62).

Both plaintiffs and defendants are entitled to an order for production as of right, without filing any affidavit in support, and delay does not deprive them of such right (*Rochdale Canal Co.* v. *King*, 15 Beav. 11), and this is the general practice; but in one case, where the circumstances were special, Malins, V.C., held that he had a discretion, and refused to make an order until a *primâ facie* case should have been made out (*Lane* v. *Gray*, 16 Eq. 552). As to whether a plaintiff may in all cases obtain the common order before defence, see *Union Bank of London* v. *Manby*, 13 C.D. 239. See further R. 121.

Persons bound by the proceedings, though not formally parties to the suit, may obtain the order (*Dent* v. *Dent*, 1 Eq. 186). It may also be granted on the application of a creditor who has come in under an administration decree, and made out a *primâ facie* case in support of his claim (*McVeagh* v. *Croall*, 1 De G. J. & S. 399). Conversely, a claimant coming in under a decree may be ordered to produce documents (Daniell's Ch. Pr., 5th Ed., 1683).

The fact that a party cannot be required to produce the documents in his possession does not excuse him from making the usual

affidavit (*Rumbold* v. *Forteath*, 3 K. & J. 44; *Lazarus* v. *Mozley*, 5 Jur. N.S. 1119).

It will be noticed that by the 26th section the defendant, if he has been required to answer interrogatories, cannot, until he has put in a "sufficient statement of defence thereto," obtain from the plaintiff an affidavit of documents. The English enactment ran—"where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill." It seems clear that in the 26th section of our Act the words "sufficient statement of defence thereto" are inserted *per incuriam*, "sufficient answer thereto" being really intended, for three reasons—(1) the section, as it reads, does not correspond (as it was presumably intended to do) with the English enactment; (2) a statement of defence is not put in in answer to interrogatories, but to the statement of claim; (3) the sufficiency of a statement of defence cannot, but that of an answer to interrogatories can, be considered by the Court (s. 24).

The English Act gave the Court a discretion to order the plaintiff to file an affidavit of documents at the instance of a defendant, though the latter might not have sufficiently answered the bill, but no corresponding discretion is given by the Colonial Act.

Before decree, a defendant can only obtain an order against the plaintiff; if he desires it against a co-defendant, he must institute a cross-suit (*A. G.* v. *Clapham*, 10 Ha. App. lxviii.; *Wynne* v. *Humberston*, 27 Beav. 424). *After* decree, however, a defendant may, without cross-suit, obtain the usual order against a co-defendant (*Hart* v. *Montefiore*, 30 Beav. 280).

On the general subject, see Dan. Ch. Pr., 5th ed., 1673, *et sqq.*

Want of Prosecution.

Dismissal of suits.

27. Every defendant may move to dismiss the suit for want of prosecution at such times and under such circumstances and subject to such restrictions as shall be in that behalf prescribed by any general rule.

See RR. 119-120.

Motion for Decree.

28. The plaintiff in any suit may at any time after the time allowed the defendant for filing a statement of defence has expired but before replication move the Court upon such notice as shall be prescribed by a general rule for such decree or decretal order as he may think himself entitled to and the plaintiff and defendant respectively may file affidavits in support of and in opposition to the motion so to be made and use the same on the hearing of such motion and if such motion be made after an answer to interrogatories filed in the cause the statement of defence shall for the purposes of the motion be treated as an affidavit. Proceedings on motion for a decree.

This section is adopted from the 15th section of the 15 & 16 Vict., c. 86, and lays down the only method by which, under the Equity Act, 1880, causes can be determined solely on affidavit evidence. It would have been simpler and better to have followed the course indicated by the practice in England under the Judicature Act, and, instead of bringing causes to hearing under the old practice, if they are to be determined on affidavits, and under the new, if they are to be tried on *vivâ voce* evidence, to have adopted a uniform procedure, providing (as is done in England by OO. XXXVII., XXXVIII.) (1875) that all causes shall be tried on *vivâ voce* evidence (with certain limitations, as regards minor points), unless the parties consent to have them heard on affidavits.

Replication is necessary when the decree has not been made, and the suit is to be proceeded with in the ordinary from, but is not necessary where the motion is pending (*Duffield* v. *Sturges*, 9 Ha. App. lxxxvii.). See s. 30.

On motion for decree, evidence is taken by affidavit, and not *vivâ voce*,—subject to this, however, that recourse may be had to the provisions of ss. 39, 42, and 47, *q.v.*

See further as to the practice on motion for decree, RR. 124. 129.

A plaintiff may read a defendant's answer against that defendant without notice (*Stephens* v. *Heathcote*, 1 Dr. & Sm. 138; see *Dawkins* v. *Mortan*, 1 J. & H. 339). A plaintiff may not read one defendant's answer against his co-defendant without notice (*Stephens* v. *Heathcote*). A defendant may not read his own answer against the plaintiff without notice (*ibid.*). If the plaintiff reads one part of a defendant's answer against that defendant, such defendant, notwithstanding that no notice has been given, is at liberty to read the rest of his answer against the plaintiff (*ibid.*).

Where a husband and wife have answered jointly, the wife's admissions may be read against her with reference to her separate estate (*Clive* v. *Carew*, 1 J. & H., at p. 207; *Callow* v. *Howle*, 1 De G. & Sm. 531).

Where no notice has been given to read a defendant's answer, and in fact it has not been read, it ought nevertheless to be entered as read in the decree (*Bright* v. *Legerton*, 29 Beav. 69).

Making of such decree discretionary.

29. Upon any such motion it shall be discretionary with the Court to grant or refuse the same and to give such directions with respect to the further prosecution of the suit as the circumstances appear to require and the Court may make such order as to costs as it may think right.

This section is adopted from the 16th section of the 15 & 16 Vict., c. 86.

Where on a motion for a decree the plaintiff fails to make out his case, the Court has a discretion to dismiss the motion with costs, leaving the suit to go to a hearing (*Warde* v. *Dickson*, 5 Jur. N.S. 698; *Thomas* v. *Bernard*, 7 W.R. 86).

Upon a motion for decree a plaintiff may have the same relief, "according to the prayer of the bill," that he could have at the hearing of the cause in the ordinary way (*Norton* v. *Steinkopf*, Kay 45, and *ib.* App. x).

Issue.

30. In suits where notice of motion for a decree or decretal order shall not have been given or having been given where a decree or decretal order shall not have been made thereon issue shall be joined by filing a replication in the form or to the effect of the replication now in use in the Court. Filing replication.

See R. 130.

Mode of Trial of Cause.

31. The present mode of taking evidence before the Master to be used at the hearing of the cause after issue joined is hereby abolished and such evidence shall hereafter be taken by the oral examination of witnesses and other proofs before the Judge in open Court and the evidence may if either party so require be taken down by a shorthand writer and the Judge shall have the same power of issuing or of authorising the issue of subpœnas and of punishing parties for non-attendance in obedience to any such subpœna as is now vested in the Supreme Court in its Common Law Jurisdiction. Evidence in contested causes to be taken orally.

"Other proofs" probably refers to evidence by affidavit under s. 40, *q.v.* The same expression occurs in s. 36.

The permission to either party, apparently without the consent of the other party, to *require* that the evidence be taken down by a shorthand writer is novel, and has not, in the writer's experience, ever been insisted on.

As to the costs of shorthand notes in England, see the cases collected by Morgan and Wurtzburg (2nd ed.), pp. 147, 497-9.

32. In all cases in which the Court in Equity has jurisdiction to entertain an application for an injunction against a breach of any covenant contract or agreement or against Power of Court to award damages in certain cases.

the commission or continuance of any wrongful act or for the specific performance of any contract covenant or agreement it shall be lawful for the Court if it shall think fit to award damages to the party injured either in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such manner as the Court shall direct.

This section is taken from the 2nd section of Lord Cairns' Act (21 & 22 Vict., c. 27), which remained in force in England notwithstanding the passing of the Judicature Acts (*Fritz* v. *Hobson*, 14 C.D. 542); the powers conferred by it are still preserved there, although the Act itself has been repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict., c. 49): see *Holland* v. *Worley*, 26 C.D. 578; *Allen* v. *Ayres*, W.N. (1884), 242; *Chapman* v. *Guardians of Auckland Union*, 23 Q.B.D. 299, 300; *Sayers* v. *Collyer*, 28 C.D. 103; *Dreyfus* v. *Peruvian Guano Co.*, 42 C.D. 73, 43 C.D. 316.

See notes to s. 4, *ante*.

The Court may, under this section, grant damages, though not asked by the statement of claim (*Catton* v. *Wyld*, 32 Beav. 266, approved by Lord Chelmsford in *Betts* v. *Neilson*, 3 Ch. 441; *Curriers' Company* v. *Corbet*, 2 Dr. & Sm. 355; *Griffin* v. *Mercantile Bank*, 11 N.S.W. R. Eq. 242-258). But it was held that it had no power, upon motion made *after decree* for specific performance, to add an order awarding damages; to do so would be to make a supplemental decree on facts happening subsequently to decree (*Corporation of Hythe* v. *East*, 1 Eq. 620).

The intention of the section was to give the Court power to grant complete relief *wherever it had a well-founded jurisdiction to entertain the case*, and not to compel the plaintiff to seek partial relief in one Court, and then turn him over to another in order to obtain supplemental relief (*per* Wood, V.C., *Hindley* v. *Emery*, 1 Eq. 54). But when the plaintiff fails to establish any covenant, contract, or agreement, of which specific performance can be directed, the Court has no jurisdiction to grant relief in damages. The meaning of "jurisdiction," as here used, appears from the judgment of Wood, V.C.—where the existence of an agreement

is made out, the Court may think it better to give relief in damages than to perform the agreement, but the relief thus given is, by the words of the Statute, *in addition to or in substitution for* specific performance, and *implies the existence of an agreement between the parties capable of being specifically performed* (*Lewers* v. *Earl of Shaftesbury*, 2 Eq. 271). The opening words of the section (thus understood) express what is a condition precedent to the granting of damages under the section, for such damages cannot be given unless in a case where the Court has jurisdiction to grant equitable relief, *i.e.*, where, independently of the claim to damages, there is jurisdiction to grant an injunction or specific performance (see *per* Wood, V.C., *Hindley* v. *Emery*, *ubi supra*; *Swaine* v. *G.N.R. Co.*, 12 W.R. 391; *Wedmore* v. *The Mayor of Bristol*, 11 W.R. 136; *per* Turner, L.J., *Durell* v. *Pritchard*, 1 Ch. 251-2; *Franklinski* v. *Ball*, 33 Beav. 560; *per* Cotton, L.J., *Proctor* v. *Bayley*, 42 C.D. 401; but see *Howe* v. *Hunt*, 31 Beav. 420; *Schotsmans* v. *Lancashire, &c., Co.*, 1 Eq. 349, reversed on another point, 2 Ch. 332); and, accordingly, where such condition precedent has not been fulfilled, the Court has frequently rejected the claim to damages (see *Norris* v. *Jackson*, 1 J. & H. 319; *Middleton* v. *Greenwood*, 2 De G. J. & S. 142; *Soames* v. *Edge*, Johns. 669; *Middleton* v. *Magnay*, 2 H. & M. 233; *Samuda* v. *Lawford*, 4 Giff. 42; *Ferguson* v. *Wilson*, 2 Ch. 77; *Rogers* v. *Challis*, 27 Beav. 175; *Lewers* v. *Earl of Shaftesbury*, 2 Eq. 270; *Tillett* v. *Charing Cross Bridge Co.*, 26 Beav. 419; *Darby* v. *Whittaker*, 4 Dr. 134; *Lancaster* v. *De Trafford*, 10 W.R. 474; *White* v. *Boby*, 26 W.R. 133; *Griffin* v. *Tonkin Mining Co.*, cited in *Horsley* v. *Ramsay*, 10 N.S.W.R. Eq. 45 *q.v.*) But it must be borne in mind that the condition precedent is satisfied, if the plaintiff had a title to equitable relief *at the time of filing his statement of claim*; it is immaterial, so far as regards the grant of damages, that the title to equitable relief has for some reason vanished before the hearing (*Davenport* v. *Rylands*, 1 Eq. 302; *Catton* v. *Wyld*, 32 Beav. 266; *Cory* v. *Thames Ironworks Co.*, 11 W.R. 589; *Fritz* v. *Hobson*, 14 C.D. 542); a Judge must look to the existing state of things to see whether protection by injunction is then needed, and, if not, he will not grant an injunction; but he must also look to the initial stage of the suit to see whether, when it was brought, a *bonâ fide* claim for an injunction existed; if he comes to the conclusion that, though there

was a *bonâ fide* claim for an injunction at the time when the suit was brought, an injunction is not necessary and that damages are an adequate relief in substitution for an injunction, he may give such damages (*per* Bowen, L.J., *Chapman* v. *Guardians of Auckland Union*, 23 Q.B.D. 304). But the Court will not entertain a suit for the mere purpose of giving relief in damages for the infringement of a patent, when the statement of claim has been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction (*Betts* v. *Gallais*, 10 Eq. 392). Nor does the section confer upon the Court any jurisdiction to award damages in a case where no wrongful act had been committed by the person against whom an injunction was sought. Therefore, where a suit is brought for an injunction in respect of a threatened injury, and no actual wrong has been committed by the defendant, the Court has no jurisdiction to give damages in substitution for such injunction (*Dreyfus* v. *Peruvian Guano Co.*, 43 C.D. 316).

If an injunction can be supported to restrain the progress of dilapidations not completed at the filing of the statement of claim, then this section gives jurisdiction to assess damages in respect of such parts of the dilapidations as were already effected at that date (*Hindley* v. *Emery*, 1 Eq. 52). Nay, more; it is not to be laid down as a general rule that, where a building injuriously affecting ancient lights has been completed before the statement of claim is filed, the Court is unable to give damages unless the injury is such as would justify a mandatory injunction (*City of London Brewery Company* v. *Tennant*, 9 Ch. 212). Neither is the section confined to cases in which the plaintiff could recover damages at law (*Eastwood* v. *Lever*, 4 D. J. & S. 114, 128; and see *Dreyfus* v. *Peruvian Guano Co.*, 43 C.D. 342). The right to damages is not taken away by the appointment of a receiver, even by consent, or by any other mode of placing property *in medio* pending the hearing of the suit (*Dreyfus* v. *Peruvian Guano Co.*, 42 C.D. 66; 43 C.D. 316).

The section does not diminish the rights of suitors. Therefore, a plaintiff in equity, who would before the present enactment have been allowed at the same time to sue the defendant at law for damages, may still do so, although he might under this section obtain damages in the suit. Accordingly, where A filed a bill against B for the cancellation of bills of exchange, drawn by B,

and accepted by A in part performance of a contract of which B failed to perform his part, and for an injunction to restrain B from parting with or suing on the bills, and, pending the suit, A commenced an action against B for damages for breach of the contract, it was held that the suit and the action were not for the same matter, and an order to elect obtained by B was discharged (*Anglo-Danubian Company* v. *Rogerson*, 4 Eq. 3).

The Court has granted damages *in substitution* for specific equitable relief, where the plaintiff has by laches or acquiescence disentitled himself to an injunction (*Senior* v. *Pawson*, 3 Eq. 330; *Eastwood* v. *Lever*, 33 L.J. Ch. 355; but see *Collins* v. *Stutely*, 7 W.R. 710; *Bauman* v. *Matthews*, 4 L.T. N.S. 784); where, through circumstances happening after the institution of the suit, the grant of specific relief has become impossible (*Catton* v. *Wyld*, 32 Beav. 266; *Cory* v. *Thames Iron Works Co.*, 11 W.R. 589), unless it has become impossible by the plaintiff's own act (*Hipgrave* v. *Case*, 28 C.D. 356; *Davenport* v. *Rylands*, 1 Eq. 302; *Fritz* v. *Hobson*, 14 C.D. 542); where the injury against which an injunction was sought was done under Parliamentary authority (*Wedmore* v. *The Mayor of Bristol*, 11 W.R. 136), and where in a case justifying a mandatory injunction such an injunction had not been asked for by the bill (*Martin* v. *Headon*, 2 Eq. 425; see now, however, s. 57, *post*), or the grant of it would inflict on the defendant an injury out of proportion to the benefit which it would confer on the plaintiff (*Jackson* v. *Duke of Newcastle*, 12 W.R. 1066). But, in the latter case, damages cannot, according to the most recent exposition of the law, be substituted for an injunction without the plaintiff's concurrence; for, where a plaintiff has established his right to a perpetual injunction against a defendant, the Court has no power to oblige him against his will to accept damages in lieu of the injunction (*Krehl* v. *Burrell*, 11 C.D. 146; *Greenwood* v. *Hornsey*, 33 C.D. 471, not following *Holland* v. *Worley*, 26 C.D. 578: compare *Doherty* v. *Allman*, 3 App. Cas. 709, which, however, had reference to damages at law).

A plaintiff may have specific performance with an inquiry as to damages, if it seems reasonably probable from the nature of the breach that substantial damages would reasonably and naturally result from it, even though it may be difficult to show specifically what the damage was, or to define the particular loss

which has been sustained (*per* Foster, J., *Griffin* v. *Mercantile Bank*, 11 N.S.W. R. Eq. 253). It is sufficient if the Court sees, from the nature of the breach of duty, that there may be damages which may be reasonably said to have naturally arisen therefrom, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the breach. . . . To refuse the inquiry, the Court must be prepared to say that the plaintiff cannot reasonably hope to obtain any damages, and it is not enough to say that no specific damage or loss has been suggested (*per* Manning, J., *ibid.*, 255, 259).

If the injury complained of is trivial the Court will refuse both specific relief and damages, and leave the plaintiff to his remedy at law (*Robson* v. *Whittingham*, 1 Ch. 442).

Damages may be assessed or question of fact arising in any suit may be tried by a jury before the Court itself.

33. It shall be lawful for the Court if it shall think fit to cause the amount of such damages in any case to be assessed or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself.

This section is taken from the 3rd section of the 21 & 22 Vict., c. 27.

It has been laid down in England that the Court will not, except by consent, direct trial before a jury until it has heard enough of the case to be satisfied of its expediency (*George* v. *Whitmore*, 26 Beav. 557; *Bonsor* v. *Bradshaw*, 4 Jur. N.S. 1011; *Bradley* v. *Bevington*, 4 Dr. 511).

Whether a jury is or is not to be summoned is entirely within the discretion of the Judge, and no appeal will lie (*Schneider* v. *Shrubsole*, 12 W.R. 359; see *Fernie* v. *Young*, 1 E. & I. App. 63).

The remarks of the Court in *Blunt* v. *Terry*, 5 N.S.W. W.N., at p. 51, with regard to the trial of certain issues raised in that case, are not to be taken as going beyond the limits of the matter then before the Court (*per* Darley, C.J., *Goodsell* v. *National Bank of Australasia*, 11 N.S.W. R. Eq., p. 34).

34. Any question of fact and any question as to the amount of damages which shall be so ordered to be tried by a jury before the Court itself shall be reduced into writing in such form as the Court shall direct and at the trial the jury shall be sworn to try the said question and to give a true verdict thereon according to the evidence and upon every such trial the Court shall have the same power jurisdiction and authority as belong to any Judge of the Supreme Court sitting at *nisi prius*. Questions ordered to be tried by jury to be reduced into writing.

This section is taken from the 4th section of the 21 & 22 Vict., c. 27.

As to the form of issues, see R. 142.

A defendant will not be allowed to add a totally new question of fact not in any way suggested by his pleading to the questions already directed for trial (*Morgan* v. *Fuller*, 2 Eq. 296).

The trial of the questions of fact and the hearing of the cause should not be on the same day, or at least the two should be kept distinct, and the trial of the questions precede the hearing. But in a case where the trial of the questions and the hearing of the cause did take place at the same time, but the findings on the questions were entered on one day, and the decree which was founded on them appeared to be made on the hearing of the cause, and was dated some days afterwards, this mode of proceeding did not enable the parties, upon an appeal against the decree, to open the whole matter as upon a motion for a new trial, and, no such motion having been made in the Court below, the House of Lords refused to treat the appeal as one which brought the evidence and findings under its notice for review (*Fernie* v. *Young*, 1 E. & I. App. 63). See note to section 38.

The discretion formerly possessed by the Court of Chancery in granting new trials of issues has not been affected by this Act, and the Court may supplement the evidence given at the trial by a consideration of affidavits, setting forth facts which did not appear at the trial (*Goodsell, &c.*, v. *National Bank of Australasia*, 11 N.S.W.R. Eq. 32, *per* Darley, C.J., and Stephen, J., affirming the decision of Owen, C.J. Eq., who had set aside a verdict and

ordered a new trial of an issue which he had directed to be tried, and which had been tried before himself and a jury under the provisions of sec. 35).

In granting a new trial a Judge in Equity has a much wider discretion than a Judge at Common Law, because at Common Law, when once the verdict is returned, the Judge is *functus officio*, and has to express neither approval nor disapproval of the verdict, whereas in a Court of Equity the Judge has to act upon the verdict returned, and impliedly express his approval by basing his decree upon it (*ib.* at p. 33, *per* Owen, C.J. Eq.).

Judge may procure attendance of jury.

35. The Judge may issue such precepts and make such orders upon the Sheriff for procuring the attendance of a special or common jury for the trial of any such question of fact or question of damages as may be made by the Supreme Court and may also make any other orders in relation thereto which to him may seem requisite and every such jury shall be summoned struck and called in like manner as if summoned for the trial of a cause in the Supreme Court in its Common Law jurisdiction and generally for all purposes of or auxiliary to the trial of questions by a jury and in respect of new trials the Judge shall have the same jurisdiction in all respects as belongs respectively to the Supreme Court in its Common Law jurisdiction or to any Judge thereof for the like purpose Provided that from every order made by the Judge on an application for a new trial there shall be the same right of appeal as from any other order of the Court.

This section is extracted *mutatis mutandis* from the 3rd section of the 21 & 22 Vict., c. 27.

If damages are assessed, or a question of fact is tried, by a jury before the Primary Judge, any application that may be made for a new trial must be made, under this section, to such Judge, subject to appeal, as in *Goodsell, &c.* v. *National Bank of Australasia, ubi sup.*

36. It shall be lawful for the Court to cause the amount of such damages in any case to be assessed or any question of fact arising in any suit or proceeding to be tried before the Court itself without a jury and to cause the evidence on the trial of that question to be taken by the oral examination of witnesses and other proofs in open Court and any question of fact and any question as to the amount of damages which shall be so ordered to be tried before the Court itself shall be reduced into writing in such form as the Court shall direct and the verdict of the Judge shall be of the same effect as the verdict of a jury under this Act and the proceedings upon and after such trial as to the power of the Court the evidence and otherwise shall be the same as in the case of a trial by jury under this Act Provided that in the case of a trial under this section any person may apply for a new trial either to the Judge before whom the trial was heard or by way of appeal to the Full Court.

Damages may be assessed or questions of fact tried before the Court itself without a jury.

This section is taken from the 5th section of the 21 & 22 Vict., c. 27.

As to "other proofs," see note to s. 31.

On an application for an injunction a trial was ordered by the Lord Chancellor to take place by a jury before a Vice-Chancellor. On a consent between the parties, the Vice-Chancellor substituted a trial before himself without a jury. This was held by the House of Lords to be *ultra vires* of the Vice-Chancellor: the change could only be competently effected by an order of the Lord Chancellor (*Fernie* v. *Young*, 1 E. and I. App. 63).

The section provides, *inter alia*, that, where damages are assessed, or a question of fact is tried by the Primary Judge without a jury, an application for a new trial may be made either to such Judge or to the Full Court.

37. It shall be lawful for the Court in any case where it shall see fit to cause any such question of fact to be tried or the amount of such damages to be assessed by a jury before any Judge of the Supreme Court or in any Circuit Court.

Damages may be assessed by a jury before any Judge of the Supreme Court at *nisi prius* or on circuit.

This section is substantially identical with a proviso in s. 2 of 25 & 26 Vict., c. 42, declaring that, whenever it should appear to the Court that any question of fact might be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues in the superior Courts of Common Law, it should be lawful for the Court of Chancery to direct such trial. It was held that, in order to bring a case within the proviso, the Court of Chancery had to be satisfied that the administration of justice in the particular case might be more conveniently exercised and promoted by directing such issues than by completing the hearing and the inquiry before itself (*Young* v. *Fernie*, 1 De G. J. & S. 353).

If a decree is founded upon the finding of issues, however those issues were found, whether on trial at law or on a trial in the Court of Chancery, with or without a jury, and the decree states the findings, but does not refer to the evidence, the House of Lords held, on an appeal against such a decree, that it could not look at the evidence to see whether it afforded ground for the findings or the decree. In a case, therefore, where there had been an application to the Court of Chancery for an injunction to restrain the infringement of a patent, and a trial had taken place before a Vice-Chancellor without a jury, and his Honour had made certain findings, and in the decree on the hearing had made no reference to anything but the findings, the patent, the specification, and the answers, and there was an appeal against the decree alone, the House had no power to look into the evidence in order to satisfy itself whether the decree was or was not warranted by the evidence, but was bound to confine itself to the decree and to the matters referred to in it (*Fernie* v. *Young*, 1 E. & I. App. 63).

As to suing out a writ of inquiry under this section, see RR. 145-148.

In *Blunt* v. *Terry*, 5 N.S.W. W.N. 50, the Full Court, by virtue of the 28th section of 4 Vict., No. 22, directed certain issues to be tried before one of the Judges sitting as at *nisi prius*.

An appeal will lie from an order of the Primary Judge directing an issue before a jury; but if the Court of Appeal is of

opinion that there is really a conflict of evidence, it will not interfere with the discretion of the Judge in directing an issue (*Williams* v. *Guest*, 10 Ch. 467).

Proceeding to hearing after evidence closed.

38. When the evidence on both sides is closed and there has been no trial before a jury a memorandum to that effect shall be signed by the Judge and filed and the plaintiff may thereupon forthwith proceed to the hearing of the cause unless the Judge shall otherwise order And the plaintiff shall without any such memorandum after the verdict in cases of trial before a jury proceed to the hearing on a day to be fixed by the Judge for that purpose and it shall not be necessary in any case to sue out a subpœna to hear judgment.

The enactment that the plaintiff shall after a verdict in cases of trial before a jury proceed to the hearing on a day to be fixed by the Judge for that purpose, seems to intimate that, where a trial of questions of fact is had before a jury, the hearing of the suit should not be had until some day subsequent to such trial, and, indeed, that an application to fix a day for the hearing should not be made until after the verdict has been delivered; and see notes to s. 34.

Judge may require examination before himself of any witness.

39. Upon the hearing of any cause or matter the Judge may require the production and oral examination before himself of any witness or party in the cause and may direct the cost of and attending the production and examination of such witness or party to be paid by such of the parties to the suit or matter and in such manner as he may think fit.

This section (which in this Act is somewhat inconveniently placed under the heading "Mode of Trial of Cause," belonging as it does to the succeeding rather than the preceding sections) is taken from the 39th section of the 15th and 16th Vict., c. 86.

Evidence.

Evidence at the hearing.

40. The evidence to be used at the hearing shall be taken in the same manner and be subject to the same rules and exceptions as at a trial at *nisi prius* Provided that affidavits by particular witnesses or as to particular facts may by consent or by leave of the Court be used on the hearing and such consent may if the Court shall think fit be given by or on the part of married women or infants or other persons under disability.

The proviso in this section as to the admission of affidavits obviously refers, both from its collocation and its wording, only to suits in which the general evidence is taken orally, and does not enable a party to prove by affidavit the principal facts of his case (*Schultz* v. *Roberts*, 1 S.C.R. Eq. 34); the only method provided by the Act for the determination of suits *entirely* upon affidavit evidence is by motion for decree under s. 28, *q.v.*

If it is wished on behalf of persons under disability to consent to the admission of affidavits under s. 40, leave to give such consent must be obtained from the Court; an application for such leave may properly be made *ex parte*, for, even after leave granted, it is open to the opposite side to refuse to give their consent, if they should object to such admission. Where, however, a party, being *sui juris*, refuses to consent, or, being under disability, refuses to apply for leave to consent to the admission of affidavits, the Court has power under this section to order such admission *in invitum*, but in such a case the application should, of course, be on notice to the dissentients.

In a friendly suit to set aside a family deed, in which one of the defendants was an infant, a compromise was agreed on by the parties, but as the allegations contained in the pleadings, as to the circumstances connected with the deed, were not sufficient evidence of these circumstances, as against the infant, Sir W. Manning, P.J., by consent allowed affidavits relating thereto to be filed under the proviso in this section (*Morrisset* v. *Lawson*, 5 N.S.W. R. Eq. 73).

See notes to next section.

41. The Court at the hearing of any cause or of any further directions therein may receive proof of affidavit of all proper parties being before the Court and of all matters necessary to be proved for enabling the Court to order payment of any money belonging to a married woman and of all such other matters not directly in issue in the cause as in the opinion of the Court may properly be so proved. Affidavits.

This section, like the proviso in s. 40, evidently relates, when imported into the Equity Act, to suits in which the general evidence is taken orally, and extends only to comparatively formal matters, not to "matters directly in issue," or the merits of the case. Indeed, it seems to the writer superfluous, being merely co-extensive with, and covered by, the proviso in s. 40.

The section is taken from the 28th section of the 13 & 14 Vict., c. 35, since repealed by s. 3 of 46 & 47 Vict., c. 49. Under it an affidavit by the parents as to the members constituting a class of children has been admitted on further consideration instead of an inquiry being directed (*Bush* v. *Watkins*, 14 Beav. 33; and see *Fowler* v. *Reynal*, 3 Mac. & G. 500), and also an affidavit as to the apportionment of a fund amongst creditors (*Bear* v. *Smith*, 5 De G. & Sm. 92). But evidence discovered after the original hearing, and raising a new issue and a new defence, cannot be admitted under this section upon further consideration; though, if justice cannot be otherwise done, the Court will direct an inquiry (*Howard* v. *Chaffers*, 9 Jur. N.S. 634; *Fleming* v. *East*, Kay, App. lii.; see *May* v. *Newton*, 34 C.D. 351).

42. Every witness who has made an affidavit in any cause or matter before the Court shall be subject to oral cross-examination in the same manner as if the evidence given in his affidavit has been given by him orally and may be re-examined orally by the party using such affidavit and such witness shall attend before the Court to be so examined upon receiving due notice and payment of his reasonable expenses in like manner as if he had been duly served with Cross-examination of a deponent.

a writ of subpœna *ad testificandum* and the expenses attending such examination shall be paid by the parties respectively in like manner as if the witness were the witness of the party cross-examining and shall be deemed costs in the cause unless the Court shall otherwise direct.

This section is partly taken from s. 38 of 15 & 16 Vict., c. 86 (see *In re Knight*, 25 C.D., p. 299; and *cf. Backhouse* v. *Alcock*, 28 C.D. 669).

Where a person has made and filed an affidavit to be used in a matter pending before the Court, he cannot be exempted from cross-examination by the withdrawal of the affidavit (*Re Quartz Hill, &c., Co.*, 21 C.D. 642; and see *Ex parte Child*, 20 C.D. 126).

A plaintiff had required the attendance of a defendant to be cross-examined on his affidavit. He attended, but, it being held that he was entitled to his expenses as a witness, the plaintiff abandoned this course of proceeding, and filed interrogatories for the defendant's examination. It was held that this could not be done until the costs of the former proceedings had been paid (*Davey* v. *Durrant*, 24 Beav. 411).

By O. XXXVIII., r. 4 (1875), unless a deponent is produced at the trial for cross-examination (the prescribed notice having been given), his affidavit shall not be used as evidence, unless by the special leave of the Court; but in such a case the Court will not order the affidavit to be taken off the file, but objection should be taken to the affidavit being read at the hearing (*Meyrick* v. *James*, W.N. (1877) 120; 46 L.J. Ch. 579); and *quære* whether this provision applies to a witness out of the jurisdiction (*De Mora* v. *Concha*, 32 C.D., p. 133; 11 App. Cas., p. 541).

Notice to admit documents.

43. In any case in which all the parties are competent to make admissions any party may call on any other party by notice to admit any document saving all just exceptions and in case of his not admitting the same the cost of proving the document shall be paid by the party so neglecting or refusing to admit whatever the result of the cause unless

the Court shall otherwise order and no costs of proving any document shall be allowed unless such notice has been given except where the omission to give it was in the opinion of the Master a saving of expense.

This section is taken from the 7th section of 21 & 22 Vict., c. 27. In the opening words, "in any case in which *all* the parties are competent," &c., the word italicised seems to have crept in by inadvertence. Suppose a suit by A (*sui juris*) *v.* B (*sui juris*) and C (under disability): surely it is not intended that the fact of C being unable to make admissions shall prevent A and B from calling on each other to make admissions *inter se?*

Assignees of an insolvent, and a married woman whose husband is a defendant, are competent within the meaning of the section (*Churchill* v. *Coller*, 1 N.R. 82).

Examining witnesses *de bene esse.*

44. In every case where the Court shall deem it expedient so to do the Court may grant a commission or make an order at any stage of the cause for the examination of witnesses either orally or upon interrogatories as the Court shall think fit and before such person or officer of the Court as it shall for that purpose appoint and every such examination being duly taken and returned may be read as evidence at the trial or hearing accordingly Provided that it shall not be necessary to sue out any commission for the examination of any witness within the jurisdiction of the Court and every officer or person appointed to examine any such witness by order of the Court shall have the power of administering oaths and also such other powers as by the order appointing him may be directed.

This section is compounded, with some alterations, of parts of O. XXXVII., rr. 1, 4 (1875); and *cf.* 18 Vict., No. 13, ss. 2 & 3.

This provision appears to apply only to the examination of witnesses where there is a pending litigation between contesting parties (*In re Hewitt*, 15 Q.B.D., p. 163).

Some of the rules which guide the Court in granting a commission to examine witnesses abroad may be found in the following cases:—*Re Boyse*, 20 C.D. 760; *Berdan* v. *Greenwood*, *ib.* 764, *n*; *Langen* v. *Tate*, 24 C.D., at p. 528; *Armour* v. *Walker*, 25 C.D. 673; *Lawson* v. *Vacuum Brake Co.*, 27 C.D. 137, explained in *Coch* v. *Allcock*, 21 Q.B.D. 178; *Re Mysore West G. Co.*, 42 C.D. 535.

The Court in issuing a commission for the examination of a party to the suit (*Nadin* v. *Bassett*, 25 C.D. 21; *McQuade* v. *Herman*, 3 N.S.W. W.N. 102) has imposed the condition that the evidence so taken shall not be read at the hearing if the other party requires such evidence to be given orally.

Whenever a necessary witness is going abroad, or is, from illness, age, or other infirmity, likely to be unable to attend the trial, an order will be made for his examination under this section, in the presence of both parties (*Warner* v. *Mosses*, 16 C.D. 100). The practice is that the witness examined *de bene esse* is examined by both parties. There might be a case—a case of imminent danger of death—in which leave might be given to either party to attend, and therefore it would not be absolutely necessary that both parties should attend; but it must be shown to be "necessary for the purposes of justice" (*per* Jessel, M.R., *ibid.*). The words in inverted commas are the words occurring in the English rule: in the enactment under consideration we have "expedient," which is a wider term. And it has been held that the Court has jurisdiction on a proper occasion, when it is "necessary for the purposes of justice," to make an order for the examination of witnesses upon an *ex parte* application, the order being taken by the applicant at his peril, and subject to the risk of being discharged on sufficient grounds (*Bidder* v. *Bridges*, 26 C.D. 1). An order will not be made for the examination of witnesses before the trial, unless it is impossible, or at least really difficult, to procure their attendance at the trial (*The M. Moxham*, 1 P.D. 116; *per* Jessel, M.R., *Warner* v. *Mosses*, *ubi supra*; consider *Re Imperial Land Co. of Marseilles*, W.N. (1877) 244; *Spiller* v. *Paris, &c., Co.*, 27 W.R. 225; *Banque Franco-Egyptienne* v. *Lütscher*, W.N. (1879) 183; 28 W.R. 133).

An application under this section should be made promptly: see *Steuart* v. *Gladstone*, 7 C.D. 394.

The Court has a discretionary power to direct the filing of depositions informally taken (*Bolton* v. *Bolton*, 2 C.D. 217).

45. All pleadings examinations and affidavits in causes or matters in Equity may be sworn and taken in any place out of this colony under the dominion of Her Majesty before any Judge Notary Public or person authorised to administer oaths at such place or before any British Consul or Vice-Consul in any place out of Her Majesty's dominions And judicial notice shall be taken of the seal or signature as the case may be and authority of any such Judge Notary Public person Consul or Vice-Consul. Pleadings, &c., out of the jurisdiction.

This section corresponds, *mutatis mutandis*, with s. 22 of the 15 and 16 Vict., c. 86.

It seems superfluous to state that where pleadings, &c., are sworn before persons of whose signature judicial notice is to be taken, no verification of their signature is necessary (*Hayward* v. *Stephens*, 36 L.J. Ch. 135), or that the mere fact of the signature of an authorised person being attached to a document does not make such document receivable in evidence (*Re Forbes*, 1 W.R. 32; see *Re Goss*, 12 Jur. 595).

It will be noticed that the section is only permissive, and consequently the Court is at liberty to receive, and in fact has frequently received, pleadings, &c., sworn otherwise than before a British Consul or Vice-Consul in places out of the Queen's dominions, *e.g.*, before notaries or persons authorised by the law of the foreign country to administer oaths (*Levitt* v. *Levitt*, 2 H. & M. 626; *Haggitt* v. *Iniff*, 5 De G. M. & G. 910; *Re Kenah's Trusts*, 15 W.R. 781; *Cooke* v. *Wilby*, 25 C.D. 769). But in such cases the Court has no authority to take judicial notice of the signature or authority of the person before whom the document is sworn, and requires proof of these things (*Baillie* v. *Jackson*, 3 De G. M. & G. 38; *Re Earl's Trusts*, 4 K. & J. 300; *Re Davis*, 8 Eq. 98)—a certificate of the clerk of a Superior Court of New York has been held sufficient verification (*Levitt* v. *Levitt*, *ubi supra*; *Alexander* v. *Nurse*, W.N. (1871) 249)—and in *Brooke* v. *Brooke*, 17 C.D. 833, where the execution of a release was attested by a notary in a colony, and there was no evidence that the attestation was for the purpose of using the deed in Court, *held*, nevertheless, that it was a document within the section of the English Act, and that

the Court would take judicial notice of the notary's seal and signature,—though proof may be dispensed with, where the fund is very small (*Mayne* v. *Butter*, 13 W.R. 128), or where there is consent (*Lees* v. *Lees*, W.N. (1868) 268; *Lyle* v. *Elwood*, 15 Eq. 67; *Bell* v. *Turner*, 17 Eq. 439; *Bacon* v. *Turner*, W.N. (1876) 292, where there was only an unsworn declaration; and see *Whiting* v. *Bassett*, 14 Eq. 70). Where there has been no consul or consular agent within reasonable access, the Court has accepted an affidavit made in one of the United States, attested by the Governor as being sealed with the great seal of the State (*Re Scriven*, 16 W.R Ch. Dig. 105), and has ordered an affidavit sworn before a foreign local magistrate to be filed, the seal and attestation of the local Court sufficiently authenticating his authority (*Cooper* v. *Moon*, W.N. (1884) 78), and has appointed a resident solicitor special examiner to take the evidence (*Drevon* v. *Drevon*, 12 W.R. 66).

Assistance of scientific persons.

46. The Judge may in every case obtain the assistance of conveyancing counsel accountants merchants engineers actuaries or other scientific persons the better to enable him to determine any matter at issue in any cause or proceeding and to act upon the certificate of any such person The allowance in respect of fees to such persons shall be regulated by the Master subject to an appeal to the Judge.

The provisions of this section are taken from ss. 40 and 42 of 15 & 16 Vict., c. 80. By the Judicature Act, 1873, s. 56, provision is made for trials by the Court with the aid of assessors; but such a method of trial has not been introduced here (unless it be authorised by the section above set out), and, even in England, has never been resorted to except in admiralty matters.

Under this section a complicated builder's account was referred to chambers, there to be disposed of by the Judge personally, with, if necessary, the assistance of such scientific person as he should think fit to call in (*Mildmay* v. *Lord Methuen*, 1 Dr. 216); a question of alluvial encroachment on a sea-shore was referred to an engineer (*A.-G.* v. *Chambers*, 4 De G. & J. 58, where the form of order is given); and in another case an engineer was directed to make experiments to ascertain the effect of steam navigation

upon a canal (*Case* v. *Midland Railway Co.*, 27 Beav. 247). This section does not empower the Court, where plaintiffs have clearly established their right to an injunction, to delay granting it until a reference has been made to an expert (*A.-G.* v. *Colney Hatch, &c.*, 4 Ch. 146); and a general inquiry as to what ought to be done to preserve a plaintiff's light and air has been refused (*Stokes* v. *City Offices Co.*, 13 W.R. 537). In *A.-G.* v. *Colney Hatch, &c.* (page 166), Selwyn, C.J., thought that *after decree* an inquiry might perhaps be directed as to the means to be adopted to prevent or cure the evil complained of, and *after decree* an opinion may be taken as to the time which ought to be allowed for carrying it into effect (*A.-G.* v. *Merthyr Tydfil, &c.*, W.N. (1870) 148).

The report of an expert is not to be looked at in the light of an award, but only as furnishing materials for the information and guidance of the Court (*Ford* v. *Tynte*, 2 De G. J. & S. 127, where affidavits were admitted in opposition; *Adamson* v. *Gill*, 16 W.R. 306).

The expert has no jurisdiction to call witnesses (*Morris* v. *Llanelly Railway Co.*, W.N. (1868) 46).

It was laid down by Kindersley, V.C., as the opinion of all the Judges, that the section did not intend that the Court should delegate the power of calling in scientific assistance to the Master, nor direct him to receive such assistance, the purpose of the section being to enable the *Judge*, in doing that which he has to do, in substitution for the Master, to call in the aid of scientific persons (*Mildmay* v. *Lord Methuen*, 1 Dr. 220; see, however, *Re London, &c., Co.*, 6 W. R. 141); but in this colony, though the Master has not apparently the power himself to call in scientific aid, the Judge may procure it for him [see RR. 201 & VII. (8)].

Oral evidence on motions, &c.

47. Any party in any cause or matter may by a subpœna require the attendance of any witness before the Court or Master or any person specially appointed for the purpose and may require the production of any deed instrument writing matter or thing which such witness may be lawfully required to produce and may examine such witness orally for the purpose of using his evidence upon any motion

petition or other proceeding in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause.

This section is taken, with immaterial variations, from 15 & 16 Vict., c. 86, s. 40. It does not refer to cross-examination (which is provided for by s. 42), but to examination in chief. It will probably not be resorted to except for the purpose of getting the evidence of persons who, from hostility or for some other cause, decline to make affidavits.

Any party may, without leave of the Court, issue a *subpœna* for the examination of a witness at any stage of a suit; but the Court will exercise a control over this privilege to prevent its being oppressively used (*Raymond* v. *Tapson*, 22 C.D. 430; *Fenton* v. *Cumberlege*, 48 L.T. 776). But a *subpœna duces tecum*, requiring a solicitor, not a party to the suit, to produce all papers, &c., relating to all dealings and transactions between his firm and the plaintiffs or defendants (as the case may be) for a period of 30 years, without specifying any particular documents required, is too vague, and the witness is entitled to refuse production. But if the witness, having been served with a *subpœna* in this general form, admits that he has in his possession "the documents thereby required," he must produce them, and cannot insist on being first sworn (*Lee* v. *Angas*, 2 Eq. 59).

Answer how used on certain motions.

48. Upon application by motion or petition to the Court in any suit depending therein for an injunction or a receiver or to dissolve an injunction or discharge an order appointing a receiver where the defendant has filed an answer to interrogatories such answer shall for the purpose of evidence on such motion or petition be regarded as an affidavit and affidavits may be received and read in opposition thereto.

This section is adopted from the 59th section of the 15 & 16 Vict., c. 86, which was directed against the old rule prohibiting contradiction of the defendant's answer.

Semble, on a motion for an injunction, the plaintiff cannot cross-examine a defendant on his answer, unless it is to be used on the defendant's behalf (*Wightman* v. *Wheelton*, 23 Beav. 397).

49. In cases where it shall be necessary for any party to go into evidence subsequently to the hearing or on any inquiry account or reference before the Judge or Master such evidence shall be taken in such manner as shall be prescribed by any general rule of the Court. Evidence after the hearing.

See R. 217.

Declaratory Decree.

50. No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby and the Court may make binding declarations of right without granting consequential relief. Declarations of right.

This section is an adoption of the 50th section of the 15 & 16 Vict., c. 86 (repealed by s. 3 of 46 & 47 Vict., c. 49), which effected in this respect an alteration in the law: see *Grove* v. *Bastard*, 2 Ph. 622; and *cf.* O. XXV., r. 5 (1883).

To save expense, the Court has declared the construction of executory marriage articles, instead of directing a settlement to be executed in conformity therewith (*Byam* v. *Byam*, 19 Beav. 58).

But, notwithstanding this enactment, the Court will not, in general, declare *future* rights; but will leave them to be determined when they come into possession. Thus it will not, during the life of a tenant for life, entertain a suit to settle the rights of remaindermen, though, of course, a suit to perpetuate testimony will lie (*Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391, 419; *Garlick* v. *Lawson*, 10 Ha. App. xiv; and see *Dowling* v. *Dowling*, 1 Ch. 612); it has no power to make a declaration in the lifetime of the tenant for life with regard to the interests of parties entitled in reversion, unless it shall be necessary to do so for the administration of an estate, or in order to grant the plaintiff the relief to which he is entitled (*Gosling* v. *Gosling*, Johns. 265). On the principle of the last mentioned exception, the Court has declared a future right. Land as to which a dispute as to the amount of the lessee's interest was pending (viz., whether he had a right of renewal from 1885, or whether his interest expired altogether at

the end of his existing term, 1890) was taken by a railway company, under an agreement by which it was provided that, if the lessee should substantiate his right of renewal, the company should pay him a further sum (the amount, if in dispute, to be settled by arbitration, pursuant to the Lands' Clauses Act), in addition to the price of the existing term. The company having subsequently bought up the lessor's reversion in fee, the lessee filed a bill against them, praying a declaration of his right to a renewal from 1885, and payment of compensation on that footing, and it was held, on demurrer, that the Court had jurisdiction to decide the question of future right of renewal, on which the lessee's claim to compensation wholly depended, and for ascertaining which no means were afforded by the Lands' Clauses Act (*Bogg* v. *Midland Railway Co.*, 4 Eq. 310; and see *Cox* v. *Barker*, cited *infra*). But a suit to have a covenant declared void has been treated as premature, and dismissed, when brought before the happening of the event on which the covenant, if good, would come into operation (*Fyfe* v. *Arbuthnot*, 1 De G. & J. 406). On the same principle, the Court has refused to entertain suits by remaindermen or their mortgagees to compel the tenant for life to produce the title deeds, where the plaintiff's title was *bonâ fide* disputed (*Davis* v. *Earl of Dysart*, 20 Beav. 405, 417, 420; *Pennell* v. *Earl of Dysart*, 27 Beav. 542).

The Court used to decline to pronounce decrees declaratory of *legal* rights, especially where infants were concerned (*Webb* v. *Byng*, 8 De G. M. & G. 633; *Trustees of Birkenhead Docks* v. *Laird*, 4 De G. M. & G. 732; compare *De Windt* v. *De Windt*, 1 E. & I. App. 87); but, having regard to the 4th section of the Act, *q.v.*, these decisions are no longer law as to cases within that section.

It has been laid down by an eminent Judge that the section now under consideration applies only in cases in which there is some equitable relief which might be granted if the plaintiff chose to ask for it (*Rooke* v. *Lord Kensington*, 2 K. & J. 753; *Bristow* v. *Whitmore*, 4 K. & J. 743); that it was meant only to remove the objection that a plaintiff, who might have consequential relief, prays merely a declaration of his right (*Jackson* v. *Turnley*, 1 Dr. 617). And it was held that there is no jurisdiction in the Court under which a plaintiff may institute a suit, alleging that he has a good title to property, of which he is in possession,

without any interruption of his enjoyment, but that the defendant sets up an equitable claim which ought not to be binding on the plaintiff, and (praying no other relief) obtain in such a suit a declaration that it is not binding on him (*Rooke* v. *Lord Kensington*, *ubi supra*). Again, a lease having been granted to two partners, a bill was filed by the representative of one of the lessees deceased, alleging that the lessor claimed to have a right under the covenants against the plaintiff, if a breach should arise, and praying a declaration that the defendant had no right: a demurrer was allowed (*Jackson* v. *Turnley*, *ubi supra*). But the authority of these cases, so far as they enunciate the general propositions above referred to—for the decisions themselves seem quite unimpeachable—has been shaken by the remarks of James, L.J., who has expressed an opinion that in these cases the Court had adopted rather a narrow view, at the same time adding that certainly it would not have done to ask the Court to make a declaration upon mere abstract questions, and that possibly it would not be right to ask a Court of Equity to decide something which would have to be determined in a Court of Law (*Cox* v. *Barker*, 3 C.D. 370). By a marriage settlement real estate was limited to such uses as the husband and wife should appoint, and in default of appointment to the use of the trustees during the life of the wife on trust for her for her separate use, with remainder to the husband in fee. The husband entered into a contract to sell the property, the purchaser having notice of the provisions of the settlement. The purchase money was paid to the trustees of the settlement, and a draft conveyance was approved in the form of an appointment by the husband and wife to the purchaser, but before the conveyance had been executed the husband suddenly died, having by a will dated before the contract devised all his real estate to trustees upon trust for his widow for life, and after her death to sell and divide the proceeds as therein directed. The widow, who was one of the executors, brought an action against the purchaser, the other executors, and the devisees in trust under the husband's will, asking the Court to determine whether she could be compelled to concur in the conveyance to the purchaser, what was the effect of the contract for sale, what would be the devolution of the purchase money if the contract should be completed, and whether, if the contract were completed by the trustees of the settlement alone, the

purchaser would be entitled to compensation out of the purchase money in respect of the plaintiff's life interest. It was held that the statement of claim was not open to demurrer by the purchaser on the ground that he was not interested in all the questions raised, or on the ground that only a declaratory decree was asked for (*Cox* v. *Barker*, *ubi supra*).

Kekewich, J., in *Evans* v. *Manchester*, *&c.*, *R. Co.*, 36 C.D., p. 640, made a declaration that the defendant was liable, and would be liable, to make good to the plaintiff any damage occasioned by the escape of water. See *Birmingham*, *&c.*, *Land Co.* v. *London*, *&c.*, *R. Co.*, 36 C.D. 650, affd. 40 C.D. 268, as to a declaration of title to land after notice to treat for portion of it by a railway company.

Formal Defects or Irregularities.

Formal defects not to invalidate proceedings.

51. No proceeding shall be invalidated by any formal defect or by any irregularity unless the Court shall be of opinion that substantial injustice has been caused by such defect or irregularity and that such injustice cannot be remedied by any order of the Court.

Apart from any enactment, "I have no doubt," said Turner, L.J., "of the power of the Court to dispense with the General Orders when the circumstances and the justice of the case require" (*Ferrand* v. *Mayor*, *&c.*, *of Bradford*, 8 De G. M. & G. 95, approved by Lord Chelmsford in *Betts* v. *De Vitre*, 15 W.R. 701); "I conceive," said Lord Langdale, M.R., "that the Court has sufficient authority, when the occasion requires its exercise, to prevent parties converting its own rules, and the sanctions employed to enforce them, into the means of injustice" (*Lord Suffield* v. *Bond*, 10 Beav. 153). "There is no doubt about the rule," said Lord Cottenham in *Lenaghan* v. *Smith*, 2 Ph. 539, "but it is impossible not to suspect that this is an abuse of it. The object of the rule, as of all others, is to promote the ends of justice; but if in any particular case it be applied to pervert justice, the Court will depart from it." "I quite admit," said Malins, V.C., "that the rules and orders of the Court must be adhered to; but there is a still higher rule of the Court, which is

that persons who are guilty of bad faith cannot avail themselves of those rules and orders" (*Talbot* v. *Keay*, 8 Eq. 612). In a like spirit, Wood, V.C., said, "Whenever the Court is satisfied that substantial justice requires any of its own regulations to be waived, or any slip to be remedied, the Court will interfere for the purpose," but added, "I say nothing of any matter depending upon statutory powers or regulated strictly by Act of Parliament" (*Smith* v. *Baker*, 2 H. & M. 499). Here, however, the power of overlooking irregularities is itself conferred by statute.

Compare O. LIX. (1875), O. LXX., r. 1 (1883), by which it is provided that non-compliance with any of the rules of Court issued under the Judicature Act 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. "Nothing," said Jessel, M.R., "can be more distinct and valuable than this rule, which enables the Court to do justice without regard to technicalities," Cotton, L.J., adding, "I am not inclined to allow a party to take advantage of technical objections, when he has not been deprived of the opportunity of defending himself" (*Dawson* v. *Beeson*, 22 C.D. 509, 510). The meaning of the rule is further explained by Kay, J., in *Petty* v. *Daniel*, 34 C.D., at p. 180.

An irregularity in a notice of motion was allowed to be amended in *Williams* v. *De Boinville*, 17 Q.B.D. 180; *cf. In re Coulton*, 34 C.D. 22. See *Reynolds* v. *Coleman*, 36 C.D. 453, 458, as to an irregularity in an order for leave to serve out of the jurisdiction. As to waiver of irregularity by appearance, see *In re McRae*, 25 C.D. 19; *Boyle* v. *Sacker*, 39 C.D. 249. But a judgment irregularly signed is not an instance of non-compliance with a rule, nor with an irregularity in acting under any rule; the defendant is entitled *ex debito justitiae* to have such judgment set aside (*Anlaby* v. *Praetorius*, 20 Q.B.D., at p. 769). Other recent cases on waiver of irregularities by the acts of the parties are *Re Haycock's Policy*, 1 C.D. 611, 616; *Ex parte Morgan*, 2 C.D. 72; *Hampden* v. *Wallis*, 26 C.D. 746; *Moore* v. *Gamgee*, 25 Q.B.D. 244; in the first and last of which cases the objection was to the jurisdiction of the Court.

Sale of Mortgaged Property.

Court may direct a sale in foreclosure suits.

52. In any suit for the foreclosure of the equity of redemption in any property the Court may upon the request of the mortgagee or any subsequent incumbrancer or of the mortgagor or any person claiming under them respectively direct a sale of such property instead of a foreclosure on such terms as the Court may think fit and without previously determining the priorities of incumbrances or giving time to redeem provided that if such request be made by any such subsequent incumbrancer or by the mortgagor or any person claiming under them respectively the Court shall not direct any such sale without the consent of the mortgagee or the person claiming under him unless the party making such request shall deposit in Court a reasonable sum to be fixed by the Court for the purpose of securing the performance of such terms as the Court may think fit to impose on him.

This section is borrowed from the 15 & 16 Vict., c. 86, s. 48.

As to the *principles* on which the Court acts in directing a sale under the section, the statute intended to give the Court a very considerable discretion, in order to avoid the great delay and expense which is occasioned by foreclosure and redemption in a case where there are a great number of successive mortgages, and the Court will exercise that power in such a manner as not to operate injuriously or oppressively on any person interested, *e.g.*, so as not to dispossess a family of an old family estate; the discretion is given with a view to its exercise for the benefit of all parties interested, and so as not to injure any of them; but the discretion of the Court does not interfere with any power of sale which the mortgagor has granted to the mortgagees (*per* Lord Romilly, *Hurst* v. *Hurst*, 16 Beav. 374, 5, 6). The same learned Judge (*Hiorns* v. *Holtom*, 16 Jur. 1077) expressed a reluctance to order a sale under this section, unless by consent, except in cases where there was such a complication that the

common decree could not be conveniently worked out. It is within the discretion of the Court whether a foreclosure or a sale shall be ordered; but a sale is not to be ordered as of course. There may be cases of complication where a sale is eminently desirable, and there may be cases where, by reason of there being little or no complication, or for other reasons, a sale ought not to be ordered (*per* Lord Cairns, *Heath* v. *Crealock*, 10 Ch. 32). An order for sale will not be made where the Court cannot give possession and insure that the title deeds shall be handed over (*S.C.*).

A *mortgagee*, it has been said, must make out a special case in order to induce the Court to order a sale, where the mortgagor or subsequent incumbrancers dissent (*Robert* v. *Price*, 1 W.R. 303; and see *Messer* v. *Boyle*, 21 Beav. 559); but this canon seems not to have been rigidly applied, and sales have been ordered on the request of mortgagees, notwithstanding the opposition of mortgagors or *puisne* incumbrancers (*Wickham* v. *Nicholson*, 19 Beav. 38; *Newman* v. *Selfe*, 33 Beav. 522). See further *Paine* v. *Edwards*, 10 W.R. 709; *Foster* v. *Harvey*, 11 W.R. 899, 12 W.R. 92; *Cator* v. *Reeves*, 9 Ha. App. liii., n.

It may here be mentioned that the relief to which an *equitable mortgagee* by deposit of deeds, not accompanied by a memorandum, is entitled is foreclosure, not sale, unless a sale be consented to (*James* v. *James*, 16 Eq. 153; *Backhouse* v. *Charlton*, 8 C.D. 444; *Lees* v. *Fisher*, 22 C.D. 283, *q.v.* as to form of decree); but, if the deposit be accompanied by a memorandum of agreement to execute a legal mortgage, the depositee is entitled to either foreclosure or sale (*York, &c., Co.* v. *Artley*, 11 C.D. 205). In no case, however, can a pledgee of personal chattels foreclose; therefore a depositee of railway bonds was held entitled to an order for sale only (*Carter* v. *Wake*, 4 C.D. 605). Where foreclosure is ordered, an infant has a day to show cause in the usual way (*Mellor* v. *Porter*, 25 C.D. 158). In *Graham* v. *Farron*, 7 N.S.W. W.N. 58, the Court decreed foreclosure, though the greater part of the debt was not yet due.

Where a second mortgagee obtained an order for sale, the conduct of it was given to the first mortgagee (*Hewitt* v. *Nanson*, 7 W.R. 5).

As to sale at request of a *mortgagor*, see *Tennant* v. *Trenchard*, 4 Ch. 537; *Cooke* v. *Cholmondeley*, 5 W.R. 835; *Whitbread* v. *Roberts*, 7 W.R. 216).

In some cases sales have been directed only on terms, time to redeem being given (see *Smith* v. *Robinson*, 1 Sm. & G. 140; *Lloyd* v. *Whittey*, 17 Jur. 754; *Whitbread* v. *Roberts*, 7 W.R. 216; *Newman* v. *Selfe*, 33 Beav. 522); in others immediate sales have been ordered (see *Phillips* v. *Gutteridge*, 4 De G. & J. 531; *Mears* v. *Best*, 10 Ha. App. li.; *Anning* v. *Lavers*, 1 W.R. 19; *Wigham* v. *Measor*, 5 W.R. 394; *Marriott* v. *Kirkham*, 10 W.R. 340; *Foster* v. *Harvey*, 11 W.R. 899).

The fact of infants being interested is no obstacle to a sale being ordered (*Wigham* v. *Measor*, 5 W.R. 394).

Though the section authorises a sale in a "suit for foreclosure," it may be directed in a suit in which foreclosure is not expressly prayed; nor is it an objection that the mortgagee, who asks for an order for sale, has himself an express power to sell (*Hutton* v. *Sealey*, 4 Jur. N.S. 450). Instead of ordering a sale, the Court may decree foreclosure, and give liberty to apply in chambers for a sale (*Burmester* v. *Moxon*, 35 Beav. 310). But a sale would not be ordered on interlocutory application under the old practice (*Wayn* v. *Lewis*, 1 Dr. 487; *per* Jessel, M.R., *London, &c., Co.* v. *Dover*, 11 C.D. 204); but under the new practice foreclosure may, in proper cases, be ordered on motion (see R. 28), and in such cases, no doubt, a sale may likewise be directed. As a rule, a sale will not be directed after a decree for foreclosure (*Girdlestone* v. *Lavender*, 9 Ha. App. liii.; *Campbell* v. *Moxhay*, 18 Jur. 641), but it has been done on the application of the mortgagor, where the mortgagee consented, and a sum was paid into Court to indemnify a *puisne* incumbrancer (*Laslett* v. *Cliffe*, 2 Sm. & G. 278), and on the application of a *puisne* mortgagee with the consent of the prior mortgagees, where the bill had been taken *pro confesso* against the mortgagor (*Woodford* v. *Brooking*, 17 Eq. 425).

The deposit must be enough "to meet at a rough estimate the possible expenses of an abortive attempt at a sale" (*Bellamy* v. *Cockle*, 2 W.R. 326), and is applicable to indemnify the first mortgagee for his costs in such an attempt (*Corsellis* v. *Patman*, L.R. 4 Eq. 156). Where a mortgagor declined to deposit £100,

foreclosure was decreed (*Boydell* v. *Manby*, 9 Ha. App. liii). A reserved bidding will be fixed sufficient to cover what is due to the mortgagee (*Whitbread* v. *Roberts*, 7 W.R. 206).

For form of order see Seton (4th ed.), 1038; *Whitbread* v. *Roberts*, *ubi supra*.

Account.

Dispensing with references in certain cases of account.

53. In all cases of account either party may by consent or by leave of the Judge file a State of Facts before or at the hearing of any cause petition motion or matter verified by affidavit and where the amount is capable of being ascertained without difficulty from the pleadings or evidence or by such State of Facts the Court may adjust the same and decree accordingly without further inquiry or reference and where the account cannot be so adjusted may give such special directions as may seem expedient with respect to the mode in which the account shall be taken or verified which directions may be given either by the decree or order directing such account or by any subsequent order and where it shall think fit so to do the Court may direct that in taking the account the books in which it has been kept or any of them shall be taken as *primâ facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objections thereto as they may be advised.

It is obvious that, in a case to which procedure by State of Facts is applicable, much time and expense would be saved by having the account promptly settled by the Judge, instead of its being referred; but probably few cases of disputed account will offer themselves in which recourse can be had to such procedure, because it can only be resorted to if (1) both parties consent to the filing of a State of Facts, or, one dissenting, the Court orders it *in invitum*, and (2) the amount in dispute is capable of being ascertained without difficulty.

The second part of the section—relating to special directions and *primâ facie* evidence—is taken, with only verbal alterations, from the 54th section of the 15 & 16 Vict., c. 86, applications under which were made in Court at the hearing, or by motion (*Ewart* v. *Williams*, 3 Drew 21), or by summons in Chambers (*Hardwick* v. *Wright*, 15 W.R. 953, Seton (4th ed.), 774); and, *semble*, a petition was not irregular (*Browne* v. *Collins*, 12 Eq. 586). R. 27 now provides for interlocutory applications, *q.v.*

For form of summons, see Daniell's Ch. Forms (2nd ed.), 1303.

Where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the Court may give special directions, but such directions will not be given unless it appears that the ordinary evidence cannot be had, or merely to save expense (*Lodge* v. *Prichard*, 3 De G. M. & G. 906; *Ewart* v. *Williams*, 7 De G. M. & G. 68, in which case it was further held that the enactment was retrospective). Again, the enactment cannot be construed as authorising an order varying the account itself (*per* Knight Bruce, L.J., *Nelson* v. *Booth*, 3 De G. & J. 121); it applies only to the mode of carrying on an account directed by the decree, and does not extend to enable a substantial variation of the decree (*per* Turner, L.J., *ibid.*).

A settled account may be admitted by the Master without an order (*Newen* v. *Wetten*, 31 Beav. 315); the practice, however, appears to be to obtain a special direction at the hearing (Seton (4th ed.), 794). The Master may not without an order take books as *primâ facie* evidence (*Cookes* v. *Cookes*, 11 W.R. 871). In *Holgate* v. *Shutt*, 27 C.D. 111, 28 C.D. 111, 116, the audited accounts of a building society were treated as *primâ facie* correct, but under an order directing an account the accounting party was allowed to set up any settled accounts, although settled accounts were not expressly mentioned in the order, and any settled accounts so set up were open to be impeached, although the order was equally silent with regard to impeaching them.

Special directions:—*Blackford* v. *Davis*, 4 Ch. 304; *Wolf* v. *Vanderzee*, 17 W.R. 547; *Hobson* v. *Jones*, 9 Eq. 456; *Deane* v. *Thwaite*, 21 Beav. 621. *Primâ facie* evidence:—*Sleight* v. *Lawson*, 3 K. & J. 292; *Stainton* v. *Carron Co.*, 24 Beav. 346; *Ogden* v. *Battams*, 1 Jur. N.S. 791; *Morgan* v. *Higgins*, 5 Jur. N.S. 240; *Banks* v. *Cartwright*, 15 W.R. 417; *Hardwick* v. *Wright*, *ib.* 953; *Coleman* v. *Mellersh*, 2 Mac. & G. 309.

Sale of Real Estate.

54. If in any suit instituted in relation to real estate it shall appear to the Court that it will be expedient that the same or any part thereof should be sold for the purposes of such suit the Court may at any time direct the same to be sold and such sale shall be as valid as if directed to be made by a decree or decretal order on the hearing and any party to the suit in possession of such estate or in receipt of the rents and profits thereof shall deliver up such possession or receipt to the purchaser or such other person as the Court shall direct. Sales may be directed before decree.

This section is taken, with merely verbal alterations, from the 55th section of the 15 & 16 Vict., c. 86; and *cf.* O. LI., R. 1 (1883), which has been held not to give the Court any power to direct a sale in a case in which it had no power to do so previously (*In re Robinson*, 31 C.D., p. 249).

The section is intended to apply only to those cases in which, for the protection of the property or other like cause, it is necessary to come to the Court (*per* Romilly, M.R., *Prince* v. *Cooper*, 16 Beav. 546; *per* Malins, V.C., *Tulloch* v. *Tulloch*, 3 Eq. 574). In those cases the Court has power to order a sale before the hearing (*Tulloch* v. *Tulloch*), and, *a fortiori*, after the hearing but before the Master's report (as in *Bell* v. *Turner*, 2 C.D. 409). It is the course of the Court, when it is shown that it will be necessary to resort to real estate, to make an order for the sale of it, without waiting for the hearing or further consideration, the only question always being whether it is just and proper to make that order (*per* Hall, V.C., *S.C.*). See further *Martin* v. *Hadlow*, 1 W.R. 101. The section was intended to apply to administration suits; it does not apply to ordinary suits for foreclosure (*London, &c., Co.* v. *Dover*, 11 C.D. 204, in which *Davis* v. *Ashwin*, 47 L.J. Ch. 70, was questioned).

Application under the section may be made on motion, as in *Prince* v. *Cooper* and *Tulloch* v. *Tulloch* (for form of which see Daniell's Ch. Forms (2nd ed), 1366), or petition, as in *Bell* v. *Turner*.

See R. 26.

Application of Income.

Allowance to parties out of property in certain cases.

55. Where any real or personal property is the subject of any proceeding in Equity and the Court is satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such proceeding the Court may at any time after the commencement of such proceeding allow to the parties interested therein or any of them the whole or part of the annual income of such real property or a part of such personal property or of the income thereof up to such time as the said Court shall direct and for that purpose may make such orders as may appear expedient.

This section is taken, with verbal alterations, from the 57th section of the 15 & 16 Vict., c. 86. It differs, however, from the English enactment in not permitting an allowance of the *whole* of the income of personal property. It permits an allowance in proper cases of (1) the *whole or part* of the *income* of *real* property, (2) *part* of the *capital* of *personal* property, (3) *part* of the *income* of *personal* property.

An allowance will only be made under this section where the executors admit assets (*Knight* v. *Knight*, 16 Beav. 358), and where the applicants are clearly entitled, and some pressing reason exists for the application (*Rowley* v. *Burgess*, 2 W.R. 652; *Chubb* v. *Carter*, W.N. (1867), 179).

For a special order, see *Stacey* v. *Southey*, 1 Dr. 400.

Applications under this section should be made in chambers (*Bentley* v. *Craven*, 1 W.R. 362; and see foot-note to *Knight* v. *Knight*, *ubi supra*). For form of summons, see Daniell's Ch. Forms, (2nd ed.), 1200. See also s. 62.

Injunction.

Injunctions to stay proceedings at law.

56. The practice of the Court with respect to injunctions for the stay of proceedings at law shall so far as the nature

of the case will admit be assimilated to the practice of the Court with respect to special injunctions generally and such injunctions may be granted upon interlocutory applications supported by affidavit in like manner as in the case of other special injunctions.

This section is taken, with verbal alterations, from the 58th section of the 15 & 16 Vict., c. 86.

Injunctions and receivers.

57. 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 whether there be a prayer for an injunction or receiver or not* and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass such injunction may be granted if the Court shall think fit whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title and whether the estates claimed by both or by either of the parties are legal or equitable.

This section is, with the exception of the words italicised (which have been added), and of the omission of the words "A mandamus or" at the beginning of the section, identical with s. 25, sub-s. 8, of the Judicature Act, 1873.

The italicised words are an innovation upon the English practice, according to which injunctions cannot be granted (*Colebourne* v. *Colebourne*, 1 C.D. 690), nor receivers appointed (*Pares* v. *Clegg*, 7 Jur. N.S. 1136; but see *Malcolm* v. *Montgomery*, 2 Moll. 500) before the hearing, unless specially claimed by the plaintiff's pleading.

Injunctions. The first point to be considered is whether the section applies to the case of granting an injunction or receiver after the judgment [or hearing] as well as before. No doubt it applies to both. There is a larger discretion given to the Judges as to when they shall grant an application than they had before. Of course, like every new power, it must be exercised for judicial reasons; but the existence of such power gets rid of any decisions, if decisions there be, limiting the exercise of the discretion as regards the exercising it on an interlocutory application as distinguished from a trial (*per* Jessel, M.R., *Ango-Italian Bank* v. *Davies*, 9 C.D. 286, 287). But the power given to grant an injunction in all cases in which it shall appear to the Court to be "just or convenient" to do so does not in the least alter the principles on which the Court should act (*per* James, L.J., *Day* v. *Brownrigg*, 10 C.D. 307; *per* Thesiger, L.J., *Gaskin* v. *Balls*, 13 C.D. 329); *e.g.*, the Court will not grant a mandatory injunction where it would not have granted one under the old practice (*Gaskin* v. *Balls*). In ascertaining what is "just," said Jessel, M.R., your must have regard to what is "convenient"; what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles (*Beddow* v. *Beddow*, 9 C.D. 93). In the words of the same learned Judge, the granting of an injunction must be "just" as well as "convenient" (*Day* v. *Brownrigg*, *ubi supra*); the words "just or convenient" do not mean that the Court is to grant an injunction simply because the Court thinks it convenient: it means that the Court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles (*Aslatt* v. *Corporation of Southampton*, 16 C.D. 148).

"But the moment you find there is a legal principle (the M.R. went on to say), that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury on him, it appears to me that the Court ought to interfere. Now, it has been said—and I think truly said—that, as a general rule, the Court only interferes where there is some question as to property. I do not think that the interference of the Court is absolutely confined to that now; there may be cases in which the Court would interfere even when personal *status* is the only thing in question; but it is not necessary for me to decide that question at the present moment." His Lordship then proceeded to grant an

injunction restraining a corporation from avoiding the office of alderman held by the plaintiff, an injunction never heard of formerly (*S.C.*). That case was questioned in our Court in *Macpherson* v. *Sutherland*, 6 N.S.W.R. Eq. 114, and it was laid down that the Court will not interfere in the affairs of a voluntary association unless there is property in question. . . . "If no member complains that the property of the association is about to be taken from him, or that some breach of the law or malversation has been committed, or that there has been some attempt to misapply the funds, the Court will not interfere" (*per* Martin, C.J., 120). But in a very recent case it has been stated that the right to grant an injunction does not depend in any way on the existence of property, but under its original and independent jurisdiction the Court will prevent what it considers and treats as a wrong, whether arising from a violation of an unquestionable right, or from breach of contract or confidence (*Pollard* v. *Photographic Co.*, 40 C.D. 354).

In *Cooper* v. *Whittingham*, 15 C.D. 501, Jessel, M.R., held that where a statute creates a new offence or imposes a penalty, the ancillary remedy by injunction may still be claimed, and stated his opinion to be that this section might be said to be a general supplement to all Acts of Parliament; but this is a wider interpretation than has since been adopted by the Court of Appeal (*Hayward* v. *East London Waterworks Co.*, 28 C.D. 146). By this section, said Jessel, M.R., larger jurisdiction to grant injunctions than existed before is given in every case (*Quartz, &c., Co.* v. *Beall*, 20 C.D. 507); and Fry, J., has referred to the evident intention of the legislature, as indicated by the section, to enlarge rather than diminish the power of the Court in respect of injunctions (*Thomas* v. *Williams*, 14 C.D. 873). But it has since been laid down that under this section no power is given to the Court to issue an injunction in a case in which the Court before this Act had not power to give any remedy whatever (*North London R. Co.* v. *G. N. Railway Co.*, 11 Q.B.D. 30; *London and Blackwall R. Co.* v. *Cross*, 31 C.D. 354; and *cf. Newton* v. *Newton*, 11 P.D. 13, and the earlier cases which claimed for the English Courts, as at present constituted, an almost unlimited power of granting injunctions, could in any case only be cautiously cited as precedents applicable in New South Wales, because they proceed upon sections in the Judicature Act

or Orders thereunder not adopted here, conferring upon the Chancery Division the large powers contained in the Common Law Procedure Act (*Beddow* v. *Beddow*, 9 C.D. 89; compare *Quartz, &c., Co.* v. *Beall, ubi supra*), a power to grant prohibition (*Hedley* v. *Bates*, 13 C.D. 498; *Stannard* v. *S. Giles*, 20 C.D. 196), and a power to make any order for the preservation of any property the subject of the suit (*Strelley* v. *Pearson*, 15 C.D. 113).

Under the provisions of this section, injunctions have been granted restraining, even on interlocutory application, the publication of a libel (*Thorley's, &c., Co.* v. *Massam*, 14 C.D. 763; *Thomas* v. *Williams, ibid.* 864; *Quartz, &c., Co.* v. *Beall*, 20 C.D. 507; *Hill* v. *Hart Davies*, 21 C.D. 798; *Liverpool, &c., Assoc.* v. *Smith*, 37 C.D. 170, and see *Halsey* v. *Brotherhood*, 19 C.D. 386; *Société Anonyme, &c.* v. *Tilghman's, &c., Co.*, 25 C.D. 1; *Bonnard* v. *Perryman* [1891], 2 Ch. 269; *Salomons* v. *Knight, ibid.* 294; compare *Saxby* v. *Easterbrook*, 3 C.P.D. 339); the exercise by a landlord of the legal right of distress (*Shaw* v. *Earl of Jersey*, 4 C.P.D. 359).

But the Court has no power to restrain a mortgagee from exercising all his remedies at law and in equity at the same time; and where there has been no misconduct or fraud on the part of the mortgagee, the Court cannot interfere to restrain the exercise of the mortgagee's legal remedies (*Sachs* v. *Beaumont*, 8 N.S.W.R. Eq. 5).

"Where a public body refuses to perform the duties of its office, and the plaintiff seeks merely to compel the performance of those duties, the only remedy is by a *mandamus*, and that is a prerogative writ issuing only out of the Queen's Bench; but where a public body not only refuses to perform its duty, but does a wrongful act, then the Court of Equity will interfere by injunction," (*per* Owen, C.J. Eq., *Jeanneret* v. *Hixson*, 11 N.S.W.R. Eq. 8; see also *Glossop* v. *Heston and Isleworth Local Board*, 12 C.D. 102; *Frewin* v. *Lewis*, 4 M. & Cr. 249, and *A. G.* v. *Mid. Kent R. Co. and S. E. R. Co.*, 3 Ch. 100); so, too, when the statutory right of an individual is interfered with, the remedy is by injunction and not *mandamus* (*Holland* v. *Dickson*, 37 C.D. 672).

The Court will not, on application for an injunction to the hearing, decide a doubtful point of law where the effect of such decision would be to materially alter the position of the parties; in such a case the injunction will go whatever may be the Court's

opinion as to the ultimate result of the suit (*Chappell* v. *Broughton*, 11 N.S.W.R. Eq. 65). But in order to entitle the plaintiff to an interlocutory injunction, though the Court is not called upon to decide finally on the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiff is entitled to relief (*Preston* v. *Luck*, 27 C.D. 506; *cf. Challender* v. *Royle*, 36 C.D. 425; *Republic of Peru* v. *Dreyfus, &c., & Co.*, 38 C.D. 362; *The Mogul Steamship Co.* v. *McGregor, Gow & Co.*, 15 Q.B.D. 476; Seton (4th ed.), pp. 171-178).

A plaintiff is entitled to apply for an injunction without giving notice, and to receive his costs, where an unlawful act has been committed for the consequences of which the defendant is liable, and whether the act be wrong by Statute or Common Law or an infringement of equitable rights (*Cooper* v. *Whittingham*, 15 C.D. 501; *Upmann* v. *Forester*, 24 C.D. 237; *Goodhart* v. *Hyett*, 25 C.D. 182; *Nicols* v. *Pitman*, 26 C.D. 382; *United, &c., Co.* v. *London, &c., Co.*, 26 C.D. 766; *Wittman* v. *Oppenheim*, 27 C.D. 260).

The Court has jurisdiction to grant a mandatory injunction on interlocutory applications (*per* Fry, L.J., *Bonner* v. *G. W. Railway Co.*, 24 C.D. 10; *Hermann Loog* v. *Bean*, 26 C.D. 314; Seton, (4th ed.), pp. 178, 179).

The mode of application is regulated by R. 27; and see Seton (4th ed.), p. 171. The affidavits in support of the motion must be sworn after statement of claim filed; but *semble*, if sworn previously, an order would be made on plaintiff's undertaking to have them resworn and filed (*Green* v. *Prior*, W.N. (1886) 50).

The undertaking as to damages given on every interlocutory injunction (*Cooper* v. *Smyth*, 4 N.S.W.R. Eq. 39) applies to all the defendants, although one or more only may be restrained (*Tucker* v. *New Brunswick, &c., Co.*, 44 C.D., at p. 252).

Where an interlocutory injunction has been granted on the usual undertaking as to damages, if it afterwards is established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, though the plaintiff was not guilty of misrepresentation, suppression, or other default in obtaining the injunction (*Griffith* v. *Blake*, 27 C.D. 474; *cf.*

Ross v. *Buxton*, W.N. (1888) 55; *Sheppard* v. *Gilmore*, W.N. (1887) 242).

Where the plaintiff obtains an *ex parte* injunction on terms which he does not fulfil, the injunction will be dissolved on motion on the ground of non-fulfilment of the condition on which it was granted (*Spanish G. A. Corp.* v. *Spanish Corp.*, W.N. (1890) 158). As to dissolving injunctions, see Seton (4th ed.), p. 291, *et sqq.*

Receivers.

Under this section the Court may and does grant receivers when it never could have done so before. Thus, for instance, it has power to grant a receiver under the section where a plaintiff has himself the power of obtaining possession at law (*per* Cotton, L.J., *Anglo-Italian Bk.* v. *Davies*, 9 C.D. 293, and see *per* Jessel, M.R., *S.C.*, cited *ante*, p. 62; *Gawthorpe* v. *Gawthorpe*, W.N. (1878) 91; *Manchester, &c., District Bank* v. *Parkinson*, 22 Q.B.D. 173). On this principle receivers have been appointed at the instance of legal mortgagees (*Pease* v. *Fletcher*, 1 C.D. 273; *Truman & Co.* v. *Redgrave*, 18 C.D. 547; *Tillett* v. *Nixon*, 25 C.D. 238; *Re Pope*, 17 Q.B.D. 749). But in such a case there is no right to a receiver; the Court has a discretion to make the appointment when it is "just and convenient" (*Re Prytherch*, 42 C.D. 600). Again, in a suit for partition, where one of the co-owners is in occupation, though not in exclusive occupation, of the property, the Court now has jurisdiction to appoint a receiver (*Porter* v. *Lopes*, 7 C.D. 358). In an action for the specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff having appealed, the Court of Appeal (no previous application having been made to the Divisional Court or a Judge) appointed the plaintiff receiver and manager of the farm without security, on his undertaking to abide by any order which the Court might make in the matter (*Hyde* v. *Warden*, 1 Ex. D. 309).

After judgment for foreclosure absolute, the plaintiff cannot obtain the appointment of a receiver of the mortgaged property (*Wills* v. *Luff*, 38 C.D. 197).

On proposals for a purchase of a business carried on under the order of the Court by a receiver and manager, the Court refused to restrain him from soliciting orders from, or doing business with, the present customers (*In re Irish*, 40 C.D. 49).

Where the circumstances of the case are urgent, a receiver may be appointed *ex parte* before the defendant has appeared (*Taylor* v. *Eckersley*, 2 C.D. 302), and even before he has been served with the statement of claim (*H.* v. *H.*, 1. C.D. 276); and in the case of a supposed lunatic, pending an inquisition (*In re Pountain*, 37 C.D. 609).

Appended are short references to late authorities on injunctions and receivers:—

INJUNCTIONS—ARBITRATION.—*Farrar* v. *Cooper*, 44 C.D. 323; *London and Blackwall Railway Co.* v. *Cross*, 31 C.D. 354.

BREACH OF COVENANT.—Seton (4th ed.), pp. 179-184.

COVENANT BY VENDOR NOT TO CARRY ON BUSINESS.—*Vernon* v. *Hallam*, 34 C.D. 748; *Palmer* v. *Mallet*, 36 C.D. 411.

RESTRAINT OF TRADE.—*National, &c., Bank* v. *Marshall*, 40 C.D. 112.

BUILDING ESTATE — RESTRICTIVE COVENANT. — *Mackenzie* v. *Childers*, 43 C.D. 265; *Spicer* v. *Martin*, 14 App. Cas. 12; *Sayers* v. *Collyer*, 103.

INFANT—APPRENTICESHIP DEED.—*De Francesco* v. *Barnum*, 43 C.D. 165.

LEASES.—*Rolls* v. *Miller*, 27 C.D. 71, *ib.* 81; *Hall* v. *Ewin*, 37 C.D. 74; *Tod-Heatly* v. *Benham*, 40 C.D. 80; *Buckle* v. *Fredericks*, 44 C.D. 244; *Clegg* v. *Hands*, 44 C.D. 503.

CLUB MEMBERS.—*Baird* v. *Wells*, 44 C.D. 661; *Andrews* v. *Salmon*, W.N. (1888) 102.

COPYRIGHT — INFRINGEMENT. — Seton (4th ed.), pp. 243-252. *Shore* v. *Schmincke*, 33 C.D. 546; *Ager* v. *P. & O., &c., Co.*, 26 C.D. 637; *Trade, &c., Co.* v. *Middlesborough, &c., Assoc.*, 40 C.D. 425; *Cate* v. *Devon, &c., Co.*, 43 C.D. 500; *Warne* v. *Seebohm*, 39 C.D. 73; *Pollard* v. *Photographic Co.*, 40 C.D. 345; *Tuck* v. *Priester*, 19 Q.B.D. 629; *Caird* v. *Sime*, 12 App. Cas. 326.

NUISANCE.—Seton (4th ed.), pp. 219-234. *Jenkins* v. *Jackson*, 40 C.D., 71; *Ballard* v. *Tomlinson*, 29 C.D. 115; *Fletcher* v. *Bealey*, 28 C.D. 688; *Reinhardt* v. *Mentasti*, 42 C.D. 685.

OBSTRUCTION OF LIGHT.—*Newson* v. *Pender*, 27 C.D. 43; *Myers* v. *Catterson*, 43 C.D. 470.

PATENT. — *Proctor* v. *Bayley*, 42 C.D. 390; *Kurtz* v. *Spence*, 33 C.D. 579; *Challender* v. *Royle*, 36 C.D. 425; *Barney* v. *United Telephone Co.*, 28 C.D. 394; *Driffield, &c., Co.* v. *Waterloo Mills Co.*, 31 C.D. 638; *Combined, &c., Machine Co.* v. *Automatic, &c., Co.*, 42 C.D., 665; *Barrett* v. *Day*, 43 C.D. 435; *Colley* v. *Hart*, 44 C.D. 179.

PRINCIPAL AND AGENT—CORRUPT BARGAIN BY AGENT FOR COMMISSION.—*Lister & Co.* v. *Stubbs*, 45 C.D. 1.

TRADE MARK. — Seton (4th ed.), pp. 234-243. *Lever* v. *Goodwin*, 36 C.D. 1; *Waterman* v. *Ayres*, 39 C.D. 29; *Somerville* v. *Schembri*, 12 App. Cas. 453; *Burland* v. *Broxburn Oil Co.*, 42, C.D. 274; *Thompson* v. *Montgomery*, 41 C.D. 35,

TRADE NAME.—*Street* v. *Union Bank of Spain.* 30 C.D. 156; *Turton* v. *Turton*, 42 C.D. 128; *Tussaud* v. *Tussaud*, 44 C.D. 678; *Borthwick* v. *Evening Post*, 37 C.D. 449; *Licensed Victuallers', &c., Co.* v. *Bingham*, 38 C.D. 139.

TRESPASS.—Seton (4th ed.), pp. 195-219.

WAY.—*Ib.*, pp. 210-213.

RECEIVERS — CREDITORS' ADMINISTRATION ACTION. — *Philips* v. *Jones*, 28 Sol. Jo. 360; *Harris* v. *Harris*, 35 W.R. 710; *Re Wells*, 45 C.D. 569.

INTEREST ON MONEYS IN HANDS OF EXECUTORS.—*R.* v. *Judge of Lincolnshire C. Court*, 20 Q.B.D. 167.

MORTGAGEE IN POSSESSION.—*Mason* v. *Westoby*, 32 C.D. 206, but *cf. Re Prytherch*, 42 C.D. 590.

MARRIED WOMAN'S SEPARATE ESTATE.—*Re Peace and Waller*, 24 C.D. 405.

PROBATE, BEFORE APPLICATION FOR, AS AGAINST A CO-EXECUTOR.—*Re Moore*, 13 P.D. 36.

RECEIVER AND MANAGER. — *Taylor* v. *Neate*, 39 C.D. 538; *Howell* v. *Dawson*, 13 Q.B.D. 67.

DEBENTURE HOLDERS.—*Blaker* v. *Herts, &c., Waterworks Co.*, 41 C.D. 399; *Makins* v. *Percy Ibotson & Sons*, 1891, 1 Ch. 133; *In re Joshua Stubbs, Ltd.*, 1891, 1 Ch. 187, 475.

PARTNERSHIP PROPERTY.—See *Taylor* v. *Neate*, *ubi sup.*, and *Niemann* v. *Niemann*, 43 C.D. 198.

58. No writ of injunction shall hereafter be issued or any docquet be signed or filed as at present but service upon any person of the decree or order directing such injunction or notice thereof shall have the same effect as the issuing of a writ of injunction and signing and filing of a docquet and service of the writ upon such person and thereupon the plaintiff shall be entitled to all such remedies as he is entitled to under the present practice. No writ to be issued.

As to giving notice of an injunction by telegram, see *Re Bishop*, 13 C.D. 110.

As to the writ of injunction hereby abolished, see *Daniell*, Ch. P. (5th ed.), 1525.

Abatement of Suit.

59. Upon any suit becoming abated by death marriage or otherwise or defective by reason of some change or transmission of interest or liability it shall not be necessary to file any new or supplemental statement of claim in order to obtain the usual order to revive such suit or the usual decree or order to carry on the proceedings but an order to Simplifying proceedings for reviving a suit.

the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit or of the same having become defective and of the change or transmission of interest or liability and an order so obtained when served upon the party or parties who according to the present practice would be defendant or defendants to a bill of revivor or supplemental bill shall from the time of service be binding on such party or parties in the same manner as if such order had been regularly obtained according to the existing practice and such party or parties shall thenceforth become a party or parties to the suit and be bound to enter an appearance thereto as if he or they had been duly served with process to appear to such a bill duly filed against him Provided that the party or parties so served may within such time after service as shall be prescribed by any general rule in that behalf apply to the Court to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill stating the previous proceedings in the suit and the alleged change or transmissions of interest or liability and praying the usual relief consequent thereon Provided also that if any party so served is under disability other than coverture such order shall be of no effect as against such party until a guardian *ad litem* shall have been appointed for such party and such time shall have elapsed thereafter as shall be prescribed by any general rule.

This section corresponds with the 52nd sec. of 15 & 16 Vict., c. 86 (since repealed by 44 & 45 Vict., c. 59).

Where a person named as defendant dies *before appearance*, an original statement of claim must be filed against his representative: it is not a case for revivor (*Crowfoot* v. *Mander*, 9 Sim. 396; *Bland* v. *Davison*, 21 Beav. 312; *Williams* v. *Jackson*, 7 W.R. 104).

The Court has a discretion, and has refused orders of revivor on the ground of negligence, laches, and delay (see *Alsop* v. *Bell*, 24 Beav. 451 ; *Higgins* v. *Shaw*, 2 Dr. & W. 356 ; *Bland* v. *Davison*, 21 Beav. 312 ; *Dunne* v. *Doyle*, 10 Ir. Exch. R. 502 : no objection on this score appears to have been taken in *Deeks* v. *Stanhope*, 1 Jur. 413).

The decisions upon this section have been by no means uniform, and in cases where, under the old practice, an original bill in the nature of a supplemental bill would have been necessary, it has been held that the order to revive or carry on the proceedings could not be obtained, *e.g.*, where, in consequence of the death of a plaintiff or defendant, or determination of an interest, a fresh and distinct interest arises in another person who is not a party to the original suit (see *Hills* v. *Springett*, 5 Eq. 123, and cases there cited ; *Auster* v. *Haines*, 4 Ch. 445 ; *Beardmore* v. *Gregory*, 2 H. & M. 491, 496 ; *Watts* v. *Watts*, Johns. 631 ; Seton (4th ed.), 1531).

The section applies to special cases (*Wilson* v. *Whateley*, 1 J. & H. 331), and petitions (*Robinson* v. *Hewetson*, 1 W.R. 100 ; *Re Youl*, 16 Eq. 107).

On the death of a defendant who has delivered a counter-claim, it is necessary that his representatives, if they wish to prosecute the counter-claim against the plaintiff in the original suit, should obtain an order of revivor against him. An order of revivor of the original suit obtained by the plaintiff against them does not authorise them to prosecute the counter-claim against him (*Andrew* v. *Aitken*, 21 C.D. 175).

The section makes an order of revivor binding from the date of service, except in the case of parties under disability other than coverture, in whose case it does not bind until after the lapse of the prescribed time after the appointment for them of a guardian *ad litem*.

For practice under this section, see Daniell Ch. P. (5th ed.), 1377-1401, and RR. 160-163. See also s. 9, *ante*.

The present practice in England under the Judicature Act in respect of change of parties, &c., varies from the above, and is regulated by O. L., r. 1 (1875), O. XVII., r. 1 (1883), which provides that 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*.

Supplemental Statements.

Facts newly arising—how introduced.

60. It shall not be necessary to file any supplemental statement of claim for the purpose only of stating facts which have occurred after the institution of the suit but such facts may be introduced by way of amendment into the original statement of claim if the cause is otherwise in a state to allow of an amendment in the statement of claim and if not the plaintiff may state such facts on the record in such manner and subject to such rules with respect to the proof thereof and affording the defendant an opportunity of answering the same as shall be prescribed by any general rule in that behalf.

This section is taken from the 53rd section of 15 & 16 Vict. c. 86. The section is not imperative (*Foulkes* v. *Davies*, 7 Eq. 46), and only applies to amendments before decree (*Commerell* v. *Hall*, 2 Drew. 194). Where the suit is not in such a state as to allow of amendment, the plaintiff may file a written statement under R. 161. This is, however, rarely done (Daniell, Ch. P. (5th ed.) 1395), inasmuch as, before decree, the statement of claim may, in almost all cases, be amended. After decree a supplemental statement of claim must be filed (*Commerell* v. *Hall*, *ubi supra*).

As to amendment of pleadings, see RR. 151-159.

Judge Sitting in Chambers.

General power to sit in Chambers.

61. After the commencement of this Act the Judge shall sit in Chambers for the despatch of such business in Equity as in his opinion may advantageously and with propriety be

heard in Chambers and such Judge shall fix the times for so sitting and when so sitting shall have the same powers and jurisdiction as in open Court.

62. The business to be disposed of by the Judge in Chambers shall consist of such of the following as he shall think would be more conveniently so disposed of namely—Applications for time for leave to amend for production of documents for determining the mode of trial and settling the questions to be tried applications relating to the conduct of any suit or matter the guardianship or maintenance of infants matters connected with the management of property and such other matters as the Judge may from time to time see fit so to dispose of. Particular business to be heard there.

These two sections contain the substance of ss. 11, 13, and 26 of the Act 15 & 16 Vict., c. 80, and give the Judge an extremely wide discretion as to what business shall, and what shall not, be taken in Chambers.

The appointment of a receiver has been considered a "matter connected with the management of property" within the meaning of the 62nd section (*Booth* v. *Coulton*, 16 W.R. 683).

As to applications for time to plead, see R. 90; to file statement of defence, R. 97; and as to time generally, RR. 294-300. As to amendment of pleadings, see RR. 151-159; as to production of documents, ss. 25 and 26, and RR. 121, 122; as to the mode of trial and issues, ss. 33 and 34, and RR. 142, 143; as to applications made as to conduct of a cause—*e.g.*, on account of a party not prosecuting, RR. 119, 120; for security for costs, R. 75; change of solicitor by order of course, R. 27; appointment of new next friend (Daniell's Ch. P. (5th ed.) 75) and of guardian, &c., R. 287.

63. The Judge while sitting in open Court may adjourn for hearing in Chambers or while sitting in Chambers may Adjournment from Court to Chambers.

adjourn for hearing in open Court any case before him which he may think would better be heard in Chambers or in open Court as the case may be.

This section follows, with verbal alterations, section 27 of 15 & 16 Vict., c. 80.

It is in the discretion of the Judge to hear matters in Chambers, or adjourn them into Court (*Re Agricultural, &c., Co.*, 11 W.R 330, 386).

When a cause or matter is adjourned from Court to Chambers (*Wallis* v. *Bastard*, 2 W.R. 47), or from Chambers into Court (*Dicken* v. *Hamer*, 2 L.T. N.S. 276), it is unnecessary expressly to reserve the costs, for such a reservation is implied. The hearing in Court of a matter adjourned from Chambers is only a continuation of the hearing in Chambers (*Leeds* v. *Lewis*, 3 Jur. N.S. 1290); and *vice versâ*. However, where there is an adjournment to Chambers for the purpose of making an inquiry as to a matter on which no evidence has been offered in Court, it would seem that an order should be drawn up directing an inquiry (*Kelson* v. *Kelson*, 9 Ha. App. lxxxvi).

See Daniell's Ch. Pr. (5th ed.), 1040, 1188, as to proceedings adjourned to Chambers.

This section is of little importance in this colony, where the difference between the hearing in Chambers and in Court is so slight.

Procedure in Chambers.

64. The course of proceeding in Chambers shall be by summons and as nearly as may be according to the forms observed by Judges of the Supreme Court sitting in Chambers in proceedings at law.

Decrees of Judge.

Mode of settling decrees.

65. The decrees and orders of the Judge whether sitting in open Court or in Chambers may be settled by the Judge or he may direct any such decree or order to be settled by

the Master in Equity and the Judge shall in every case certify his approval thereof under his hand And no warrant shall be taken out to consider any decree or order but the Judge or Master shall at the time of settling the decree or order direct what proceedings shall be taken thereunder and the Judge shall direct what inquiries and proceedings shall be taken before himself under the decree or order and what before the Master.

See RR. 206, 207.

Proceedings before the Master.

What matters inquirable before Master

66. The Judge or the Full Court in cases under Appeal shall have the sole power to order what matters shall be investigated before the Master in Equity with or without special direction and what matters shall be heard and investigated by themselves respectively and in every case unless the Judge or such Court shall otherwise direct the Master shall tax costs and make such inquiries as have usually been prosecuted before the Master And the Judge shall give such aid and directions in any such inquiry as he may think fit subject to the right of appeal and to the right of every suitor to bring any particular point before the Judge himself.

This section is taken *mutatis mutandis* from the 29th sec. of 15 & 16 Vict., c. 80.

As to the right of a suitor here referred to, see s. 69.

Power to summon witnesses, &c.

67. The Master in Equity shall for the purpose of any proceeding before him have full power to issue advertisements to summon parties and witnesses to administer oaths to take affidavits and also acknowledgments except those of

married women and when directed by the Judge or Full Court to examine parties or witnesses orally or upon interrogatories And every party and witness summoned by the Master shall be bound to attend such summons and shall for disobedience thereof be liable to process of contempt in like manner as for disobedience to or for default of attendance in pursuance of any order of the Supreme Court or on any writ of subpœna and all persons knowingly swearing or affirming falsely before the Master shall incur all the penalties of perjury.

This section (compounded of secs. 30 & 31 of 15 & 16 Vict., c. 80) provides that the Master can only examine parties or witnesses, when directed by the Judge or Full Court; but section 47 enacts that any party may *subpœna* a witness before the Master for examination.

See R. 217 as to the affidavits and evidence which may be used before the Master, and Daniell's Ch. P. (5th ed.), 1058, and for the practice see Walker & Elgood's Administration Actions, p. 91.

Form of Master's report.

68. Directions by the Judge concerning any proceedings before the Master shall not require any particular form and the result thereof shall not be embodied in a formal report but shall be stated in a short certificate to the Judge unless he shall otherwise direct And the approval of the Judge of any such certificate or report shall be signified under his hand.

This section is equivalent, *mutatis mutandis*, to the 32nd section of 15 & 16 Vict., c. 80.

It has been held that the certificate should state not facts merely, but conclusions drawn from the facts (*Lee* v. *Willock*, 6 Ves. 605; *Dixon* v. *Dixon*, 3 Bro. C.C. 509), though it would be sufficient if it stated a fact involving, according to the practice of the Court, a particular consequence (*Bick* v. *Motly*, 2 M. & K. 312). At the present time, however, it is considered that, if the circumstances warrant it, a certificate may state facts, and

reserve for the consideration of the Court the legal questions arising out of them (*Stott* v. *Meanock*, 10 W.R. 605). The Master's reason for the conclusion at which he ultimately arrives is not such a specific and definite finding as would necessitate a summons to vary the certificate (*per* Owen, C.J. Eq., *Stephen* v. *Roberts*, 11 N.S.W.R. Eq. 129). In that case the Master in his certificate decided two points, the first in favour of the plaintiff, the second in favour of the defendants, and the certificate as a whole in favour of the defendants. The plaintiff took out a summons to vary the certificate on the ground that the finding of the Master was wrong on the second point; *held*, that the defendants could support the certificate by shewing that the finding of the Master was also wrong on the first point, and that the conclusion at which he arrived was the correct one, although they had not taken out a summons to vary the certificate.

See RR. 235-239.

How and when it may be reviewed.

69. No exception shall lie to any certificate or report of the Master after it has been adopted and signed by the Judge but any party may during the proceeding before the Master or within such time after its conclusion as shall be fixed by any general rule in that behalf take the opinion of the Judge on any particular point or matter arising in the course of the proceeding or upon the result of the whole when brought to a conclusion When so adopted and signed every such certificate and report shall be filed and shall thenceforth be binding on all parties unless discharged or varied by the Court upon application within such time as may be fixed by any general rule Provided that nothing herein shall prejudice the power of the Full Court sitting in Equity on Appeal to open any such certificate or report as any report of the Master absolutely confirmed may now be opened.

This section is the shortened equivalent of secs. 33 and 34 of 15 & 16 Vict., c. 80.

In proceedings in Chambers every party has the unqualified right to have his case, or the minutest point arising in Chambers, heard personally (in the first instance, and not by way of appeal) by the Judge, though there be no controversy between the parties, and the Master cannot refuse an application to have it so heard (*Re Agriculturist, &c., Co.*, 3 De G. F. & J. 194 ; *per* Kindersley, V.C., *Wadham* v. *Rigg*, 2 Dr. & Sm. 80 ; *Re London and County Assurance Co.*, 5 W.R. 794 ; *Re Home Counties, &c., Co.*, 10 W.R. 457 ; *per* Wood, V.C., *Dawkins* v. *Morton, ib.* 339; *Hayward* v. *Hayward*, Kay, App. 31). It is the right of the suitor to have the matter at once adjourned before the Judge, without taking out any summons. Of course, if a solicitor took an adjournment before the Judge of every item in an account no business could be transacted. In theory there is a right to do this, but in practice it is found impossible that it should be done. The practice is to wait until the taking of the account is completed, and then to take an adjournment once for all to the Judge. When, however, a question of principle is involved in an item which decides the mode in which the account is to be taken, it is, of course, impossible to wait until the account is completed, and then it is quite right to adjourn the item at once before the Judge. If a solicitor were so unreasonable as to insist on the adjournment of every item in an account to which he might object, that would be an abuse of the process of the Court, and I have no doubt the Judge would have jurisdiction to punish the solicitor by making him pay the costs personally (*per* Jessel, M.R., *Upton* v. *Brown*, 20 C.D. 732 ; *Re Watts*, 22 C.D. 5). See further s. 66.

The above note relates to the adjournment to the Judge of particular items or matters, for which, as it has been seen, no summons is necessary : for the procedure, where the opinion of the Judge is to be taken upon the result of a finished proceeding, see RR. 240, 241. As to approving and filing a certificate, see R. 242 ; as to discharging or varying the same, R. 243, and Daniell's Ch. P. (5th ed.), 1219-1227, Seton (4th ed.), 67-70.

As to whether a party, dissatisfied with a decision of a Judge in Chambers, should proceed at once to the Full Court, or first procure the matter to be re-heard by the Judge in Court, see the contradictory cases of *York, &c., Railway Co.* v. *Hudson*, 18 Beav. 70 ; *Thomas* v. *Elsom*, 6 C.D. 346 ; *Holloway* v. *Cheston*, 19 C.D. 516 ; *Anderson* v. *Butler's Wharf Co.*, 21 C.D. 131 ; *Manchester, &c., Co.* v. *Slagg*, 47 L.T. 556.

Appeals.

Provisions for appeals to Full Court.

70. Any person feeling aggrieved by any decree or order of the Judge may at any time within fourteen days next after the pronouncing of the same or within such further time as the Judge may allow enter an appeal in the office of the Court against such decree or order to the Full Court subject to such general rules as shall be in that behalf prescribed and every person so appealing shall within fourteen days from the time of filing such appeal deposit in the hands of the Master such sum not exceeding one hundred pounds as such Master shall direct or at the option of the person appealing shall deposit with such Master a bond of two persons to be approved of by him in such sum not exceeding one hundred pounds as he shall direct conditioned to be void if the appellant shall prosecute his appeal with all due diligence and pay such costs as the Court shall adjudge which said sum of money or bond as the case may be shall be held by the Master subject to the order of the Court And if such sum of money or bond shall not be deposited as aforesaid within the period hereby provided such appeal shall be deemed to have been abandoned.

The wording of this section permits, contrary to the English practice, an appeal for costs only (*Dight* v. *Gordon*, 3 S.C.R. Eq. 62; *Dixon* v. *Williams*, 13 S.C.R. Eq. 7; *Lillis* v. *Davis*, 1 N.S.W. W.N. 27; *Hood* v. *Cullen*, 6 N.S.W.R. Eq. 22). But the Court of Appeal will still have regard to the discretion of the Judge, and will not overrule his order unless there has been a disregard of principle or a misapprehension of facts (see *Gilbert* v. *Hudlestone*, 28 C D. 594). *Eberlein* v. *Eberlein* 8 N.S.W.R. Eq. 1, was also an appeal for costs only, and there it was held that the Court of Equity has not unlimited discretion as to costs. *E.g.*, it cannot deprive a plaintiff,

who succeeds in every particular of the claim, of costs, if the defendant has opposed the claim of the plaintiff throughout, unless the plaintiff has been guilty of some grave misconduct. Delay in instituting proceedings, when such delay has caused no injury to the defendant, is not sufficient ground to enable the Court to deprive a successful plaintiff of costs. (*S.C.*).

One of several co-plaintiffs may appeal alone, if the others decline to concur (*Beckett* v. *Attwood*, 18 C.D. 54).

A claim under a winding-up order having been refused by the M.R., the counsel for the liquidator asked the counsel for the claimant whether he intended to carry the case further, and, on being informed that he did not, said he should not ask for costs. An order was drawn up dismissing the claim without costs and not containing any undertaking not to appeal. *Held* that, as no such undertaking was embodied in the order, an appeal would lie (*Re Hull and County Bank*, 13 C.D. 261 ; and see *Young* v. *Fernie*, 33 L.J.N.S. Ch. 192).

The practice here laid down as to security for costs differs from the modern English practice, according to which security for the costs of an appeal can only be directed under special circumstances (O. LVIII., r. 15 (1875). Before the Judicature Act, however, security was always required to the extent of £20, a sum which was generally quite inadequate.

A respondent may obtain his costs of an abandoned appeal by making a substantive application for them to the Full Court (*Webb* v. *Mansel*, 2 Q.B.D. 117 ; *Charlton* v. *Charlton*, 16 C.D. 273) on notice (*Re Oakwell Collieries*, 7 C.D. 706) ; but he should first apply to the appellant out of Court, and, if he omits to do so, he will not be allowed the costs of his motion (*Griffin* v. *Allen*, 11 C.D. 913). See R. 198.

An application for an extension of time for appealing must be made to "the Judge," *i.e.*, the Judge from whose decision it is wished to appeal. In England such an application must be made to the Court of Appeal. It must not be *ex parte* (*Evennett* v. *Lawrence*, 4 C.D. 139). The Court in England has laid it down that it will not grant an extension of time for appealing after the time limited by the rules has expired, except under very special circumstances, and that the mere fact that the Court of Appeal has in another case (*Craig* v. *Phillips*, 7 C.D. 249), or even

in the same case (*Esdaile* v. *Payne*, 40 C.D. 530-535) come to a different conclusion, is not such a circumstance; and generally, that a person applying for the indulgence of an extension of time must show special grounds, such as mistake (mistake of the meaning of the rules is not sufficient), surprise, inevitable accident, or the like (see *Swindell* v. *Birmingham Syndicate*, 3 C.D. 133; *Trail* v. *Jackson* 4 C.D. 9; *International Financial Society* v. *City of Moscow Gas Co.*, 7 C.D. 241; *Re Blyth and Young*, 13 C.D. 416; *In re Clayton Mills Manufacturing Co.*, 37 C.D. 28; *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 368; *Curtis* v. *Sheffield*, 21 C.D. 1, in which are contained observations on the change of opinion in the Legislature and Judges as to the period during which orders should be appealable; *Re New Callao*, 22 C.D. 484). It may be, however, that the Colonial Court will be more ready, in its discretion, to grant extensions of time for appealing than the cases above cited show the Court of Appeal in England to be. In England a party has a year in which to appeal from a final, and three weeks only in which to appeal from an interlocutory order (O. LVIII., r. 15) (1875): in *Craig* v. *Phillips* (7 C.D. 249) the Court refused to extend the time for appealing from a final decree, but, in the course of his judgment, Jessel, M.R., said, "I can understand a different view being taken in cases where the time limited for appeal is very short, as in appeals under the winding-up Acts, and where accounts are still pending, and the assets undistributed; in such case a creditor, whose proof had been refused, might be allowed further time to appeal." By our Act only fourteen days are allowed for appealing from any kind of decree or order, and it may be thought that the shortness of the time thus allowed admits, or even invites, greater liberality on the part of the Judge in the matter of granting extensions. It has, however, been held in this colony that it is no ground for extending the time for entering an appeal against an interlocutory order, that the appellant is out of the jurisdiction, and that, as the necessary security for the costs of the appeal cannot be given before communication with him, the time for giving such security will, unless an extension be granted, have run out in the meantime, whereby the appeal will be deemed abandoned (*Eno* v. *Davies*, 4 N.S.W.R. Eq. 37); but, under special circumstances, absence from the kingdom of the parties having the right of appeal has been considered in England to justify an extension of time for appealing (*Re Jacques*, 18 C.D. 392), and, in this colony, where the defendant had been

throughout in England, his time for appealing from an adverse and final order which had been made against him was extended till his solicitors could receive a cablegram in answer to a letter they had written to him asking for his instructions as to appealing (*Burt* v. *Wall*, Owen, C.J. Eq., 11th Sept., 1891).

See RR. 196-200; and for form of notice of appeal see Schedule F. to Rules.

Mode of appealing.

71. All appeals under this Act shall be by way of rehearing and shall be brought by notice of appeal in a summary way and no petition or other formal proceeding other than such notice shall be necessary. The appellant may by the notice appeal from the whole or any part of any decree or order and such notice shall state whether the whole or part only of such decree or order is complained of and in the latter case shall specify such part.

This section is taken from O. LVIII., r. 2 (1875).

The meaning of the enactment that an appeal is to be by way of rehearing is that it is not to be confined to the points mentioned in the notice of appeal (*per* Jessel, M.R., *Purnell* v. *G.W.R. Co.*, 1 Q.B.D. 640); but see the cases cited under s. 73.

A notice of appeal may be sufficient, though informal (*Re West Jewell, &c., Co.*, 8 C.D. 806, explained in *Collins* v. *Vestry of Paddington*, 5 Q.B.D. 374); but the mere intimation, in the course of correspondence, of an intention to appeal is not sufficient (*Re Blyth and Young*, 13 C.D. 416; *Re New Callao*, 22 C.D. 484).

An irregularity in the notice may be waived by appearance (*Re McRae*, 25 C.D. 19).

As to the concluding words of the section, see *Re Duchess, &c., Co.*, 10 C.D. 307; *Hood* v. *Cullen*, 6 N.S.W.R. Eq. 22.

Notiee of appeal.

72. 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 Full Court may direct

notice of the appeal to be served on all or any other parties to the suit or upon any person *or body corporate* 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 make such decree or order as might have been made if the persons *or bodies corporate* served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the Full Court may seem fit.

This section, with the exception of the words italicised in the text (which have been added), are taken from O. LVIII., r. 3 (1875).

The section gives the Full Court discretion to allow a notice of appeal to be amended as to dates, &c., and special circumstances are not required to justify such amendment (*Re Stockton, &c., Co.*, 10 C.D. 335; see also *Re Crosley*, 34 C.D. 664.

An appellant ought to serve notice of appeal on all parties who will be affected by the order of the Court of Appeal, and, if a party who would be so affected is not served, he may appear without service, and obtain his costs, and this rule applies, though the appeal fails through irregularity, and never comes on to be heard (*Re New Callao*, 22 C.D. 484). By an order in an administration suit a fund which, according to the construction to be put upon a will or codicil, was payable to A or B or C, was directed to be paid to C. A appealed, serving notice of appeal upon C only. *Held*, that whether or not the appellant was right, under this section, in serving C only, the appeal could not be heard in the absence of B, and that the Court would in the exercise of the discretion given to it by the same section, order the appeal to stand over, in order that B might be served (*Hunter* v. *Hunter*, 24 W.R. 504).

Service of notice of appeal on the solicitors who were on the record but had ceased to act, was held to be good service (*Lady de la Pole* v. *Dick*, 29 C.D. 351).

In a proper case the Court of Appeal has jurisdiction to make an order for substituted service of a notice of appeal, though no express provision to that effect is contained in the Rules of Court (*Ex parte Warburg*, 24 C.D. 364).

As to service by direction of the Court of a notice of appeal on other parties to the suit or on persons or corporations not parties, see *Purnell* v. *G. W. R. Co.*, 1 Q.B.D. 636; *Hunter* v. *Hunter*, W.N. (1876), 138.

General powers of the Full Court.

73. The Full Court shall have all the powers and duties as to amendment and otherwise of the Judge 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 the Master or a 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 decree or order from which the appeal is brought Upon appeals from a decree or order upon the merits at the trial or hearing of any cause or matter such further evidence (save as aforesaid) shall be admitted on special grounds only and not without special leave of the Court. The Full Court shall have power to make any decree or order which ought to have been made and such further or other order as the case may require The powers aforesaid shall 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 Full Court shall have power to make such order as to the whole or any part of the costs of the appeal as may seem just *Provided always that the Full Court shall be deemed to be any number of Judges thereof not being less than three.*

This section is taken from O. LVIII., r. 5 (1875), the words italicised in the text being added. As to amendment, see s. 9, and RR. 151-159.

Notwithstanding the powers here given to the Full Court, an appellant will not be allowed to raise upon his appeal a new case inconsistent with that which he originally raised in the primary Court, even though the evidence taken in that Court supports the new case (*Ex parte Reddish*, 5 C.D. 882). "A point not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. . . . A Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness-box" (*per* Lord Herschell, *The Tasmania*, 15 App. Cas. 225; see further *Willmott* v. *London Celluloid Co.*, 34 C.D. 151; *Davis* v. *Galmoye*, 39 C.D. 322; *London, Cheltenham, &c., Co.* v. *S.E.R. Co.*, 40 C.D. 100).

By an order in an administration suit a fund, which, according to the construction to be put upon a will and codicil, was payable to A or B or C, was directed to be paid to C. B appealed, the notice of appeal having been served on both A and C. On the dismissal of B's appeal, the Court held that, under this section, it was open to A also to ask for a reversal of the order for payment to C (*Hunter* v. *Hunter*, 24 W.R. 527). On the argument of an appeal, the respondent may rely on grounds on which the Court below decided against him (*Directors, &c.* v. *Kisch*, 2 H.L. 100).

The words "further evidence" mean evidence not used at the hearing in the Court below, and include, therefore, evidence that has been used only in Chambers (*per* Jessel, M.R., *Jones* v. *Chennell*, 8 C.D. 505).

When the further evidence which it is desired to adduce consists of affidavits or documents, it may be received on an application made on the hearing of the appeal, though notice of an intention so to apply should previously be given to the other side (*Hastie* v. *Hastie*, 1 C.D. 562; *Justice* v. *Mersey, &c., Co.*, 24 W.R. 199; *Jones* v. *Chennell*, 8 C.D. 504; but see *Re Orr Ewing's Trade Marks*, 26 W.R. 777); but, where a party wishes to examine fresh witnesses *viva voce*, he must apply for leave by motion previously to the hearing of the appeal (*Dicks* v. *Brooks*, 13 C.D. 652); and

in default of this the Court refused to allow the hearing of the appeal to be postponed; a substantive application ought to have been made before the appeal was called on (*Exchange and Discount Bank* v. *Billinghurst*, W.N. (1880), 2). Leave to *subpœna* a witness may be given, without prejudice to the question whether his evidence is to be received (*Govers' case*, 24 W.R. 36).

It is impossible to lay down *a priori* what will be a sufficient special ground for admitting further evidence; at the same time, the Court should be very cautious about admitting it, and it is not by any means to be admitted as a matter of course, but there should be a strong reason given for admitting it (*per* Jessel, M.R., *Jones* v. *Chennell*, 8 C.D. 505); the Court is very careful not to encourage perjury by permitting fresh evidence to be adduced after hearing of the cause (*per eundem*, *Dicks* v. *Brooks*, 13 C.D. 653; and see *Sanders* v. *Sanders*, 19 C.D. 380). But further evidence has been permitted where, in a case turning upon the propriety of an investment and the conduct of a trustee, evidence on these matters, which had been before the Judge in Chambers, had been excluded on further consideration in consequence of a technical objection (*Jones* v. *Chennell*); where in a suit involving slander of title and violation of copyright, it was desired to prove public use made of the alleged copyright, and it was sworn that the fresh evidence was not discovered till after the hearing of the suit (*Dicks* v. *Brooks*); where the Court below refused to allow a party, who had been taken by surprise by a point made against him at the hearing, to produce rebutting evidence (*Bigsby* v. *Dickinson*, 4 C.D. 24). But, where a witness has been examined *vivâ voce* in the Court below, further evidence by affidavit of the same witness ought not to be admitted on an appeal (*Taylor* v. *Grange*, 15 C.D. 165): of course, however, if the Full Court, for its own satisfaction, requires further evidence to be adduced, that is quite a different matter (*per* Cotton, L.J., *ibid.*; *Arnot's case*, 36 C.D. 710). Fresh evidence cannot be admitted where there has been no surprise, and the evidence has not been discovered since the hearing; it would be too dangerous; parties must not take the chance of the result of the hearing in the Court of first instance, and then tender fresh evidence before the Full Court (*Re Phœnix, &c., Co.*, 4 C.D. 116); and again, it would be too dangerous, after the Full Court has indicated what the point of the case is, to allow the only living man who can give evidence to testify in his own favour, though

the Court in such circumstances intimated that, if there had been any written evidence, they would have been very glad to admit it (*Weston's case*, 10 C.D. 582); and when the defect of evidence is apparent, evidence subsequently tendered to make good the defect must be viewed with the utmost jealousy (*Pooley's Trustee, &c.*, 28 C.D. 51, *per* Fry, L.J.). The rule strongly adhered to is that parties ought not to be allowed to bolster up their case by adducing fresh evidence before the Court of Appeal (*Evans* v. *Benyon*, 37 C.D. 345, *per* Cotton, L.J.).

An application by some of several plaintiffs for leave to give *vivâ voce* evidence on the hearing of their appeal, on the ground of absence through illness from the hearing in the Court below, was refused (*Arnison* v. *Smith*, 41 C.D. 98); and *quære* if this section is applicable where the party asking for leave to adduce evidence before the Court of Appeal has adduced no evidence at all in the Court below (*S.C.*).

Where a decree is made against several defendants who have precisely similar cases, and one of them successfully appeals, the appeal does not enure for the benefit of the defendants who have not appealed (*Esdaile* v. *Payne*, 40 C.D. 530-535).

The Full Court being a Court of ultimate appeal cannot at the same time dismiss a suit and grant relief in the suit; so, where, on an appeal being allowed, and the suit dismissed, the respondent applied for an injunction against the appellant, in respect of the subject matter of the suit, pending an appeal to the Privy Council, and also asked that the suit should be kept alive in order that a witness might be examined *de bene esse*, the Court dismissed the application, but directed that the order allowing the appeal and dismissing the suit should lie in the office, so as to give the respondent an opportunity to move for leave to appeal to the Privy Council, and ask for a stay of proceedings (*Collins* v. *Featherstone*, 10 N.S.W.R. Eq. 274).

Regulations as to cross appeals.

74. It shall not under any circumstances be necessary for a respondent to give notice 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 or altered he shall within such time as may be prescribed by any general rule or by special order give notice of such intention

to any parties who may be affected by such contention The omission to give such notice shall not diminish the powers by this Act conferred upon the Full Court but may in the discretion of the Court be ground for an adjournment of the appeal or for a special order as to costs.

This section is taken from O. LVIII., r. 6 (1875).

It is obvious from the concluding sentence of this section that the previous direction that "if a respondent intends, &c., he *shall*, &c.," is directory only, and not imperative.

A respondent who seeks to have an order varied on a point in which the appellant has no interest cannot proceed by cross-notice under this section, but must give a notice of appeal (*Re Cavander's Trusts*, 16 C.D. 270; but see *Ralph* v. *Carrick*, 11 C.D. 880).

Where an appeal is dismissed with costs, the costs occasioned by the respondent's cross-notice will be deducted from the costs of the appeal (*The Lauretta*, 4 P.D. 25). A respondent who has given cross-notice of appeal is in the same position as to costs as if he had presented a cross-appeal: accordingly, where a defendant appealed, and a co-defendant gave a cross-notice and succeeded on it, his costs were ordered to be paid by the appellant and the plaintiff in moieties (*Harrison* v. *Cornwall, &c., Co.*, 18 C.D. 334); and, in the converse case of a defendant succeeding in his appeal, and a co-defendant failing on his cross-notice, the plaintiff and the party so failing were ordered each to pay one-half of the appellant's costs (*Johnstone* v. *Cox*, 19 C.D. 17). If, however, the case be one where the costs cannot have been materially increased by the notice, the costs ought not to be apportioned, and in such a case, plaintiffs failing on their cross-notice, defendants were given a lump sum of £5 for their costs incidental to the notice (*Robinson* v. *Drakes*, 23 C.D. 98).

As to the powers of the Full Court, see s. 73.

Stay of proceedings on appeal.

75. Every notice of appeal shall stay the execution of proceedings upon the decree or order appealed from unless the Judge shall direct such execution to be proceeded with Provided that the Judge may (subject nevertheless to appeal as from any other order) direct such decree or order to be carried into execution and all proceedings to be taken

thereupon as if no appeal had been entered which direction may be upon such terms as to security or otherwise or absolutely without any terms as to such Judge shall seem fit.

This enactment is the converse of the English rule (O. LVIII., r. 16) (1875), which is as follows:—"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." In England an appeal from an interlocutory order may be brought on in a week or fortnight's time; but in this colony the sittings of the Full Court for the hearing of Equity appeals are not continuous, and it is obvious that, if notice of appeal were not as a rule to stay execution, irreparable injury might be done by an erroneous order of the Court below. The section, however, gives the Judge ample discretionary powers to direct that execution be proceeded with, but it is apprehended that for such direction a special case must be made.

By what seems an oversight, an order directing execution is made appealable like the order originally appealed from. But notice of appeal against an order directing execution will operate to stay that order, and, if the Court again direct execution, the appellant may, by a fresh notice of appeal, stay *that* order, and so on *toties quoties*. A perverse appellant can thus neutralise entirely the power given to the Judge to direct execution pending appeal. But this view of the section is subject to the question what is the precise meaning of "proceedings upon the decree or order;" does it include, *e.g.*, a simple order granting an injunction, or does it refer only to something ulterior, *e.g.*, to the taking of accounts in Chambers under the order? If the expression stood alone, the latter interpretation would doubtless be the preferable one; but the subsequent words "such decree or order," obviously referring to the same things as are meant by "proceedings upon the decree or order," seem to indicate that the last mentioned expression means simply "the decree or order," thus giving the perverse appellant before referred to the widest powers of defeating the orders of the Court, at all events up to the point at which his perverseness would amount to an abuse of the process of the Court.

Decrees how settled.

76. The decrees and orders of the Supreme Court on appeal shall be settled by the Master as at present and the Court may in any decree or order direct what if any accounts shall be taken or inquiries made before the Judge and what if any before the Master.

Cf. ss. 65, 66 ; and see RR. 206, 207, VII. (8).

Appeal by direction of the Judge.

77. The Judge may on the application of any party or at his own discretion and on such terms if any as he shall think fit to impose direct a rehearing by the Full Court of any cause petition motion or matter before him and in such case it shall not be necessary to give any notice of appeal but nothing herein shall prejudice the right of any party to appeal where the Judge shall not give any such direction.

This is a remarkable provision, introducing an entirely novel practice. It confers an authority on the Judge, at his own discretion, to force an appeal *in invitos*—to direct that, though the losing party in the Court below may have no desire to question further the decision arrived at, and though he may be able only with difficulty to pay the costs of his unsuccessful litigation there, he shall nevertheless contest the case over again, at his own peril as to further costs. If this power were conferred by anything less than an Act of the Legislature, it would be safe to call it *ultra vires;* for, if the litigants are content, who has a right to compel them to renew the fight? But it was apparently done by Sir W. Manuing, P.J., in *Cox* v. *Brown*, 1 N.S.W. W.N. 79, though the report is confused.

So far as the section authorises the Court on the application of a party to direct a rehearing by the Full Court, it was resorted to in *In re the Underwood Estate Acts, In the matter of Felton's petition*, 8 N.S.W.R. Eq. 132, where by consent a decree was made *pro formâ*, and the case ordered to be reheard before the Full Court.

78. The Judge or Full Court shall in every case have power to award costs as between solicitor and client. Costs.

But the Master should not tax costs as between solicitor and client, unless specially so directed by the Court (*Broughton* v. *Rodd*, 6 S.C.R. Eq. 102).

79. Nothing in this Act shall be construed to affect the right of any party to appeal to Her Majesty in Council from any such decree or order or from any reversal or affirmance thereof. Appeals to Privy Council

An appeal lies directly from the Primary Judge in Equity to the Privy Council (*Dean* v. *Dawson*, 9 N.S.W.R. Eq. 27; *Re Underwood's Will*, 11 N.S.W.R. Eq. 313; *Plomley* v. *Shepherd*, [1891] A.C. 244; *De Mestre* v. *West*, *ibid.* 264).

In the transcript sent to the Privy Council, on appeal from the Full Court reversing a decision of the Primary Judge, evidence taken on commission in a proceeding connected with the suit, and admissible therein, but not referred to before the Court, was allowed to be inserted. The reasons of the Court, which are to be submitted to the Privy Council, are only those of the Court appealed from—the Full Court—not those of the Primary Judge (*Bucknell* v. *Vickery*, 5 N.S.W.R. Eq. 81; *Stockton Coal Co.* v. *Fletcher*, 5 N.S.W. W.N. 29).

Miscellaneous.

80. The Judges of the Supreme Court or any three of them may make general rules for regulating the times and form and mode of procedure and generally the practice of the Court in respect of the several matters to which this Act relates and for fixing the amount of all fees and allowances to officers of the Court and solicitors in reference to such matters and otherwise for the effectual execution of this Act and of the intention and object thereof Provided Power to make rules.

that the rules of the Supreme Court at present in force in reference to such matters or any of them until repealed or altered by any such general rule shall continue in force.

This section is taken from s. 12 of 21 & 22 Vict., c. 27.

Rules to be laid before Parliament.

81. All rules made under this Act shall immediately after the making thereof be laid before both Houses of Parliament if then sitting or if not within ten days after the next sitting thereof and if either of the said Houses shall by any resolution passed within thirty days after such rules have been laid before it resolve that any such rule or any part thereof ought not to continue in force then such rule or part shall immediately cease to be binding.

"This section does not require that the rule of Court, before it can have validity, must be laid before Parliament. It becomes a rule of Court directly it is signed by the Judges, and all that the Act says is that it shall be laid before Parliament, in order that Parliament, if it think fit, can resolve that any rule or portion of a rule is not to remain in force. The wording of the section shows that the rule is in force until set aside by resolution of the House. If it were otherwise the Court would not have power to make rules if Parliament did not sit for six months, whereas it might be necessary for the due administration of justice to pass rules at once" (*per* Windeyer, J., delivering the judgment of the Full Court in *Lion Insurance Co.* v. *Neild*, S.M.H., Dec. 2, 1889). In that case defendant's motion to rescind the order dismissing his appeal because he had not complied with R. 3 of R.G. of 21st May, 1888 (corresponding with R. 199), as to the printing of the pleadings, &c., on the ground that the rule in question had not been laid before Parliament under this section, was dismissed with costs. But compare s. 25 of the Judicature Act, 1875, which is to the same effect as this section, providing that, on address by either House of Parliament praying that any rule or order may be annulled, Her Majesty may by Order in Council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect,

under which section, *semble*, rules of Court become binding when they have been so laid before Parliament, and no address has been presented (*Powell* v. *Davies*, 82 L.T. 99).

Interpretation clause.

82. In the construction of this Act the words "statement of claim" shall include "information" and the word "affidavit" shall include affirmation statutory declaration and attestation of honour.

Cf. R. VII. (6). As to affirmations and declarations, see 1 Ol. Stat., 1636-9. Persons entitled to the privilege of peerage "answer" upon attestation or protestation of honour (Daniell's Ch. P. (5th ed.) 638, 648).

Commencement of Act and repeal of sundry Acts.

83. This Act shall commence on the first day of September one thousand eight hundred and eighty and may be cited as the "Equity Act of 1880" and after that date the several Acts and parts of Acts specified in the Second Schedule hereto shall be repealed Provided that such repeal shall not have the effect of reviving any practice procedure or penalties which have been abolished by the said Acts or any of them or of invalidating any acts thereby authorised or validated.

SCHEDULES.

FIRST SCHEDULE.

Indorsement on Statement of Claim.

VICTORIA R.

To the within named defendant A.B. (or where there is more than one defendant defendants A.B. and C.D.) greeting—We command you ("and every one of you" where there is more than one defendant) that within days after the service hereof on you exclusive of the day of such service you cause an appearance to be entered for you in our Supreme Court in the office of the Master in Equity to the within statement of claim and that if you do not admit that the plaintiff is entitled to the relief within prayed you do at the same time of entering appearance file in the office of the Master in Equity a memorandum to the effect that you dispute the plaintiff's claim and further that if you do admit the plaintiff's claim you do on the eighth day after such appearance or so soon after as you can be heard attend either personally or by counsel before the Judge in Equity at the Supreme Court House in King Street in the City of Sydney at ten of the o'clock in the forenoon and submit to such decree as is within prayed or as shall be just.

Witness the Honourable the Primary Judge at Sydney the day of in the year of our Lord and in the year of our reign.

NOTE.—Appearances are to be entered at the office of the Master in Equity at the Court House in King Street aforesaid and if you either neglect to enter your appearance or to file a memorandum as above mentioned or personally or by counsel to attend at the *place and time above mentioned* you will be subject to such order as the Court may think fit to make in your absence.

SECOND SCHEDULE.

Acts and parts of Acts repealed.

4 Victoria No. 22 sections 20 & 21.

5 Victoria No. 9 sections 12 & 13.

11 Victoria No. 22 the whole.

16 Victoria No. 13 the whole.

17 Victoria No. 7 the whole.

26 Victoria No. 12 section 37.

In the Supreme Court of New South Wales. In Equity.

REGULÆ GENERALES.*

THURSDAY, THE 7TH MAY, 1891.

IN pursuance of the several powers vested in us in that behalf, we do order and direct in manner following:—

PRELIMINARY.

I. From and after the 25th day of May, 1891, all the Rules and Orders which have been heretofore made and established in the Equity jurisdiction of this Court shall be rescinded; and in lieu thereof the following shall constitute the Standing Rules of the Court in its Equitable jurisdiction, except that this rescinding shall not extend to or affect any General Rules and Orders now in force, where embodied in General Rules and Orders distributively or collectively applicable to the general administration and business of the several jurisdictions of the Supreme Court, nor any of the following Rules and Orders:—

* Under the Orders to the "Settled Estates Act of 1886," R. 36, the Companies Acts, RR. of 1st April, 1889, R. 88, and the Lunacy RR. of 7th July, 1887, R. 42, in cases not provided for by these Rules, the Equity practice then in force is to be followed; and under the Bankruptcy RR. of 29th August, 1890, R. 15, the Equity Rules are to regulate inquiries directed under a motion under s. 130 of the Bankruptcy Act before the Registrar and appeals from any decision or report made by him thereon; see also s. 13 (2) of the same Act with regard to receivers, and *cf.* R. 146 of the Bankruptcy RR., 1887.

The General Rules of Court of 1st March, 1856, as to the officers and offices of the Court, or any General Rules as to proceedings in vacation.

II. Notwithstanding anything herein expressed, the rescinding hereinbefore made shall not affect any practice of the Court in its Equitable jurisdiction, or any practice or usage of, in, or connected with, the offices of the said Court, or the officers thereof, which originated in or was sanctioned by any of the Rules and Orders hereby rescinded, or by prior usage of the Court, except so far as the same may be inconsistent with anything hereinafter contained.

III. Where any of the Rules and Orders hereby rescinded were intended to abolish any writ, practice, matter, or thing, such rescinding shall not have the effect of reviving the same.

IV. Every Rule or part of a Rule herein contained, which is a repetition, without variation, of a Rule or Order, or part of a Rule or Order, hereby rescinded, shall have the same construction as was put on such rescinded Rule or Order, or part of a Rule or Order, and shall operate not as a new Rule, but in the same manner as such rescinded Rule or Order, or part of a Rule or Order, would have operated if these Rules had not been made.

V. Every Rule or part of a Rule herein contained, which is a repetition, with variation, of a Rule or Order, or part of a Rule or Order, hereby rescinded, shall receive the same construction as was put on such rescinded Rule or Order, or part of a Rule or Order, and shall operate, not as a new Rule, but in the same manner as such rescinded Rule or Order, or part of a Rule or Order, would have operated if these Rules had not been made, except so far as such variation indicates a contrary intention.

VI. Where there is no established practice or usage of the Court, as hereinbefore mentioned, and where none of the Rules now made shall be applicable, then the practice of the Supreme Court of Judicature in England, exercising its equity jurisdiction, shall be followed so far as applicable.

The exact limits of the operation of this R. are doubtful. It is thought, however, that the R. cannot have the effect of introducing into the colonial practice any English practice established after the date of the R.: this would seem to follow from the judgment of the Privy Council in *Taylor* v. *Barton*, 7 N.S.W.R. 30, in which case the Privy Council, affirming the judgment of the Supreme Court, held that the Standing Order No. 1, to the effect that "in all cases not specially provided for hereinafter, or by sessional or other orders, resort shall be had to the rules, forms, and usages of the Imperial Parliament, which shall be followed so far as the same can be applied to the proceedings of the House," could not be construed so as to adopt by anticipation rules or orders of the House of Commons subsequently passed. The words "resort shall be had to the rules," &c., . . . naturally signified the then existing and known rules, forms, and usages of the House of Commons. In the absence of words of prospect or futurity, and of any context indicative of an intention so improbable as that of adopting by anticipation all future changes in the procedure or practice of the House of Commons, their Lordships thought it would be unreasonable so to construe the Standing Order.

This R. was made originally on the 29th of June, 1883, but such original R. was by the present RR. rescinded, and re-made as from the 25th May, 1891. The result seems to be to alter the operation of the rule so as to make it introduce the English practice (so far as applicable), not as it existed on the 29th June, 1883, but as it existed on the 25th May, 1891.

Compare the notes to R. 34.

VII. In these Rules the following words have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction, viz :—

(1.) Words importing the singular number include the plural number, and words importing the plural include the singular number.

(2.) Words importing the masculine gender include females.

(3.) The word "person" or "party" includes a body politic or corporate.

(4.) The words "statement of claim" include information.

(5.) The word "plaintiff" includes informant.

(6.) The words "affidavit" or "oath" include affirmation, statutory declaration, and the promise in lieu of oath under the Act 40 Vict., No. 8; and the word "sworn" includes affirmed, declared, and promised.

Cf. section 82 of the Act.

(7.) The word "receiver" includes consignee and manager.

(8.) The words "the Court" mean the Primary Judge in Equity, or any Judge sitting in Equity, in Court, or in Chambers, unless the subject be a matter before the Court of Appeal.

(9.) The words "the present practice of the Court" mean the practice of this Court at the time of the coming into force of these Rules.

(10.) The title "Deputy Registrar" includes that of "Assistant Taxing Officer."

(11.) The word "Master" means the "Master in Equity."

PROCEEDINGS GENERALLY.

1. All proceedings shall be commenced and continued in the Equity Office, and each suit or matter shall be there kept in a distinct and separate form, entitled

"In the Supreme Court
of New South Wales.
In Equity."

2. A book shall be kept in the Equity Office, to be called the Suit Book, which shall contain a chronological entry of every proceeding in every suit or matter.

3. All pleadings and proceedings shall be written in a clear legible hand, or in type, and the same shall not be received unless so written.

4. All statements of claim, statements of defence, and subsequent pleadings, interrogatories, answers, and exceptions, and copies thereof respectively, and all petitions, reports, decrees, and decretal and other orders, shall be on foolscap paper, written briefwise, on one side only, with a quarter margin, and having not less than five folios nor more than seven folios of seventy-two words on each page, and divided into convenient paragraphs, with the numbers of the paragraphs severally written on the inner edge of the margin.

5. All affidavits and all examinations, cross-examinations, and re-examinations on references shall be on foolscap paper, in the form now ordinarily used, divided into convenient paragraphs, with a quarter margin, but written on one side only of the paper, and folded lengthwise, with the name of

each deponent or examinant indorsed thereon. And there shall not be less than three folios nor more than four folios of seventy-two words on each page.

6. All orders, except Chamber Orders, and all decrees shall be signed and passed by the Master, and then sealed with the seal of the Court and entered in the entry-book.

7. All Chamber Orders shall be entered in the same manner and in the same office as orders made in open Court are entered. Save as aforesaid, the practice as to orders made in Chambers shall be the same as at Common Law.

8. All writs shall be sealed with the office seal of the Court or Master, and tested in the name of the Primary Judge in Equity.

9. Every summons, writ, and ordinary certificate shall be signed by the Master, Deputy Registrar, or the Chief Clerk.

10. Certificates by the Master, Deputy Registrar, or Chief Clerk of the filing of any pleading or documents shall not be required when such pleading or document is produced in Court.

11. All statements of defence, sworn pleas, and answers to interrogatories shall be taken before the Master, Deputy Registrar, or Chief Clerk and filed forthwith: Provided that statements of defence, sworn pleas, and answers of any party residing more than five miles from the Equity Office may be taken before a Commissioner of Affidavits or a Justice of the Peace, and the same shall be immediately sealed up and endorsed by such Commissioner or Justice of the Peace as aforesaid, as the case may be, with his signature,

and transmitted to the Equity Office, with the least possible delay, and filed on receipt thereof; and the signature of the party swearing the same shall be affixed or acknowledged by such party in the presence of the person before whom the same are sworn.

12. The practice respecting erasures or interlineations in affidavits shall extend and apply to statements of defence, answers, and pleas.

13. On the filing of any statement of defence, or any subsequent pleading, plea, demurrer, interrogatory, or answer, an attested copy thereof shall be forthwith served on the opposite party.

Abatement and Compromise.

14. Where any suit becomes abated, or is compromised after the same is set down to be heard, the solicitor for either party shall certify the fact to the Master, and thereupon an entry thereof shall be made in the Suit Book opposite to the title of such suit.

15. Where any suit shall have been standing for one year in the Suit Book marked as "abated," or "compromised," or shall have been standing over generally, such suit shall at the expiration of the year be struck out of the Suit Book.

Affidavits.

16. Any solicitor or person filing an affidavit not in accordance with the form prescribed in the General Rules of the Supreme Court applicable to affidavits, shall not be allowed the costs of preparing or filing such affidavit in any taxation of costs.

17. All affidavits shall state distinctly what facts or circumstances deposed to are within the deponent's own knowledge; and, where any fact or circumstance is stated upon information derived from other sources than his own knowledge, he shall distinctly state what such sources are.

18. The costs of affidavits not in conformity with the preceding Rule shall be disallowed on taxation, unless the Court shall otherwise direct.

19. Before any affidavit is used in Court or before the Master, such affidavit shall be first filed in the Equity Office; and no order grounded upon an affidavit shall be drawn up, unless such affidavit be first so filed: Provided that no copy need hereafter be served for the purpose of any motion or petition, or of any proceeding in the Equity Office, and that every affidavit so filed may be read without any office copy having been taken.

Attachment.

20. The Sheriff shall bring to the bar of the Court every person arrested upon any writ of attachment on the first day on which the Court shall sit in Equity next after such arrest, or as soon afterwards as practicable: Provided that the Sheriff may take bail for the appearance of the person arrested.

As to obtaining a writ of attachment, see R. 189.

21. If the person arrested be not so brought before the Court, or if, being so brought, no motion be made for his committal, he shall be discharged out of custody by the Sheriff, without payment by him of the costs of his

contempt, which in such case shall be paid by the party obtaining the attachment. But, in case of continued disobedience of the rule, decree, or order of the Court for a period of eight days after such discharge, the Court may order a fresh attachment to issue.

22. Where a party is in prison under an attachment, or being already in prison is detained under an attachment, and is not brought to the bar of the Court within thirty days from the time of his being actually in custody or detained under such attachment, he shall be discharged in respect of such attachment by the Sheriff, or keeper of the gaol in whose custody he is, without payment of the costs of his contempt, which in such case shall be paid by the party obtaining the attachment. But, in case of continued disobedience of the rule, decree, or order of the Court for a period of eight days after such discharge, the Court may order a fresh attachment to issue.

Deputy Registrar and Chief Clerk.

23. The Deputy Registrar or Chief Clerk may sign for the Master any process issuing out of this Court which now requires the signature of the Master.

24. The Deputy Registrar, when directed by the Court or Master, may discharge the duties of Registrar and the duties of Taxing Officer, and he may take accounts and prosecute inquiries as directed by the Court or Master, and for the purposes aforesaid shall have all the powers hereby given to the master.

25. Certificates of taxation and of funds in Court may, in the absence of the Master, be signed by the Deputy Registrar.

Election of Jurisdiction.

26. In all cases in which it is alleged that the plaintiff is prosecuting the defendant in this Court and also at Law for the same matter, the defendant may at any time after appearance, or in case the plaintiff shall have filed interrogatories seven days after filing a sufficient answer thereto, apply to the Court as of course in Chambers, for an order that the plaintiff make his election in which Court he will proceed, with the usual directions in that behalf.

The order for election is to be applied for *ex parte:* the plaintiff may then, if so advised, move to discharge such order. By Cons. Ord. XLII., r. 8, the plaintiff may so move, on the merits confessed in the answer, or, if necessary, appearing by affidavit.

Orders of course may, by the next R., be obtained by summons in Chambers.

Interlocutory Applications.

27. Interlocutory applications in a suit may be made by motion or petition and supported by affidavit or otherwise, according to the present practice of the Court, save only that applications for orders of course may be by summons in Chambers, and that a petition shall be used in applications for special orders where so provided by Act of Parliament, or where, from the circumstances of the case or the position of the parties sought to be affected by the order applied for, the notice of motion would not sufficiently convey information of the facts and circumstances upon which the application is based.

This R. must be read subject to s. 62 of the Act, and to 12 Vict., No. 1, s. 8, which enacts that no petition except a petition of course should thereafter be necessary in the Supreme Court in

its Equity jurisdiction, but that the same relief which had theretofore been given on petition might thenceforth be given on motion.

There does not appear to be any very distinct line of demarcation between the cases in which an application to the Court in a pending cause or matter should be made by motion, and those in which it should be made by petition; but, as a general rule, where any long and intricate statement of facts is required, the application should be made by petition, while in other cases a motion will be sufficient (Dan. Ch. Pr., 5th ed., 1434).

28. Any party to a suit may at any stage thereof apply by motion on notice to the Court for such order as he may, upon any admission of fact in the pleading, *or under the 108th of these Rules,* be entitled to, without waiting for the determination of any other question between the parties *(provided that where the execution of a document is admitted, such document may be put in evidence),* and the Court may, on such application, give such relief, subject to such terms, if any, as the Court may think fit.

With the exception of the words italicised in the text (which have been added), this R. is taken from O. XL., r. 11 (1875), [O. XXXII., r. 6 (1883)], which of all the Rules issued in England under the Judicature Act is probably the one most largely resorted to.

Under this R. plaintiffs have been enabled to obtain at an early stage of the suit an order for payment of trust funds into Court and a decree for administration (*Rumsey* v. *Reade*, 1 C.D. 643; *Bennett* v. *Moore*, 1 C.D. 692; *Hetherington* v. *Longrigg*, 10 C.D. 162); an order directing the usual inquiries in a partition suit (*Gilbert* v. *Smith*, 2 C.D. 686; *Parsons* v. *Harris*, 6 C.D. 694); an order in a like suit for a sale and payment of the proceeds into Court, and for an account of rents and profits received by a party in possession (*Burnell* v. *Burnell*, 11 C.D. 213); the usual partnership accounts (*Turquand* v. *Wilson*, 1. C.D. 85); specific performance (*Brown* v. *Pearson*, 21 C.D. 716); foreclosure (*Barnard* v. *Wieland*, 30 W.R. 947, and *cf. Smith* v. *Davies*, 28 C.D. 650; *Smith* v. *Buchan*, 36 W.R. 631); &c., &c.

In *Gilbert* v. *Smith (ubi supra)*, James, L.J., said the plaintiffs were entitled to the order moved for *ex debito justitiæ*. The admission must, however, be such as would show that the plaintiff is clearly entitled to the order asked for; the R. was not meant to apply when there is any serious question of law to be argued (*per* Mellish, L.J., *Chilton* v. *Corporation of London*, 7 C.D. 735); in such a case a Judge would have a discretion as to whether or not he would make an order on motion, and with the exercise of that discretion the Court of Appeal ought not to interfere (*Mellor* v. *Sidebotham*, 5 C.D. 342). The words of this beneficial R. are, it will be noticed, permissive only, not imperative; nevertheless, the English Judges have shown a marked disposition to avail themselves largely of the power it gives them of granting speedy relief, and of accelerating the proceedings in the suit.

The plaintiff may move under the R. at any stage, and notwithstanding that he has joined issue, and given notice of trial (*Brown* v. *Pearson*, 21 C.D. 716). Under the old practice, a plaintiff could not *after decree* obtain an order for payment into Court of trust moneys in a defendant's hands on admissions in the answer, but must have proceeded on the examination or report (*Wright* v. *Lukes*, 13 Beav. 107); but this canon cannot be applied to the modern statement of defence, for by the R. under consideration motions founded on admissions in the pleadings may be made *at any stage* of the suit.

Where in an action for infringement of a patent, the defendant in the defence admitted certain instances of infringement, but denied that he had committed any others, and the plaintiff thereupon moved for judgment upon the admissions in the pleadings, *held*, that the plaintiff was entitled to an enquiry as to damages arising from the admitted infringements only (*United Telephone Company* v. *Donohoe*, 31 C.D. 399).

Where the defendant in a suit for specific performance of a contract for the sale of lands entered into an agreement with the plaintiff, the vendor, whereby he agreed to accept the plaintiff's title on the plaintiff obtaining a certificate under the Real Property Act, to pay interest on the unpaid purchase money from a certain date, to pay the costs of the suit as between solicitor and client, and also to pay the costs of obtaining the certificate, while the plaintiff agreed to account to the defendant for the rents received in respect of the lands from a certain date. On

interlocutory motion to enforce this agreement, *held*, that the plaintiff was entitled to a decree on the terms of the agreement as on an admission of facts, but that defendant might have time to file affidavits setting out any equities which might have arisen between the date of the agreement and this motion (*Hentsch* v. *Dawbarn*, 10 N.S.W.R. Eq. 304).

And see notes to R. 108.

29. Every petition shall, upon being presented and before any copy thereof is served upon any person intended to be served therewith, be filed in the Equity Office, and every person intended to be served with a copy of such petition shall be served with a written copy thereof according to the practice in reference to the service of statements of claim, together with an indorsement thereon, in the form or to the effect set out in Schedule J. to these Rules, with such variations as circumstances may require, stamped with the proper stamp by one of the clerks of the Equity Office.

Petitions for the advice and direction of the Court under 26 Vict., No. 12, s. 30, are not to be verified by affidavit; where such affidavits were filed the Court refused to allow the costs of them (*Re Cox's Will*, 11 N.S.W.R. Eq. 124).

Motions and Petitions.

30. Every notice of motion shall express the day on which it is intended to be made.

31. All petitions shall be addressed to the Primary Judge in Equity; and the Master, Deputy Registrar, or Chief Clerk shall endorse thereon the usual directions.

32. At the foot of every petition preferred to the Court, and of every copy thereof, a statement shall be made of the persons (if any) intended to be served therewith; and, if

no person is intended to be served with such petition, a statement to that effect shall be made at the foot of the petition, and of every copy thereof.

This has long been the English practice. A petition which wants the proper foot-note ought not to be received into the office for filing.

33. Unless the Court gives special leave to the contrary, there must be at least two clear days between the service of a notice of motion or petition and the day appointed for hearing the notice of motion or petition ; and in the computation of such two clear days Sundays and Holidays shall not be reckoned.

Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short ; and the same fact must distinctly appear on the face of the notice served on the other party (*Dawson* v. *Beeson*, 22 C.D. 504).

As to waiver of irregularity in a notice of motion, see *Re Macrae*, 25 C.D. 19.

Ne Exeat.

34. In all cases where the Supreme Court of Judicature in England would grant or direct a writ of *Ne exeat Regno* to issue, a writ of *Ne exeat Coloniâ* may be directed to issue under the seal of this Court, and tested in the name of the Primary Judge in Equity, and signed by the Master, Deputy Registrar, or Chief Clerk ; and such writ shall have the same effect in this Colony, and shall be applied for and served in the like manner, and under the same circumstances, and subject to the same rules of practice, as the writ of *Ne exeat Regno* in England.

The practice of the Supreme Court of Judicature is to be followed in the issuing of these writs. See the notes to R. VI.

According to the practice in England under the Judicature Acts (and, in the view of Jessel, M.R.—as to which, however, the Court of Appeal gave no opinion—the practice of the Court of Chancery before those Acts), the writ is not to be issued except in cases which come within the provisions of the 6th section of the Act 32 and 33 Vict., c. 62 (*Drover* v. *Beyer*, L.R. 13 C.D. 242).

The writ of *Ne exeat Regno* is granted to prevent a person from leaving the realm, to the damage of the person to whom he is indebted, until he has given security for the amount of the debt. In order to obtain the writ the demand must be pecuniary, must be actually due, and for an ascertained amount; Seton (4th ed.), 316 (*q.v.* for form of order). The debt must not only be due, but payable *in præsenti* (*Colverson* v. *Bloomfield*, 29 C.D. 343).

The N.S. Wales Act, 37 Vict., No. 11, makes special provision for the issue of the writ in the absence of the Primary Judge, or of all the Judges of the Supreme Court, or of the illness of the Judge remaining in Sydney (s. 7).

Notice to Admit.

35. Notice to admit documents under section 43 of the "Equity Act of 1880" may be in the form set forth in Schedule C to these Rules.

Sheriff.

36. All duties formerly discharged in the High Court of Chancery in England in respect of process issued out of that Court or otherwise by a Sergeant-at-Arms shall be discharged in respect of process issued out of this Court by the Sheriff; and all such process shall be directed to the Sheriff.

Service.

37. In every case where a party shall institute or defend any suit or proceeding, or appear in any matter, by a

solicitor, service by or upon such solicitor shall (except for the purpose of bringing the party into contempt) be equivalent to service by or upon the party himself.

38. Where any party shall proceed or appear in person, he shall, except in the case of statements of claim and appearance thereto, hereinafter provided for, leave a memorandum in writing in the Equity Office, at the time of his taking the first step in the matter, setting forth his full name and address; and also if his address shall be at some place more than one mile from the Equity Office another proper place to be called his address for service which shall not be more than one mile from the said Equity Office; and service at the address for service set forth in the said memorandum shall be good service on him.

Solicitor.

39. A solicitor shall not (except by leave of the Court) act in any suit or matter for more than one party, unless the parties represented by him are in the same interest; and all the members of a firm may, for the purposes of this rule, be deemed one person.

See R. 225, and *cf.* R. 306.

40. Where upon the hearing of any suit or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally or by some proper person on his behalf, or having omitted to procure the production of or to deliver any necessary document or paper which ought to have been produced or delivered, such solicitor shall personally pay to all or any of the parties such costs (if any) as the Court shall think fit to award.

This rule is taken with immaterial variations from Cons. Ord. XXI., r. 12.

SUBPŒNAS.

41. Where it is intended to sue out a *subpœna*, a *præcipe* for that purpose in the usual form, and containing the name or firm and the place of business or residence of the solicitor intending to sue out the same, and, where such solicitor is an agent only, then also the name or firm and place of business or residence of the principal shall in all cases be filed in the Equity Office.

42. Writs of *subpœna* shall be in the forms used at Common Law, with such alterations and variations as circumstances may require.

43. No more than four persons shall be included in one *subpœna:* Provided that the party suing out the same shall be at liberty to sue out a *subpœna* for each person if it shall be requisite.

44. In the interval between suing out and service of any *subpœna*, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ resealed upon leaving a corrected *præcipe* of such *subpœna* marked with the words "altered and resealed," and signed with the name and address of the solicitor suing out the same.

45. The service of *subpœnas* shall be effected by delivering a copy of the writ, and at the same time producing the original writ.

46. Affidavits filed for the purpose of proving the service of a *subpœna* must state where, when, and how such *subpœna* was served, and by whom such service was effected.

47. The service of any *subpœna* shall be of no validity if not made within twelve weeks after the teste of the writ.

PARTIES.

I.—Persons under Disability. II.—Paupers.

I.—PERSONS UNDER DISABILITY.

48. Married women and infants may respectively sue as plaintiffs by their next friends, according to the present practice of this Court, and infants may, in like manner, defend any suit by their guardians appointed for that purpose. Married women may also, by the leave of the Court, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court may require.

This corresponds with O. XVI., r. 8 (1875), [O. XVI., r. 16 (1883)].

Under this R. the name of a defendant, who was also the next friend of the plaintiffs, and whose wife was a defendant, was struck out, and liberty was given to the wife to defend separately (*Lewis* v. *Nobbs*, 8 C.D. 591).

As to an inquiry whether a suit is for the benefit of infant plaintiffs, and whether the person suing as their next friend is a proper person for such position, see *McLaughlin* v. *Moore*, 5 N.S.W.R. Eq. 111.

A married woman who institutes proceedings with regard to her separate estate, must sue by her next friend; if the husband has an interest in the separate estate he may be joined as co-plaintiff, if not he must be made a defendant (*Startin* v. *Pye*, 11 N.S.W.R. Eq. 191; *See* v. *Reynolds*, *ibid.* 219).

The R. gives the Court a complete judicial discretion to allow a married woman to sue alone or by a next friend, and either with or without giving security for costs. The old rule that an application that a next friend should give security for costs must be made before the next material step in the cause is taken is abrogated, and the Court has a judicial discretion to direct such security to be given at any time (*Martano* v. *Mann*, 14 C.D. 419). See further R. 75.

A person cannot, pending his insolvency, act as the next friend of a married woman without giving security for costs; otherwise, after certificate granted (*Fraser* v. *Kearney*, 11 S.C.R. Eq. 35).

A married woman who has no separate property, except property which she is restrained from anticipating, and who appears without a next friend, must give security for the costs of the appeal (*Whittaker* v. *Kershaw*, 44 C.D. 296).

An infant plaintiff or defendant cannot be compelled to answer interrogatories (*Mayor* v. *Collins*, 24 Q.B.D. 361).

A next friend is not a party to the suit (*Dyke* v. *Stephens*, 30 C.D. 190).

As to the practice relating to next friends, see Daniell's Ch. P. 5th ed. 67, *et seqq*; for forms, see Dan. Ch. F. 2nd ed. 1975.

49. Any person who shall for the time being be of unsound mind, and whether or not so found by inquisition or declared under the Lunacy Act of 1878, may sue as plaintiff in any suit by his committee or guardian, if any such shall have been appointed, or if not, by his next friend; and may, in like manner, defend any suit by his committee or guardian appointed under the said Act, or by his guardian *ad litem*.

This corresponds with the English practice, for which see Daniell's Ch. P. 5th ed. 8, 80.

50. Where any person required to be served with notice of a decree or order pursuant to the 6th Rule of sec. 7 of the Equity Act of 1880 is an infant, or a person of unsound

mind not so found by inquisition or declared under the Lunacy Act of 1878, the notice shall be served upon such person or persons and in such manner as the Court or Master may direct.

This rule is taken from Cons. Ord. VII., r. 5. See R. 181.

51. Guardians *ad litem* appointed for infants, or for persons of unsound mind not so found by inquisition or declared under the Lunacy Act of 1878, who shall be served with notice of any decree or order, shall be appointed in like manner as guardians *ad litem* to defend are appointed in suits.

52. At any time during the proceedings in any suit or matter, the Court may require a guardian *ad litem* to be appointed for any infant, or person of unsound mind not so found by inquisition or declared under the Lunacy Act of 1878, who has been served with notice of such decree or order, or who shall be required to be served with notice in any suit or matter; and the Master shall have like power under references to him.

These two rules are taken from Cons. Ord. VII., rr. 6, 7.

II.—PAUPERS.

53. Any person may be admitted to prosecute or defend a suit *in formâ pauperis*, according to the present practice of the Court, provided that he obtain a certificate of counsel to the effect that the case is proper for relief in this Court.

This Rule is equivalent to Cons. Ord. VII., r. 8. As to suits by and against paupers, see Daniell's Ch. P. 5th ed. 37-45, 140-142.

54. After a person has been admitted to sue or defend *in formâ pauperis*, no fee, profit, or reward shall be taken of him by any counsel or solicitor for the despatch of his business during the time it shall depend in Court and he shall continue a pauper; nor shall any agreement be made for any recompense or reward afterwards; and any person offending herein shall be deemed guilty of a contempt of Court; and the pauper who shall give any such fee or reward, or make any such agreements, shall be thenceforth dispaupered.

This Rule is taken from Cons. Ord. VII., r. 9, omitting, however, the words which end that r.—"and not be afterwards admitted again in that suit to sue or defend *in formâ pauperis.*"

55. The Counsel or solicitor assigned by the Court to assist a pauper may not refuse to do so, unless such Counsel or solicitor satisfy the Court with some good reason for his unwillingness to be so assigned *or to continue to act under the assignment.*

This Rule (with the exception of the words italicised in the text, which are wanting in the English Order) is taken from Cons. Ord. VII., r. 10.

The Court cannot assign counsel or solicitors to pauper defendants on the application of the plaintiff (*Garrod v. Holden*, 4 Beav. 245; *Watkin* v. *Parker*, 1 M. and Cr. 370).

A pauper who has had counsel assigned to him cannot argue his case in person (*Parkinson* v. *Hanbury*, 4 De G. M. & G. 508).

56. No process of contempt shall be issued at the instance of a pauper until signed by his solicitor in the suit; and no notice of motion served or petition presented on behalf of a pauper (except for the discharge of his solicitor) shall be of any effect, nor shall any person served with such notice

or petition be bound to appear thereon, unless such notice or petition be signed by the solicitor of the pauper; and such solicitor shall take care that no such process be taken out, and that no such notice or petition be served, needlessly or for vexation, but upon just and good grounds.

PLEADINGS GENERALLY.

57. Statements of claim, statements of defence, and all subsequent pleadings, demurrers, and pleas shall, except by leave of the Court, be signed by counsel.

Signature by counsel was for centuries the English practice, until it was provided by O. XIX., r. 4 (1875), [O. XIX., r. 4 (1883)] that signature of counsel should not be necessary,—a provision that met with the express disapproval of Malins, V.C. (see *Bernard* v. *Hardwick*, W.N. 1876, 134 ; *Duckitt* v. *Jones*, W.N. 1876, 17 ; 33 L.T. 777 ; *Great Australian, &c., Co.* v. *Martin*, 5 C.D. 10). Notwithstanding the O., pleadings are still commonly signed in England as before.

Where the amendments in a statement of claim consist merely of elisions, it does not, if amended by the counsel who originally signed it, need to be re-signed (*Webster* v. *Threlfall*, 1 S. & S. 135); but if, after being filed, it is amended, it is irregular to put it again upon the file without a fresh signature to the draft, although the amendments have only reduced it to the shape in which it was originally settled by counsel (*Burch* v. *Rich*, 1 R. & M. 156).

A pleading which requires the signature of counsel, but is not so signed, ought not to be received in the office. A statement of claim not signed by counsel is demurrable (*Kirkley* v. *Burton*, 5 Madd. 378), or it may be taken off the file (*French* v. *Dear*, 5 Ves. 547 ; *Burch* v. *Rich*, *ubi supra*). Where a plaintiff improperly altered a bill, after it had been signed by counsel, it was taken off the file with costs to be paid by the plaintiff (*Troup* v. *Ricardo*, 13 W.R. 147).

58. All pleadings in a suit shall be as brief as the nature of the case will admit, and shall not contain any

scandalous or irrelevant matter. Deeds, writings, or records shall not be unnecessarily set out *verbatim*, but only so much of them or the substance and effect thereof as may be pertinent; and in adjusting the costs of the suit the Court or Master may inquire, at the instance of any party thereto, into any unnecessary prolixity, and may order the costs thereby occasioned to be borne by the party chargeable with the same.

This R. is compounded of Cons. Ord. VIII., r 2, and O. XIX., r. 2, (1875) [1883].

As to striking out pleadings or parts of pleadings which may be scandalous, &c., see R. 151. See section 24 of the Act.

59. No pleading shall be of record or be used in Court until the same has been filed in the Equity Office.

PROCEEDINGS IN SUIT BEFORE DEFENCE.

I.—Statements of Claim. II.—Indorsement on Statement of Claim. III.—Service of Statement of Claim. IV.—Appearance. V.—Defendants Submitting or Admitting. VI.—Notice of Proceedings, when unnecessary. VII.—Default of Appearance. VIII.—Security for Costs.

I.—STATEMENTS OF CLAIM.

60. Statements of claim shall be in the form set out in Schedule A to these Rules, with such variations as the nature and circumstances of each case may require.

See s. 6 of the Act.

61. Any person or persons trading under the name of a firm may be sued in the name of a (*sic*) firm, and any party

to a suit may in such case apply by summons to the Court for a statement of the person or persons who are trading under the name of such firm, to be furnished in such manner and verified on oath or otherwise as the Court may direct.

This R. is taken from O. XVI., r. 10, 1875. [O. XVI., r. 14 (1883).]

The provisions of R. 115 as to attachment for disobedience of orders to answer interrogatories, or for discovery or inspection of documents, do not apply to orders for the statement of the names of partners hereunder, see *Pike* v. *F. Keene and Byne*, 24 W.R. 322.

II.—INDORSEMENT ON STATEMENT OF CLAIM.

62. The indorsement on the statement of claim shall be varied from the form set out in the Schedule of the Equity Act of 1880, and shall be as follows—

VICTORIA R.

To the within-named defendant A.B. [*or where there is more than one defendant, defendants A.B. and C.D.*] greeting: We command you [*and every of you where there is more than one defendant*] that within days after the service hereof on you, exclusive of the day of such service, you cause an appearance to be entered for you in the Equity Office of our Supreme Court to the within statement of claim. And that you do, at the same time of entering your appearance, file in the Equity Office a memorandum stating in effect that you dispute or admit in whole or in part the plaintiff's claim, or submit to such decree or order as the Court may think fit to make, or disclaim all right, title, or interest in the subject matter of the within statement of claim. And if you admit the plaintiff's claim, you may, on the Tuesday following the eighth day after such appearance, or so soon after as you can be heard, attend either personally or by counsel or solicitor before the Judge sitting in Chambers at Chancery-square, in the City of Sydney, at ten of the clock in the forenoon, and submit to such decree as is within prayed or shall be just.

Witness the Honourable A.B., the Primary Judge in Equity at Sydney, the day of , in the year of our Lord one thousand eight hundred and ninety- , and in the year of our reign.

NOTE.—Appearances are to be entered in the Equity Office of the Supreme Court, at Chancery-square aforesaid, and if you neglect to enter your appearance, or to file a memorandum as above mentioned, or personally, or by counsel or solicitor to attend at the place and time above mentioned, you will be subject to such order as the Court may think fit to make in your absence.

So far as this R. directs a form of indorsement varying from the form expressly prescribed by the section of the Act, it would seem to be clearly *ultra vires*.

Where a decree is to be taken under the 17th sec. of the Act, it should be applied for in Chambers, where alone solicitors have audience. Of course, however, the Judge, sitting in Chambers, could, if he thought fit, adjourn any such application into Court, in which case solicitors could no longer appear.

See RR. 136, 137, as to consent matters.

63. The solicitor of a plaintiff suing by a solicitor shall indorse upon every statement of claim the address of the plaintiff, and also his own name or firm and place of business, and also, if his place of business shall be more than one mile from the Equity Office, another proper place to be called his address for service, which shall not be more than one mile from the Equity Office, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him. And when any such solicitor is only agent of another solicitor, he shall add to his own name or firm and place of business, the name or firm and place of business of the principal solicitor.

64. A plaintiff suing in person shall indorse upon every statement of claim, his place of residence and occupation

and also, if his place of business shall be more than one mile from the Equity Office, another proper place to be called his address for service, which shall not be more than one mile from the Equity Office, where writs, notices, petitions, orders, summonses, warrants, and other documents, proceedings, and written communications may be left for him.

These two Rules are taken from O. IV., rr. 1, 2 (1875) [1883].

II.—SERVICE OF STATEMENT OF CLAIM.

65. Service of a statement of claim shall be effected by serving a copy personally, or by leaving the same with a servant of the defendant, or some member of his family, at his dwelling-house or usual or last known place of abode. But such service shall not be required when the defendant by his solicitor agrees to accept service: And if it be made to appear to the Court that from the defendant being absent from the Colony, or from any other cause, the plaintiff is unable to effect prompt service as hereinbefore directed, the Court may make such order for substituted or other service, or for the substitution of notice for service, as may be just.

See s. 13 of the Act, and as to service out of the jurisdiction and substituted service, see 13 Vict., No. 31.

III.—APPEARANCE.

66. When a defendant within the jurisdiction of the Court is duly served with a statement of claim, he shall, if he reside within 100 miles from Sydney, appear thereto within eight days; and, if he reside above 100 miles and less than 200 miles, within twelve days; and, if he reside above 200 miles, within sixteen days, after service.

67. When a defendant enters his appearance he shall file a memorandum to the effect either that he disputes or admits

the plaintiff's claim, or some part thereof, specifying what part, or that he desires to submit to such decree or order as the Court may think fit to make, or that he disclaims all right, title, or interest in the subject matter of the statement of claim.

See s. 18 of the Act.

68. The solicitor of a defendant appearing by a solicitor shall state in such memorandum his place of business, and a place to be called his address for service, which shall not be more than one mile from the Equity Office.

69. A defendant appearing in person shall state in such memorandum his address, and a place to be called his address for service, which shall not be more than one mile from the Equity Office.

70. 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, on the application of the plaintiff.

RR. 68-70 are taken from O. XII., rr. 7, 8, 9 (1875) [O. XII., rr. 10, 11, 12 (1883)].

V.—NOTICE OF PROCEEDINGS—WHEN UNNECESSARY.

71. When a defendant, being one of a number of defendants, some of whom dispute that the plaintiff is entitled to the relief prayed by the statement of claim, shall enter his appearance and shall file a memorandum to the effect either that he admits that the plaintiff is entitled to the relief prayed, or that he desires to submit to such decree or order as the Court may think fit to make, or that

he disclaims all right, title, and interest in the subject matter of the statement of claim, it shall not be necessary that such defendant be served with notice of any proceedings in the suit, except of or until the hearing of the suit or of any application for the dismissal of such suit.

DEFAULT OF APPEARANCE.

72. Where any defendant, not being an infant or person of weak or unsound mind, unable of himself to defend the suit, is duly served with the statement of claim, and does not enter an appearance thereto within the time limited by the indorsement, the plaintiff may, after seven days from the time so limited for appearing thereto, apply to the Court on affidavit of service of the claim for a decree or order against such defendant in his absence, and thereupon the Court may, if satisfied of the due service of the claim, make such decree or order, or give such directions as to the taking of evidence and otherwise, for the further prosecution of the suit, as may seem just.

The words "any defendant, not being an infant, or a person of weak or unsound mind, unable of himself to defend the suit," are large enough to except from the operation of this R. the case of a defendant of unsound mind, so found by inquisition or declared under the Lunacy Act of 1878. But from the terms of R. 74, it would seem that this is not so. Nor is there any reason why it should be so, for a defendant so found or declared a lunatic has already a committee or guardian by whom to defend the suit (see R. 49), and there is consequently no occasion to appoint a guardian *ad litem* for him.

Under this R. a decree may be taken on default of appearance without the necessity (as provided by the old R.) of making an entry of default and thereupon moving for a decree. If the defendant enters an appearance and files a memorandum admitting the plaintiff's claim, a decree may be applied for in Chambers, s. 17, R. 62; if, on the other hand, the defendant enters an

appearance and files a memorandum disputing the plaintiff's claim, but omits to file a statement of defence, a decree may be obtained under s. 28, R. 124. Decrees upon admissions are provided for under RR. 28, 108, and consent or short matters under R. 136.

73. A defendant, notwithstanding his default of appearance, may at any time apply to the Court for leave to appear and defend upon such terms as to costs and otherwise as the Court may direct.

74. Where, upon default made by defendant in not appearing to a statement of claim, it appears to the Court that such defendant is an infant, or a person of unsound mind not so found by inquisition, *or declared under the Lunacy Act of 1878*, so that he is unable of himself to defend the suit, the Court may, upon the application of the plaintiff, order that one of the solicitors of the Court be assigned guardian of such defendant, by whom he may appear to and defend the suit: But no such order shall be made unless it appear to the Court, on the hearing of such application, that a copy of the statement of claim was duly served; and that notice of such application was, after the expiration of the time allowed for appearing to the statement of claim, 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 copy of the statement of claim; 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 of such infant, unless the Court, at the time of hearing such application, shall dispense with such last-mentioned service.

With the exception of the words italicised in the text, this R. is taken, *mutatis mutandis*, from Cons. Ord. VII., r. 3, which (with the substitution of "some proper person" for "one of the solicitors of the Court") was re-adopted by O. XIII., r. 1 (1875) [1883].

The R. applies to petitions as well as suits (*Re Greaves*, 2 W.R. 355). It applies to infants residing abroad (*O'Brien* v. *Maitland*, 4 De G. F. & J. 331; *Anderson* v. *Stather*, 10 Jur. 383), to infant married women (*Colman* v. *Northcote*, 2 Ha. 147), and to a person of great age and incapable of giving a continuous attention to business (*Newman* v. *Selfe*, 11 W.R. 764; *Steel* v. *Cobb*, *ibid.* 298), but not to a person who suffers from bad health only, and not from any mental incapacity (*Willyams* v. *Hodge*, 1 Mac. & G. 516).

On an application by the plaintiff under this R., the Court nominates the solicitor (*Thomas* v. *Thomas*, 7 Beav. 47; and see *Biddulph* v. *Camoys*, 9 Beav. 548; *Sheppard* v. *Harris*, 15 L.J. Ch. 104). See R. 225.

By analogy to this R. a guardian *ad litem* to a defendant may, under circumstances rendering it necessary, be appointed at the instance of a co-defendant (*Re Dawson*, 41 C.D. 415).

As to costs of guardians *ad litem* appointed under this R., see R. 301.

SECURITY FOR COSTS.

75. If it appears upon the statement of claim or otherwise, at any time during the prosecution of the suit, that the sole plaintiff, if only one, is, or if more than one, all the plaintiffs are, residing out of the jurisdiction of the Court, the defendant shall be entitled as of course to an order for the plaintiff or plaintiffs to give security to the Master for costs. And the Court may order such security, if it shall think fit, in respect of any one or more of several plaintiffs who shall be out of the jurisdiction; and no further proceedings shall be taken in the suit except by leave of the Court until after such security shall have been given.

See Morgan and Wurtzburg, 7-25; Dan. Ch. P. 5th ed. 28-37; Seton 4th ed. 125, 1643-5.

Rule 48 gets rid, in the case of moving for security from a next friend, of the old canon of practice that such an application must be made before taking a material step in the suit; the terms of the present R. get rid of the same obstructive canon in the case of moving for security from a plaintiff out of the jurisdiction (see *Lydney, &c., Co.* v. *Bird*, 23 C.D. 358). A further innovation (not introduced into the English practice) is that, where only one or some of several plaintiffs is or are out of the jurisdiction, security may nevertheless be obtained (though it is not, in this case, as of course): this is a valuable provision, for it may well happen that the only substantial plaintiffs are abroad, the plaintiffs within the jurisdiction being men of straw.

Under the present English practice security may be ordered to be given for past as well as future costs (*Brocklebank* v. *King's Lynn Steamship Co.*, 3 C.P.D. 365; *Massey* v. *Allen*, 12 C.D. 807). See R. VI.

A defendant who admits the cause of action sued upon, and sets up a counter claim founded on a distinct claim, is not entitled to security for costs from the plaintiff, a foreigner residing out of the jurisdiction (*Winterfeld* v. *Bradnum*, 3 Q.B.D. 324).

In an action for breach of contract, the defendant, a foreigner residing abroad, by his defence denied the breaches and also made a counter-claim for breaches of the same contract by the plaintiff, claiming damages to an amount less than the plaintiff's claim:—*Held*, that the defendant could not be ordered to give security for the plaintiff's costs occasioned by the counter claim (*Mapleson* v. *Masini*, 5 Q.B.D. 144). Of course, a mere defendant, though out of the jurisdiction, cannot be called on for security, notwithstanding that he takes an independent proceeding in the suit, *e.g.*, prefers a petition (*Cochrane* v. *Fearon*, 18 Jur. 568; and see *Mapleson* v. *Masini*); nor can a shareholder, who resides out of the jurisdiction, and appears to oppose a petition for winding up a company (*Re Percy, &c., Co.* 2 C.D. 531).

See s. 70 and R. 198 as to the making of the deposit or giving the security required on appeals.

76. Security for costs may be given by bond to the Master according to the custom of the Court in the penalty of

£100: Provided that the Court may, if it shall think fit, direct a greater or less amount of security to be given; and that in any case the amount of security may be paid into Court in place of giving a bond.

The English rule [O. LV., r. 2 (1875)] [O. LXV., r. 6 (1883)] is that 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 Court or a Judge shall direct, and [O. LV., r. 3 (1875)] [O. LXV., r. 7 (1883)] that, where a bond for security is given, it must, unless otherwise ordered, be given to the party requiring the security, and not to an officer of the Court. In recent cases in England, security has been ordered for £500 (*Republic of Costa Rica* v. *Erlanger*, 3 C.D. 62), and even £1,000 and £600 (*Massey* v. *Allen*, 12 C.D. 811).

The terms of this Rule make it doubtful whether the Court has power to direct, against the will of the party giving the security, that the amount of the security ordered be paid into Court, or whether the effect is only to confer on the party ordered to give security the option of paying the amount into Court, or of securing it by bond. The former would be the more beneficial construction to put on the R., for it is obvious that a security by bond may prove to be no security at all; but it is not clear that the words can properly bear such an interpretation.

77. The day on which an order that a plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, shall not be reckoned in the computation of time allowed to a defendant to plead, file his statement of defence, or demur, or otherwise make his defence to the suit.

DEFENCES—INTERROGATORIES, &c.

I.—Demurrer. II.—Plea. III.—Statement of Defence. IV.—Reply and Subsequent Pleadings. V.—Admissions. VI.—Interrogatories. VII.—Exceptions. VIII.—Consequences of Default.

I.—DEMURRER.

78. No demurrer shall be filed without a memorandum at the foot, stating shortly in substance the ground or grounds thereof, or the point or points intended to be relied on; of which memorandum a copy shall be served, as part of such demurrer.

See section 18 of the Act.

In England demurrers are abrogated [O. XXV., r. 1 (1883)], but by r. 2 points of law may be raised in the pleadings, and when so raised may be disposed of by the Judge who tries the cause at or after the trial, or may be set down for hearing and disposed of at any time before the trial.

O. XXVIII., r. 2 (1875)—which, however, did no more than re-state what had always been the practice in Equity as regards demurrers (see *per* Lord Cairns, *Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 58)—provided that a demurrer should state some ground in law for the demurrer, but the party demurring should not, on the argument of the demurrer, be limited to the ground so stated. It would appear on a mere comparison of these two provisions that the Colonial practice was different from the English, and that here a demurring party could rely only on those grounds of demurrer which he had specified; but that this is not so appears from the terms of R. 83, which makes it clear that, except so far as that R. establishes a new practice as to costs, the practice here on demurrer, as to specification of the points relied on, is the same as it was in England.

The equity in a statement of claim was not apparent, but had to be collected from a long and complicated series of facts. A defendant put in a general demurrer on the ground "that the facts alleged do not show any cause of action to which effect can be given as against this defendant." It was held that, notwithstanding O. XXVIII., r. 2 (1875), a demurrer in that form was in such case sufficient (*Bidder* v. *McLean*, 20 C.D. 512).

The Statute of Frauds must be pleaded, and cannot be raised by demurrer (*Dawkins* v. *Lord Penrhyn*, *ubi supra*; *Clarke* v. *Callow*, 46 L.J.Q.B. 53; *Olley* v. *Fisher*, 34 C.D. 368); so also the Statute of Limitations, as regards personal actions (*Dawkins* v. *Lord Penrhyn*, 4 App. Cas. 59; *Wakelee* v. *Davis*, 25 W.R. 60), but, in real actions, the last mentioned Statute *may* be raised by demurrer (*Dawkins* v. *Lord Penrhyn*, in effect over-ruling *Noyes* v. *Crawley*, 10 C.D. 31).

A demurrer for want of parties does not lie in England (*Werderman* v. *Société Générale d'Electricité*, 19 C.D. 246); and this decision being principally based upon an Order [O. XXVIII., r. 1 (1875)], which has since been incorporated in our RR. by R. 84, would appear to regulate the practice here (see R. VI.).

79. A defendant, demurring alone, may file a demurrer to a statement of claim within eight days after his appearance thereto, but not afterwards. And either party may set down the demurrer for argument immediately.

80. Where a demurrer is overruled, the defendant shall pay to the plaintiff the taxed costs occasioned thereby, unless the Court shall otherwise direct.

81. Where a demurrer to the whole or part of a statement of claim is allowed upon argument, the plaintiff, unless the Court shall otherwise direct, shall pay to the demurring party the costs of the demurrer, and where the demurrer is to the whole statement of claim, the costs of the suit also.

These RR. make it unnecessary for the successful party on demurrer to ask for his costs. It is for the other side to ask, if a

cases can be made, that he be deprived of them. With a view, however, to enforcing payment of the costs, it will be prudent to obtain an order of the Court for their payment. In *Collins* v. *Featherstone* (10 N.S.W.R. Eq. 274), the defendant demurred *ore tenus* to the plaintiff's claim, the demurrer was overruled, and the defendant appealed, the appeal was allowed with costs, and the suit dismissed with costs only of the argument below; but this decision seems irreconcilable with *Bush* v. *Trowbridge Waterworks Co.* (10 Ch. 459), and *Pearce* v. *Watts* (20 Eq. 472), which were not cited to the Full Court.

82. Where a demurrer to the whole or part of a statement of claim is not set down for argument within twelve days after the filing thereof, and the plaintiff does not within such twelve days serve an order for leave to amend the statement of claim, the demurrer shall be held sufficient to the same extent and for the same purposes, and the plaintiff shall pay to the demurring party the same costs, as in the case of a demurrer to the whole or part of a statement of claim allowed upon argument.

83. Where any grounds of demurrer are urged in arguing a demurrer beyond the grounds therein expressed, and the grounds which are so expressed are disallowed, the defendant shall pay the same costs as if the demurrer were overruled, although on the grounds so newly urged the demurrer may be allowed, unless the Court shall otherwise direct.

84. 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.

This R. is adopted from O. XXVIII., r. 1 (1875). The Common Law practice of demurring to *any* pleading is introduced into the Equity practice by this rule.

85. 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.

86. 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.

87. If the party demurring desires to be at liberty to plead as well as demur to the matter demurred to, he may, before demurring, apply to the Court for an order giving him leave to do so; and the Court, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave for him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just.

These RR. are taken from O. XXVIII., rr. 2, 4, 5 (1875).

There are three alternatives provided under this R. for the party who "desires to be at liberty to plead as well as demur to the matter demurred to":—(1) He may obtain leave as at

Common Law (17 Vict., No. 21, s. 74) to plead as well as demur; or (2) he may obtain an order reserving leave for him to plead after the demurrer is overruled—in both these cases the Court must be satisfied that there is reasonable ground for the demurrer; or (3) he may demur and apply afterwards under R. 89 for leave to plead.

88. 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; and no such order shall be made except on payment of the costs of the demurrer.

As to amendment, see RR. 151-159.

89. When 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.

These RR. are taken from O. XXVIII., rr. 7, 12 (1875). See note to R. 87.

II.—PLEA.

90. A defendant may file a plea to a statement of claim within fourteen days after his appearance thereto, but not afterwards except by leave of the Court. And either party may set down the plea for argument immediately.

By O. XIX., r. 13 (1875), [O. XXI., r. 20 (1883)] no plea or defence shall be pleaded in abatement; and for a considerable time before the Judicature Act pleas had become practically obsolete in England. It is apprehended that little, if any, recourse will be had to them here.

See section 18 of the Act.

91. A plea may be put in without oath, where the matter of plea appears upon record, but, where the matter of plea does not appear upon record, the plea must be put in upon oath.

This R. is taken from Cons. Ord. XIV., r. 2.

92. The dependency of a former suit for the same matter is a good plea, but, where the plaintiff disputes the truth of the plea, he may obtain an order of course for inquiry as to the truth thereof: And such order, and the report in pursuance thereof, shall be obtained within twenty-one days after the filing and service of such plea, otherwise the defendant may obtain as of course an order to dismiss the suit with costs.

This R. is taken in substance from Cons. Ord. XIV., r. 6.

93. Where a plea is overruled, the defendant shall pay to the plaintiff the taxed costs occasioned thereby, unless the Court shall otherwise direct.

This R. is taken from Cons. Ord. XIV., r. 12.

94. Where a plea to the whole or part of a statement of claim is allowed upon argument, the plaintiff, unless he undertakes to reply to the plea, or unless the Court otherwise directs, shall pay to the party by whom the plea is filed the costs of the plea; and, where the plea is to the whole statement of claim, the costs of the suit also; and in such last-mentioned case the order allowing the plea shall direct the dismissal of the suit.

This R. is taken from Cons. Ord. XIV., r. 16.

95. Where a plea to the whole or part of a statement of claim is not set down for argument within fourteen days

after the filing thereof, and the plaintiff does not within such time either serve an order for leave to amend the statement of claim, or by notice in writing undertake to reply to the plea, the plea shall be held good to the same extent and for the same purposes, and the same costs shall be paid by the plaintiff as in the case of a plea to the whole or part of a statement of claim allowed upon argument; and, where the plea is to the whole statement of claim, the defendant by whom such plea was filed may at any time after the expiration of such fourteen days obtain as of course an order to dismiss the suit with costs.

This R. is taken from Cons. Ord. XIV., r. 17, with the substitution of fourteen days for three weeks.

96. Where the plaintiff undertakes to reply to a plea to the whole statement of claim, he shall not, without special leave of the Court, take any proceedings against the defendant by whom the plea was filed till after replication.

This R. is taken from Cons. Ord. XIV., r. 18.

It would seem that replication must be filed within two weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court, R. 105

III.—STATEMENT OF DEFENCE.

97. A defendant who has not filed a demurrer or plea shall file a statement of defence within three weeks after the time limited for the appearance of such defendant, or within such extended time as may be consented to by the plaintiff, or as the Court may, on application for that purpose, allow. And a statement of defence shall, except in the cases of corporations aggregate, be on oath. And corporations aggregate may put in a statement of defence under their

common seal: Provided that in such case the Court may nevertheless order that a statement of defence be put in on oath by such member or officer of the corporation as it shall think fit.

As to statements of defence being on oath, see notes to the 19th section of the Act, and as to delivering interrogatories to any member or officer of a corporation, see R. 111.

See section 18 of the Act.

98. Where a defendant disputes the validity of a patent, he shall deliver to the plaintiff at the time of delivering his statement of defence, or within such further time as the Court may direct, particulars stating on what grounds he disputes it, and where one of the grounds is want of novelty, must, unless the Court shall otherwise direct, state the time and place of the previous publication or user alleged by him; and at the hearing no evidence shall, except by leave of the Court, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered.

This R. is compounded of sub-ss. 2, 3, and 4, of s. 29 of the Patents, Designs, &c., Act, 1883 (46 and 47 Vict., c. 57). The object of that section is to prevent surprises at the hearing (*Crompton* v. *Anglo-American Brush Electric Light Corp.*, 35 C.D. 283). Where the defendant had been ordered to deliver further and better particulars, *held*, on appeal, that this order ought to be affirmed, for that if the defendant knew of a particular defect in the specification, he ought to point it out, that the plaintiff might not be taken by surprise. Particulars of objection may not be within the knowledge of the patentee and must be specified (*Ledyard* v. *Bull*, 11 App. Cas. 648). See also *Halliday* v. *Heppenstall Bros.*, 41 C.D. 109; *Union Electrical, &c., Co.* v. *Electrical Storage Co.*, 38 C.D. 325; *Moss* v. *Malings*, 33 C.D. 603. As to costs, *cf. Parnell* v. *Mort, Liddell, & Co.*, 29 C.D. 325; *Badische Anilin, &c.*, v. *Levinstein*, 29 C.D. 366, 419. In England no costs of particulars of objections will be allowed where no certificate

that they are reasonable and proper has been given under s. 29 (6) of the above named Act (*Longbottom* v. *Shaw*, 43 C.D. 46).

99. Statements of defence shall be in the form set out in Schedule B to these Rules, with such variations as the nature and circumstances of each case may require.

See sections 19 and 20 of the Act.

100. A defendant, in his statement of defence, shall set forth all matters not appearing in the statement of claim, and all grounds of defence, upon which he intends to rely.

This R. of course does no more than re-state what has always been the practice of the Court. O. XIX., r. 18 (1875), is to the same effect [*cf.* O. XIX., r. 15 (1883)].

As to raising defence of *res judicata*, see *Houstoun* v. *Marquis of Sligo*, 29 C.D. 448; *Ederain* v. *Cohen*, 43 C.D. 187.

The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it (*per* Thesiger, L.J., *A. G.* v. *Biphosphated, &c., Co.*, 11 C.D. 337); but a just inference from the facts admitted would be sufficient (*Taylor* v. *Blakelock*, 32 C.D. 564).

As to pleading statutes, see the notes to R. 78. In pleading concealed fraud to avoid the Statute of Limitations general averments of fraud are not sufficient; the allegations must be precise and full (*Lawrence* v. *Lord Norreys*, 15 App. Cas. 210, affirming the C.A., 39 C.D. 213).

101. Where any defendant sets off or sets up any right or claim by way of counter claim, he shall in his statement of defence state specifically that he does so by way of set off or counter claim, and shall pray specifically for the relief that he may consider himself entitled to.

This R. is taken from O. XIX., r. 10 (1875) [O. XXI., r. 10 (1883)].

As to the form of a counter claim, see notes to section 21 of the Act, and as to amendment see RR. 153, 156.

102. Where a defendant does not know, and is not in a position either to admit or deny a fact alleged in the plaintiff's statement of claim, he may state that he does not know and that he is not able to admit that fact.

See s. 29 of the Act, with the notes, and compare O. XIX., r. 17 (1875) [O. XIX., r. 13 (1883)], which provides that 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.

103. It shall not be sufficient for a defendant in his defence to deny generally the facts alleged in 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.

This corresponds with O. XIX., r. 20 (1875) [O. XIX., r. 17 (1883)].

O. XIX., r. 22 (1875) (which is probably involved in r. 20 of the same O., or, if not, would yet seem to be in force here by virtue of R. VI.), provides as follows:—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.

With regard to these rules, pleadings will be construed strictly (*per* Jessel, M.R., *Thorp* v. *Holdsworth*, 3 C.D. 637). The following have been held insufficient as denials or non-admissions:—"The defendant denies that the terms of arrangement between himself and the plaintiffs were definitely agreed upon as alleged (*S.C.*);" "the defendants put the plaintiffs to proof of the several allegations in their statement of claim" (*Harris* v. *Gamble*, 7 C.D. 877); "the defendants do not admit the correctness of the statement set forth in pars. 1, 2, 3, and 6 of the plaintiff's statement of claim, and require proof thereof" (*Rutter* v. *Tregent*, 12 C.D. 758). So, too, where, in an action against a lessee to set aside a lease granted under a power, the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances, and the defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given, it was held that the giving of a bribe was not sufficiently denied (*Tildesley* v. *Harper*, 7 C.D. 403; see 10 C.D. 393). Again, the statement of claim in a suit for specific performance stated that the predecessor in title of the plaintiff, by his agent lawfully authorised, signed an agreement with H., the predecessor in title of the defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that H. was of unsound mind, and did not lawfully authorise anyone as his agent to sign an agreement; and in a subsequent par. denied that any agreement was signed by H. or any person by him lawfully authorised. It was held by the Court of Appeal that the defendants could only enter into evidence to show H.'s unsoundness of mind, and could not enter into evidence to show that the agent was not duly authorised (*Byrd* v. *Nunn*, 7 C.D. 284). Again, where, in an action for damages for an alleged infringement of the plaintiff's copyright in a song, the defendant by his defence alleged that the song had not been registered until a certain date, and added "the defendant denies that the song has been duly registered; the time of the first publication thereof is not truly entered on the register," it was held that the defendant was only entitled to prove that the time of the first publication had been untruly entered, and not that the name of the publisher had been untruly stated (*Collette* v. *Goode*, 7 C.D. 842).

Where the statement of claim in a foreclosure action set out the purport and effect of several mortgage deeds, and alleged that they were duly executed, and the statement of defence craved leave to refer to the deeds, when produced, and, save as by such deeds, when produced, should appear, did not admit that the same were of or to the purport or effect in the statement of claim mentioned, it was held that there was a sufficient admission of the execution of the deeds (*Barnard* v. *Wieland*, 30 W.R. 947, and *cf. Smith* v. *Davies*, 28 C.D. 650; *Smith* v. *Buchan*, 36 W.R. 631).

IV. REPLY AND SUBSEQUENT PLEADINGS.

104. Subject to the last preceding Rule, 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.

This R. is taken from O. XIX. r. 21 (1875) [O. XIX., r. 18 (1883)].

See notes to R. 102, and see RR. 130, 131, 134.

Where the defendant has filed a counter claim, the proper course for the plaintiff to pursue is to reply to the defendant's defence and put in a defence to the counter claim in the same pleading. The defendant can then reply to the plaintiff's defence to the counter claim (*Kerr* v. *Stiles*, 5 N.S.W.R. Eq. 76).

105. A plaintiff shall deliver his reply, if any, within two weeks after the defence or the last of the defences shall have been delivered, unless the time shall be extended by the Court.

This R. corresponds with O. XXIV., r. 1 (1875), except that two weeks is substituted for three weeks [*cf.* O. XXIII., r. 1 (1883)].

Mere joinder of issue is necessary, otherwise under R. 131 the statements of fact in the pleading last filed are to be deemed to be admitted.

This rule applies to a reply to a counter claim as well as to a reply to a defence (*cf. Rumley* v. *Winn*, 22 Q.B.D. 267).

106. No pleading subsequent to reply, other than a joinder of issue, shall be pleaded without leave of the Court, and then upon such terms as the Court shall think fit.

107. Subject to the last preceding rule, every pleading subsequent to reply shall be delivered within one week after the delivery of the previous pleading, unless the time shall be extended by the Court.

These RR. are taken from O. XXIV., rr. 2, 3 (1875), except that one week is substituted for four days in R. 107 (*cf.* O. XXIII., rr. 2, 3) (1883).

The Court has power to enlarge or abridge time on sufficient cause shown (R. 294).

V.—ADMISSIONS.

108. Any party to a suit 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.

This R. corresponds with O. XXXII., r. 1, 1875 [1883].

See notes to s. 20 of the Act, and RR. 28, 102, 103, 131, and Seton (4th ed.) 30, 32.

Admissions may be obtained by interrogatories and the burden of proof thus made easier than it otherwise would have been (*A. G.* v. *Gaskill*, 20 C.D. 519).

Implied admissions arise where the allegations of fact have not been specifically dealt with (see RR. 102, 103), and on default in

reply, &c., the statements of fact in the pleading last filed shall be deemed to be admitted; see R. 131, and *Lumsden* v. *Winter*, 8 Q.B.D. 650.

The rule that evidence is not to be pleaded applies to admissions as well as to other evidence (*Davy* v. *Garrett*, 7 C.D. 473).

VI.—INTERROGATORIES.

109. A plaintiff may, by leave of the Court, at any time before the expiration of fourteen days after the suit is at issue, file interrogatories for the examination of a defendant; and the defendant shall, on oath, answer such interrogatories and file such answers within fourteen days after the service of the interrogatories on him: And the answer shall be deemed sufficient, unless exceptions are filed thereto within seven days after the filing of such answer.

See s. 19 of the Act. The principle which guides the Court in granting leave to file interrogatories is this: The plaintiff is entitled to find out from the defendant what the case is that he has to meet, but not what the evidence is on which the defendant intends to support that case (*Cameron* v. *Cameron*, 7 N.S.W. W.N. 29).

110. A defendant may, by leave of the Court, and either at the time of filing his statement of defence or subsequently, before the expiration of fourteen days after the suit is at issue, file interrogatories for the examination of the plaintiff, to which interrogatories shall be prefixed a concise statement of the subject on which a discovery is sought; and the plaintiff shall, on oath, answer such interrogatories and file such answer within fourteen days after the service on him of the said interrogatories; and the answer shall be deemed sufficient, unless exceptions are

filed thereto within seven days after the filing of such answer: Provided always that it shall not be competent to any defendant to file interrogatories until he has answered any interrogatories previously filed by the plaintiff for his examination.

See s. 23 of the Act.

111. If any party to a cause or matter be a body corporate or a joint stock company, whether incorporated or not, or any 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 *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.

This R. corresponds with O. XXXI., r. 5 (1883), with the addition of the words in italics, and abolishes the old practice of making the officer a party for the purpose of discovery. See the notes to section 23 of the Act. *Cf.* s. 23 of 20 Vict., No. 31.

As to discovery and inspection under the Companies Act, see ss. 153, 207 of 37 Vict., No. 19.

112. Under special circumstances the Court may allow either party to file interrogatories at a later period in the suit.

See s. 23 of the Act.

VII.—EXCEPTIONS FOR INSUFFICIENCY.

113. Exceptions for insufficiency may be filed to any answer or further answer to interrogatories within seven days after the filing of such answer or further answer. And such exceptions shall describe the passages which are alleged to be insufficient.

In England the sufficiency or otherwise of an affidavit objected to as insufficient is determined on motion or summons. See the notes to s. 24 of the Act.

114. Where exceptions are allowed, the Court may direct that a further answer be filed, or that the party in default be examined *vivâ voce.*

See note to R. 113, and *cf.* O. XXXI., r. 11 (1883).

VIII. CONSEQUENCES OF DEFAULT.

115. If any party fail to comply with an order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment: And he shall also, if a plaintiff, be liable to have proceedings in the suit stayed until compliance; 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 filed a memorandum of dispute or statement of defence; and the Court may order accordingly.

See further R. 119.

Compare O. XXXI., r. 20 (1875) [O. XXXI., r. 21 (1883)]:— 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 the effect, and an order may be made accordingly.

Under this O. it has been laid down that it is not imperative on the Court to make an order dismissing the action, or striking out the defence (*Hartley* v. *Owen*, 34 L.T. 752, W.N. 1876, 193); such extreme measures will only be taken as a last resort (*Twycross* v. *Grant*, W.N. 1875, 201; *Anon.*, *ibid.* 202). And see R. 120.

116. Where a party has filed interrogatories, and has just reason to believe that the party interrogated means to abscond before answering, the Court may, on the *ex parte* application of the party interrogating, order an attachment to issue against him, returnable at such time as the Court shall direct.

117. Where a party is brought up in custody for want of an answer to interrogatories, and makes oath in Court that he is unable, by reason of poverty, to employ a solicitor to put in such answer, the Court, if satisfied as to the truth of that allegation, may assign a solicitor and counsel for such party to enable him to put in an answer.

118. Where a party, in contempt for want of answer or discovery, obtains upon filing an answer or affidavit of discovery the common order to be discharged as to his contempt, on payment or tender of the costs thereof; or where the party obtaining the attachment accepts the costs without order, it shall not be necessary, in case the answer or affidavit is insufficient, to recommence the process of contempt, but the party obtaining the attachment may take up the process at the point to which he had before proceeded.

PROCEEDINGS BETWEEN DEFENCE AND HEARING.

I.—Dismissing Suit for want of Prosecution. II.—Production of Documents. III.—Preliminary Accounts and Inquiries. IV.—Motion for Decree. V.—Close of Pleadings. VI.—Default of Pleading. VII.—Settling Issues of Fact. VIII.—Setting Down Suit for Hearing.

I.—DISMISSING SUIT FOR WANT OF PROSECUTION.

119. Any party may move to dismiss a suit or counter claim for want of prosecution when the opposite party has not, within the time fixed by the Rules in that behalf, or by an order of the Court, taken such step as may be then necessary in the suit or counter claim.

Where the plaintiff has become insolvent, notice of motion to dismiss for want of prosecution must be served on the assignee under his insolvency (*Wright* v. *Swindon, &c., Co.*, 4 C.D. 164; and see *Price* v. *Rickards*, 9 Eq. 35).

If the plaintiff does not set down the suit for hearing within seven days after a joinder of issue, the defendant may, instead of moving to dismiss, himself set the suit down for hearing (R. 135).

An insolvent defendant may move to dismiss (*Levi* v. *Heritage*, 26 Beav. 560), but a defendant in contempt may not, until his contempt is cleared (*Vowles* v. *Young*, 9 Ves. 173) or unless the plaintiff has waived the contempt (*Herrett* v. *Reynolds*, 2 Giff. 409).

See s. 27 of the Act.

120. Upon any application to dismiss a suit or counter claim for want of prosecution, the Court may make an order to that effect, or such other order, or may impose such terms as may appear just and reasonable.

See notes to R. 115.

For cases in which a suit may be dismissed at a defendant's instance *as of course*, see RR. 92, 95.

See s. 27 of the Act.

II.—PRODUCTION OF DOCUMENTS.

121. Any party may, without filing an affidavit, apply to the Court for an order directing any other party to the suit to make discovery on oath of all the documents which are, or have been, in his possession or power relating to any matter in question in the suit.

See ss. 25, 26 of the Act.

As to when a document is protected from production, see *A.J.S. Bank* v. *Steel*, 11 N.S.W.R. Eq. 18.

122. The party against whom such an order has been made shall make an affidavit specifying the documents which he has, or has had, in his possession or power, and also which, if any, of such documents he objects to produce; and it shall be in the form set out in Schedule D to these Rules, with such variations as circumstances may require.

An affidavit as to documents setting out a very large number of letters, instead of referring to them in bundles properly identified, was ordered to be taken off the file, the costs to be paid by the party making the affidavit (*Walker* v. *Poole*, 21 C.D. 835).

When discovery of documents is made, it is not enough to make them up in bundles and number the bundles, but the documents in the bundles must be described, and each document must be marked or numbered specially, so that any party requiring a particular document may call for it (*Cooke* v. *Smith*, 1891, 1 Ch., 509, 522).

III.—INQUIRIES AND ACCOUNTS.

123. The Court may at any stage of the proceedings in a suit or matter direct any necessary inquiries or accounts to

be made or taken, notwithstanding 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 suit or matter should proceed in the ordinary manner.

This R. corresponds with O. XXXIII. (1875) [O. XXXIII., r. 2 (1883)].

The R. does not authorise the sending the whole of the questions in a cause to be tried in Chambers, but only to authorise the Court to direct, before trial, accounts and inquiries which would otherwise have been directed at the trial (*Garnham* v. *Skipper*, 29 C.D. 566).

Allegations of wilful default ought to be disposed of at the hearing and not referred to Chambers (*Smith* v. *Armitage*, 24 C.D. 727).

Mode of application under this R. by motion, see R. 27.

IV.—MOTION FOR DECREE.

124. Sixteen days' notice shall be given to the defendant of any motion for a decree or decretal order under section 28 of the Equity Act of 1880.

See section 28 of the Act.

125. All affidavits to be used in support of such motion shall be filed before the service of such notice, and a list of such affidavits shall be set forth at the foot of such notice.

Copies of the affidavits need not be served (R. 19).

126. The defendant, within ten days after service of such notice, shall file his affidavits in answer, and deliver to the plaintiff a list thereof.

127. Within four days after the expiration of such ten days, or other period to which the time for filing the defendant's affidavits has been enlarged, the plaintiff shall

file his affidavits in reply, and he shall deliver to the defendant a list thereof.

128. No further evidence on either side shall be used upon such motion for a decree or decretal order without leave or direction of the Court.

129. Every notice of motion for a decree or decretal order shall be set down for hearing on such day as the Court may by any order or general rule direct.

V.—CLOSE OF PLEADINGS.

130. 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.

This R. corresponds with O. XXV. (1875) [O. XXIII., r. 5 (1883)].

As to joinder of issue, see R. 104; close of proceedings in default of reply, R. 131; setting suit down for hearing, R. 134.

See section 30 of the Act.

VI.—DEFAULT OF PLEADING.

131. If the plaintiff does not file a reply or demurrer, or any party does not file 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 filed shall be deemed to be admitted.

This R. is taken from O. XXIX., r. 12 (1875).

This practice is now reversed in England by O. XXVII., r. 13 (1883), which provides that such statements of fact shall "*be deemed to have been denied and put in issue.*"

See note to R. 130.

132. Any decree or order by default may be set aside by the Court, upon such terms as to costs or otherwise as such Court may think fit.

This R. is taken from O. XXIX., r. 14 (1875) [O. XXVII., r. 15 (1883)].

VII.—SETTLING ISSUES OF FACT.

133. Where in any suit it appears that the pleadings do not sufficiently define the issues of fact in dispute between the parties, and it shall be deemed desirable that they should be so defined, the Court may on the application of any party or of its own motion after replication settle such issues.

VIII.—SETTING DOWN SUITS FOR HEARING.

134. Within seven days after a joinder of issue, the plaintiff shall set down the suit for hearing on some day, except by leave of the Court not earlier than the fourteenth nor later than the twenty-eighth day after so setting down the suit; and the plaintiff shall forthwith serve notice of the suit being so set down for hearing upon all the defendants thereto.

135. If the plaintiff does not set down the suit for hearing within seven days after a joinder of issue, any defendant may set down the suit for hearing, within like periods as hereinbefore provided for setting down by the plaintiff, and shall forthwith serve on the plaintiff and the other defendants notice thereof.

See notes to R. 119.

HEARING—EVIDENCE.

I.—GENERALLY. II.—EVIDENCE BY COMMISSION.
III.—TRIAL BY JURY.

I.—GENERALLY.

136. Suits which are to be treated as Consent Matters or as Short Matters, or in which the defendant ought to attend in Court in pursuance of the endorsement on the statement of claim, shall be set down for hearing on such days as the Court may specially appoint for the hearing of such matters and suits.

The expressions "consent matters" and "short matters" as applied to causes, are to be regretted, as confusing the distinction between causes and matters which has always hitherto been observed in legal terminology.

See s. 17 of the Act, and RR. 62, 137, 138.

Consent matters mean suits in which the terms of the decree have been agreed. See next R.

Suits within this R. are to be taken on certificate of plaintiff's counsel that the cause is fit to be heard as a short matter. In giving these certificates the English practice is to be followed (*Penny* v. *Slough*, 5 N.S.W.R. Eq. 80).

As to "short matters," the English practice has been that when a cause involves no question of difficulty, and is not likely to take up much time in argument—not more than ten minutes as a rule (*Anon.*, 17 Jur. 435)—or is such that the subject matter of it would authorise the Court to make a decree as of course, it may be heard as a short cause amongst the short causes, for the hearing of which one day in each week is appointed. To obtain this privilege, there must be a certificate—which, however, in one case (*Hargraves* v. *White*, 17 Jur. 436) was dispensed with—from the counsel of the plaintiff that the cause is fit to be heard

as a short cause, but the consent of the solicitors for any of the defendants will not be required. Upon the production of such certificate to the proper officer, he will mark the cause as "short" in the cause book. The plaintiff, thus advancing a cause, proceeds at his peril; and if, on the cause coming on, it appears that it is not one which is entitled to be so advanced, the costs occasioned by the advancement will have to be paid by the plaintiff (*Daniell*, Ch. Pr. 5th ed. 685).

137. If the parties to any suit have agreed upon the terms of the decree to be asked from the Court, the suit may come on to be heard on any day after it has been set down that may be appointed for hearing Consent Matters.

138. Any suit may, by the consent of the parties thereto, or by order made with notice in Chambers on summons, come on to be heard as a Short Matter upon any day after it has been set down that may be appointed for hearing such matters, or that the parties may agree upon and the Court may order.

There are many cases in which a defendant, at first hostile, becomes reasonable and willing to take a speedy decision of the Court: these cases are met by this R., which enables suits to be heard "short" by consent.

The words, "or by order made with notice in Chambers," are difficult. They apparently contemplate an order being made against the will of the defendant for the hearing of a suit "short." But such an order would be unnecessary, for the plaintiff may himself set down the suit to be heard "short" without the defendant's consent: see notes to R. 136.

139. If the plaintiff refers to the statement of defence or any part of it as evidence in support of his case, the Judge shall take a note of such reference; and the plaintiff shall not enter into evidence as to such matters as are established by such reference; and, if he enters into evidence as to them, he will render himself liable to pay the costs thereof.

This R. is, in theory, only a corollary to section 20 of the Act, but, in practice, it may put the plaintiff in a difficulty, unless it is leniently applied by the Court. Of course, where there is a clear admission in the defence of any particular fact, no plaintiff would be justified in adducing evidence of such fact; but, as will be seen from the cases cited in the notes to R. 103, there are cases in which it is very difficult to say whether the expressions used in the defence amount to any and what admissions of the plaintiff's allegations, and in such cases it would not be prudent in a plaintiff to let the suit go to a hearing without evidence of his own in support of that part of his case; the Court may, however, be of opinion that the defendant's expressions did in fact amount to admissions sufficient for the plaintiff's purpose. It is presumed that in such cases of reasonable doubt, a plaintiff will not in any event be made to pay the costs of the evidence so adduced by him. Not improbably this R. will remain a dead letter.

A plaintiff may read a passage from a statement of defence without reading the whole of the paragraph containing such passage (*Bourke* v. *Wright*, 4 N.S.W.R. Eq. 9).

140. The Court or any party may, before, or at any time during, the hearing of a suit, require the evidence or judgment to be taken down by a shorthand writer, who shall be duly sworn; but it shall not be necessary for the witnesses to sign the notes of their evidence; and the Court may make such order as it shall think fit for the costs of employing such shorthand writer. The Judge's notes, or the notes of such shorthand writer, shall for all the purposes of the suit be *primâ facie* proof of the evidence of the deposition of witnesses.

As to shorthand notes, see s. 31 of the Act, and *In re Gurney Brick Co., Harker's case*, 11 N.S.W.R. Eq. 301, *Brown* v. *McEncroe*, 12 N.S.W.R. Eq. 93, and *cf.* R. 199.

II.—EVIDENCE BY COMMISSION.

141. Where any party has obtained a commission for the examination of witnesses, he shall, unless the Court other-

wise direct, cause notice of the time and place of such examination to be served on the parties entitled to notice seven days at least before the day of examination; and every such commission shall be returnable on some day to be fixed in each case by the Court, and shall, with the examination of witnesses under the same, be returned to the Equity Office in like manner as statements of defence taken in the country are returnable.

See R. 11.

III.—TRIAL BY JURY.

142. Any question of fact, or any question of the amount of damages, directed to be tried by a jury, shall be reduced into writing in the form set forth in Schedule E to these Rules, and shall be called the "Record for Trial," and shall be filed in the Equity Office within two days after such order shall have been made, and within seven days after such filing shall be entered for trial at such time and place and in such manner as the Court shall direct.

This R. is taken, with some alterations, from Cons. Ord. XLI., r. 26. Two and seven days are substituted for three and three days respectively, and the entry for trial, instead of being specially provided for, is to be "as the Court shall direct," rendering an application for directions necessary, at least in all cases where the practice at law (see next R.) does not sufficiently indicate the course to be pursued.

As to trial by jury, see ss. 32-38 of the Act.

143. When the Court shall order any question of fact, or any question of the amount of damages, to be tried by a jury, the course of proceedings shall be in all respects in accordance with the law and practice as to trial of issue and assessments of damages at Common Law.

144. The notice of any application for a new trial shall be given within eight days after the verdict or finding of the jury shall have been filed, or within such other time as the Court may direct.

145. Where the Court shall decree damages to any person, and shall order the amount of such damages to be assessed by a jury before any Judge of the Supreme Court, or in any Circuit Court, the person to whom such damages shall be decreed shall be at liberty to sue out from the Equity Office a writ of inquiry of damages.

See s. 37 of the Act.

146. The Rules now in force in the Courts of Common Law relative to writs of inquiry and trials shall be applicable to writs of inquiry to be issued by virtue of the last preceding Rule.

147. The writ of inquiry, together with the return thereto of the verdict or inquisition, shall within seven days after such return be filed at the Equity Office, or within such other time as the Court shall allow.

148. Any application to set aside the verdict or inquisition on any such writ of inquiry, and to direct a new inquiry, shall be made within eight days after the finding thereof, or within such other time as the Court shall allow.

149. On the day appointed for any trial, and previously to the commencement thereof, a copy of the Record for Trial, together with a copy of the statement of claim, statement of defence, and other pleadings, shall be left with the Judge before whom such trial is appointed to be had by the person at whose instance the same may have been entered for trial.

150. The verdict or finding of the jury, together with the names of the jurors who were sworn, shall be endorsed by the associate of the Judge before whom the trial has taken place on the Record for Trial, and shall be signed by him and then returned to the Equity Office to be filed. And the Judge may certify whether he is satisfied or otherwise with such verdict or finding of the jury.

AMENDMENT OF PLEADINGS.

151. The Court 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 pleadings respectively as may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the cause; 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.

This R. is taken from O. XXVII., r. 1, 1875 [O. XXVIII., r. 1, 1883].

See ss. 6, 16, 20, 24 of the Act and R. 58.

The Full Court has all the powers and duties of the Judge as to amendment (s. 73).

The application should be on summons, and the costs will in general be paid by the party in the wrong (*Marriott* v. *Marriott*, 26 W.R. 416, and see s. 62 of the Act).

Scandalous matter was, of course, constantly struck out under the old system; but charges and statements which would not have been improper under that system may nevertheless be struck out under the present system (*Watson* v. *Rodwell*, 3 C.D. 380; *Knowles* v. *Roberts*, 38 C.D. 270). Improper pleadings ought to be struck out, and not left to be dealt with as a question of costs (*Watson* v. *Rodwell*, *ubi supra*). In an action for the recovery of land, of which the plaintiff has never been in possession, a general allegation in the statement of claim that by assurances, wills, documents,

and Crown grants in the possession of the defendant—without stating their nature or further describing them—the plaintiff is entitled to the land (*Philipps* v. *Philipps*, 4 Q.B.D. 127); a statement of claim, parts of which are unintelligible, other parts irrelevant, while other parts contain offensive charges (*Cashin* v. *Cradock*, 3 C.D. 376); a statement of claim stating immaterial facts, and setting out at great length documents which could not be material except as evidence by way of admission (*Davy* v. *Garrett*, 7 C.D. 473); a claim in which the vendor of goods and the indorsees of a bill given by the purchaser to the vendor for the price jointly sue the purchaser to recover the price and also upon the dishonoured bill (*Smith* v. *Richardson*, 4 C.P.D. 112); statements in pleading which are not demurrers, but allege only matters of law that might be raised by demurrer (*Stokes* v. *Grant*, 4 C.P.D. 25); a reply which refers to an independent document, such as plaintiff's answer to interrogatories, as containing facts on which the pleading relies, without setting out such document itself as part of the reply—or which sets up new claims—or which pleads mere evidence or argument, or states conclusions of law to be drawn or inferred from the facts pleaded (*Williamson* v. *L. & N.W.R. Co.*, 12 C.D. 787); the omission, in a suit to restrain the obstruction of an alleged private right of way, to show on the statement of claim whether the plaintiff claims the right by prescription or grant, and to allege with reasonable certainty the *termini* of the way and its course (*Harris* v. *Jenkins*, 22 C.D. 481; *Spedding* v. *Fitzpatrick*, 38 C.D. 413); all these have been held embarrassing, and liable to be struck out or compulsorily amended. Compare *Berdan* v. *Greenwood*, 3 Ex. D. 251; *Heap* v. *Marris*, 2 Q.B.D. 630; *Thorp* v. *Holdsworth*, 3 C.D. 637; *Hawkesley* v. *Bradshaw*, 5 Q.B.D. 22, 302; *Whitney* v. *Moignard*, 24 Q.B.D. 630.

The striking out of pleadings as embarrassing was at first said to be so much a matter in the discretion of the Judge that, where he had exercised his discretion, the Court of Appeal would not, as a general rule, interfere, unless he had acted on a wrong principle (*Golding* v. *Wharton Saltworks Co.*, 1 Q.B.D. 374; *Watson* v. *Rodwell*, 3 C.D. 380); but the weight of these cases has been shaken by the decision that it is the duty of the Appeal Court to exercise its own discretion as to whether a pleading is so framed as to embarrass the opposite party, and that Court has struck out a pleading, though a motion for that purpose had been dismissed

with costs by the Court below, and no question of wrong principle was involved, James, L.J., saying a defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it, and that the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery (*Davy* v. *Garrett*, 7 C.D. 473).

The parties may make all such amendments as may be necessary to ascertain and place upon record the true issue or issues to be determined by the Court, but not so as to make a new case, or set up a different issue to that raised in the original pleadings, *per* Owen, C.J. Eq. (*Dibbs* v. *Dibbs*, 9 N.S.W.R. Eq. 169).

As to when amendments should be allowed, see *A.S.N. Co.* v. *Smith*, 14 App. Cas. 320; *Cropper* v. *Smith*, 26 C.D. 700; *Hipgrave* v. *Case*, 28 C.D. 360; *Steward* v. *North, &c., Tramways*, 16 Q.B.D. 556; *Riding* v. *Hawkins*, 14 P.D. 59; *Griffiths* v. *London, &c., Docks*, 13 Q.B.D. 259; *Kurtz* v. *Spence*, 36 C.D. 774.

Leave to amend refused: *Edevain* v. *Cohen*, 41 C.D. 563, 43 C.D. 187; *Wood* v. *Durham*, 21 Q.B.D. 501; *Lowther* v. *Heaver*, 41 C.D. 248; *Lawrance* v. *Norreys*, 39 C.D. 213; *Moss* v. *Malings*, 33 C.D. 603.

A motion to amend a statement of claim by the substitution of plaintiffs was dismissed with costs (*Cowan & Co.* v. *Spalding*, 3 N.S.W. W.N. 112). In that case the plaintiffs, creditors of a certain company, had brought a suit to have a bill of sale, given by the company to the defendants, also creditors of the company, declared void on the ground of fraudulent preference. Subsequently to defendant's appearance in the suit on the plaintiffs' petition for the winding-up of the company, M. was appointed official liquidator. Defendant had filed his statement of defence. The object of the motion was to substitute M.'s name for that of the plaintiffs on the record.

152. 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 filed, at any time before the expiration of four

weeks from the appearance of the defendant who shall have last appeared.

This R. corresponds with O. XXVII., r. 2, 1875 [O. XXVIII., r. 2, 1883], with the substitution of "filed" for "delivered."

The time limited for reply is two weeks from delivery of defence, R. 105.

While a demurrer is pending no amendment can be made, without leave, R. 88.

153. 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-one days from the filing of his defence.

This R. corresponds with O. XXVII., r. 3, 1875 [O. XXVIII., r. 3, 1883], "twenty-eight" being substituted for "twenty-one days."

As to pleading to reply, see R. 107.

154. When any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the filing of the amended pleading, apply to the Court to disallow the amendment, or any part thereof, and the Court 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.

This R. corresponds with O. XXVII., r. 4, 1875 [O. XXVIII., r. 4, 1883].

155 Where any party has amended his pleading under Rules 153 or 154, the opposite party shall plead to the

amended pleading, or amend his pleading within the time he then has to plead, or within eight days from the delivery of the amendment whichever shall last expire, and, in case the opposite party has pleaded before the delivery of the amendment, and does not plead again, or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

This R. corresponds with O. XXVIII., r. 5 (1883). See *Powell* v. *Jewesbury*, 9 C.D. 34.

156. In all cases not hereinbefore otherwise provided for, application for leave to amend any pleading may be made by either party to the Court, and either before or at the trial of the cause, and such amendment may be allowed upon such terms as to costs or otherwise as may seem just.

This R. is taken from O. XXVIII., r. 6 (1883).

157. If a party who has obtained an order for leave to amend a pleading filed 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 be extended by the Court.

This R. corresponds with O. XXVII., r. 7, 1875 [O. XXVIII., r. 7, 1883].

158. 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 ."

This R. corresponds with O. XXVII., r. 9, 1875 [O. XXVIII., r. 10, 1883].

159. Whenever a party has obtained leave to amend any pleading, and the amendments are so inconsiderable that no re-engrossment is required, he shall thereupon give notice to the opposite party of such amendments, and the copy of such pleading when so amended (or, if the amendment be of such a nature as to require a new engrossment, then a copy of such new engrossment) shall at the time such amendment is made or a new engrossment filed (if requiring no new appearance), be served on the solicitor of the opposite party. But if a new appearance be required, the amended attested copy or an attested copy of the new engrossment shall be served on the opposite party, together with the indorsements thereon.

REVIVOR AND SUPPLEMENT.

160. Any person under no disability, or under the disability of coverture only, who may be served with an order under the 59th section of the Equity Act of 1880 to revive any suit or carry on the proceedings therein, may apply to the Court to discharge such order within twelve days after such service; and any person being under any disability other than coverture who may be so served may apply to the Court to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such person; and, until such period of twelve days shall have expired, such order shall have no force or effect as against such last mentioned person.

This R. corresponds with Cons. Ord. XXXII., r. 1.

See s. 59 of the Act.

161. Where any suit shall not be in such a state as to allow of an amendment being made in the statement of claim, the plaintiff may state any facts or circumstances which have occurred after the institution of the suit by filing in the Equity Office a written statement, to be annexed to the statement of claim, and such proceedings by way of defence, evidence, and otherwise, shall be had and taken upon the statement so filed as if the same were embodied in a supplemental statement of claim: Provided that the Court may make any order which it shall think fit for accelerating the proceedings in any manner which may appear just.

This R. is taken *mutatis mutandis*, from Cons. Ord. XXXII., r. 2.

See s. 60 of the Act.

As to amendment, see RR. 151-159.

162. It shall not be necessary in any statement of claim to revive a suit, or in any supplemental statement of claim, to set forth any of the statements in the original pleadings, unless the special circumstances of the case may so require.

This R. corresponds with Cons. Ord. XXXII., r. 3.

The R. does not dispense with the necessity of stating, in a claim to revive, so much of the pleadings in the original suit as is sufficient to show the title of the plaintiff as against the defendant to revive the suit. If the statements in the claim to revive do not show a title to revive, the plaintiff cannot on demurrer supply the defect by reading the record of the original statement of claim, although that record be referred to in the claim to revive. The title to revive the suit against the defendant is not shown by the mere statement that such defendant is the representative of a party who put in a defence to the original statement of claim (*Griffith* v. *Ricketts*, 3 Ha. 476; and see *Anderson* v. *Wallis*, 6 Jur. 906).

163. When a suit abates before decree by the death of a sole plaintiff, any defendant *may either take the proceedings necessary to revive the suit, as in the case of such abatement after decree, or* may apply to the Court, upon motion on notice served on the legal representative of the deceased plaintiff, that such legal representative do revive the suit within a limited time, or that the suit be dismissed against such defendant.

With the exception of the words italicised in the text (which constitute a departure from the old practice in England under the Cons. Ords.), this R. corresponds with Cons. Ord. XXXII., r. 4.

The executors and devisees in trust of a deceased defendant may make the application (*Norton* v. *White*, 2 De G.M. & G. 678).

Where a *sole* plaintiff in an administration suit died, an order of course to revive was made on the application of a person who had been served with notice of the decree, and had obtained liberty to attend the proceedings (*Burstall* v. *Fearon*, W.N. 1883, 99).

On the death of one of *several* co-plaintiffs, it was ordered that the survivors should revive within a limited time or that the bill should be dismissed, notwithstanding that there should be no legal personal representative, it being their duty to obtain administration (*Saner* v. *Deaven*, 16 Beav. 30; *Adamson* v. *Hall*, T. & R. 258; *Hinde* v. *Morton*, 2 H. & M. 368; *Holcombe* v. *Trotter*, 1 Coll. 654).

DECREES AND ORDERS.

164. The party who has the carriage of any decree or order shall, within ten clear days of the same being pronounced, or within such further time as the Court shall direct, lodge the minutes of the same in the Equity Office, and take out an appointment to proceed therein.

See RR. 166, 167.

165. Where in any suit 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, make a decree 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.

This R. corresponds with O. XXII., r. 10, 1875 [O. XXI., r. 17, 1883].

See ss. 21, 22 of the Act.

166. Two clear days' notice shall be given of any appointment to settle minutes, provided that in cases of emergency the summons may be made returnable immediately.

167. Draft minutes of the decree or order shall be left in the Equity Office on taking out an appointment to settle the same.

168. The Court or Master may, in any case in which it may be considered expedient so to do, settle and pass the decree or order without making any appointment so to do, and without notice to any party.

This R. gives extraordinary powers, which, it is presumed, will seldom be invoked.

169. No decree or order shall be drawn up without the leave of the Court after six months from when it shall have been pronounced.

An *ex parte* application made under this R. was refused, there having in the meantime been an assignment of the subject matter of the rule, in *Plummer* v. *Logan*, 3 N.S.W. W.N. 73.

170. In drawing up any decree or order it shall not be necessary to recite any pleading or document in full, but a short reference thereto shall be sufficient, unless the Court or Master shall otherwise direct.

This R. is a condensation of part of Cons. Ord. XXIII., r. 2.

The Master, in drawing up any order, may introduce such alterations as from his experience he believes the Court would sanction (*Davenport* v. *Stafford*, 8 Beav. 503; *Hargrave* v. *Hargrave*, 3 Mac. & G. 348).

171. Where any sums of money or any securities or other effects belonging to the suitors of the Court are directed to be paid into or deposited in Court in any suit or matter, or to be paid out or invested; or where any stock, funds, shares, or moneys are directed to be transferred into the name and with the privity of the Master, or to be transferred out of Court, carried over, or delivered out—the exact sum of money, the amount of the stock, funds, shares, or securities, and the particulars of the effects so to be paid in, transferred, or deposited, or so to be paid out, invested, transferred out, carried over, or delivered out, shall be ascertained and specified and expressed in the decree or order in words written at length; except in the case of residues or shares of residues remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the decree or order; in which cases the amount of such residues or shares of residues shall be verified by affidavit, without any direction for that purpose in the decree or order, unless such residues or shares shall be certified by the Master, who shall be at liberty to certify the same without a direction for that purpose in such decree or order.

This R. is taken from Cons. Ord. XXIII., r. 3.

The direction contained in this R. to specify the amount to be paid out, &c., applies to those cases only in which the amount to be paid out, &c., can be ascertained at the time when the order for payment, &c., is made (*Piggott* v. *Garraway*, 9 Sim. 260).

As to the investment of money, &c., see R. 259.

172. Where a residue of stock, funds, shares, or securities or moneys, is directed by any decree or order to be operated upon by the Master, the exact amount of such residue, where the same can be done, shall, on settlement of the minutes, be verified by affidavit or otherwise, and shall be expressed and specified in the decree or order in words at length, so that the amount of such residue may appear on the face of the decree or order.

This R. is taken from Cons. Ord. XXIII., r. 4, except that the verification by affidavit, where the case admits of it, is here made peremptory, instead of being, as in the English r., only necessary where required by the Registrar.

173. All persons, whether representatives or others, who are directed to pay into or deposit in Court any sum of money, securities, or other effects with the privity of the Master, or to transfer any stock, funds, shares, or moneys, into his name and with his privity; and all persons, whether representatives or others, to whom any sums of money, stock, funds, shares, securities, or other effects are directed to be paid out, transferred, carried over, or delivered out, shall, except in the case of bodies corporate, companies, or societies, be described by name in the decree or order, and not merely as plaintiffs or petitioners or the like, unless such payments, transfers, carryings over, or deliveries, are directed to be made to or by representatives, and no probate or letters of administration shall have been taken out at the time of making such decree or order; and the Christian names and surnames or titles of honour of all such persons, and the titles of all such bodies corporate, companies, and societies shall be written at length and without abbreviation in such decrees or order.

This R. is taken from Cons. Ord. XXIII., r. 5.

See RR. 269, 271, 273.

174. In all decrees or orders directing the payment of interest, dividends, annuities, or other periodical payments, the time when the first of such payments, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, shall be made, shall be specified and expressed in words at length: *and, where the same has not been so specified and expressed, then the respective payments shall be made yearly.*

Except as regards the words italicised in the text (which have been added), this R. is taken from Cons. Ord. XXIII., r. 6.

See RR. 267, 273 (c).

175. Where any stock, funds, shares, or securities standing in the name of the Master in trust in, or to the credit of, any suit, matter, or account, or any part thereof, are or is directed to be divided and transferred or delivered out of Court to or among several persons, or to be carried over to several separate accounts, and where any money is directed to be paid out to or among several persons, or carried over to several separate accounts, the Master shall be at liberty, where it shall appear to him to be more convenient so to do, to state the respective amounts of such stock, funds, shares, securities, or money to be so transferred, paid, or carried over, in a schedule at the foot of the decree or order, and it shall be sufficient to refer to such schedule in the mandatory part of the decree or order; but in every such case the total amount of the stock, funds, shares, securities, or money respectively to be dealt with in such schedule, shall be stated in words at length in the mandatory part of the decree or order.

This R. is taken from Cons. Ord. XXIII., r. 7.

176. Where upon or after the death of any person to whom the interest or dividends of any stock, funds, shares,

securities, or money standing in the name of the Master in trust in, or to the credit of, any suit, matter, or account, or any part of such interest or dividends were or was payable for life, an order is made for the sale, transfer, or delivery or payment, of such stock, funds, shares, securities, or moneys, or for the payment of the interest or dividends to accrue due thereon subsequently to the death of such person, the same order shall also provide for the payment to the legal personal representative of such person of such proportion of the interest or dividends on such stock, funds, shares, securities, or moneys, as shall have accrued between the last period of payment and the day of his death, unless the Court shall be of opinion that such legal personal representatives are not entitled thereto, or shall for any other reason otherwise direct.

This R. is taken from Cons. Ord. XXIII., r. 8.

See RR. 269, 271, 272.

177. Every decree or order made in any suit or matter requiring any person to do an act thereby ordered shall state the time or the time after service of the decree or order within which the act is to be done; and upon the copy of the decree or order, which shall be served upon the person required to obey the same, there shall be endorsed a memorandum in the words or to the effect following, viz.:— "If you the within-named A.B. neglect to obey this Decree (or Order) by the time therein limited, you will be liable to be arrested under a Writ of Attachment issued out of the Supreme Court, and also be liable to have your estate sequestrated for the purpose of compelling you to obey the same Decree (or Order)." *And in any case where money only has to be paid to any person, then the memorandum shall be to the effect following:—"If you the within-named*

A.B. neglect to obey this Decree (or Order) by the time therein limited, a Writ of fieri facias *may be issued against you to levy upon your goods and chattels and lands and tenements and also you will be liable to have your estate sequestrated for the purpose of compelling you to obey the same Decree (or Order).*"

With the exception of the words italicised in the text (which have been added), this R. is taken from Cons. Ord. XXIII., r. 10.

Where a decree has been drawn up without fixing a time within which an act is to be done, the decree is not rendered ineffectual, but the Court will, on motion, fix a time for the performance of the act (*Needham* v. *Needham*, 1 Ha. 633).

178. Where a defendant, at the hearing, objects that a suit is defective for want of parties, and has not, by plea or statement of defence, taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court, if it shall think fit, *may add the parties upon such terms as to costs or otherwise as may be deemed just, or* may make a decree saving the rights of such parties.

With the exception of the words italicised in the text (which have been added), this R. is taken from Cons. Ord. XXIII., r. 11.

Under this R., decrees have been made in the absence, and saving the rights, of a mortgagee (*Feltham* v. *Clark*, 1 De G. & Sm. 307), the assignees of a bankrupt (*Maybery* v. *Brooking*, 7 De G. M. & G. 673), the heir-at-law of the survivor of trustees, and the personal representative (*Faulkner* v. *Daniel*, 3 Ha. 199), and a person entitled in a remote contingency (*Daubuz* v. *Peel*, 1 Coop. R. t. Cottenham, 365); but decrees will not be made under this R. in the absence of a female plaintiff's husband (*Russell* v. *Lucey*, 18 L.J. Ch. 464), nor, in a suit to execute the trusts of a creditor's deed, in the absence of the person who created the trust (*Kimber* v. *Ensworth*, 1 Ha. 293). The object of the R. was to remove a difficulty which often arose at the

hearing of a cause, from objections for want of parties being taken by defendants, when the objections had not been suggested by the answer, and the rights of the absent party would be as well protected by the decree of the Court as if he were present, or at all events those rights could not be prejudiced by a decree made in his absence. It was not contemplated that the Court would ever exercise the powers which the order gave in a manner which would be prejudicial to an absent party (*per* Wigram, V.C., *S.C.*, 295).

Where a suit involved a question in which the children of the plaintiff were interested, and a child was born after the bill was filed, the Court, on the objection taken at the hearing, ordered the cause to stand over, with liberty to amend by bringing the child born since the institution of the suit before the Court (*Leyland* v. *Leyland*, 10 W.R. 149).

At the hearing, a suit was found defective for want of parties, and was ordered to stand over, with liberty to amend by adding parties. When brought on a second time, it was still defective for want of parties. The Court dismissed it against all the defendants (*Williams* v. *Page*, 28 Beav. 148).

Compare R. 311 and ss. 7 and 8 of the Act.

179. If the plaintiff, after the suit is set down to be heard, causes the statement of claim to be dismissed on his own application, or if the suit is called on to be tried or heard in Court and the plaintiff makes default, and by reason thereof the statement of claim is dismissed, such dismissal, unless the Court shall otherwise direct, shall be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.

This R. is taken from Cons. Ord. XXIII., r. 13.

By O. XXXVI., r. 19 (1875), 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; by r. 20 of the same O., 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. These rr. are, it is submitted, imported into the Colonial practice by virtue of R. VI.; but, if not, yet they will probably be adopted by the Court as providing a reasonable practice. Under r. 20 (*supra*), the English Courts will, on a case being shown, readily set aside a judgment obtained *in absentem*, on payment by the party in default of the actual costs of the day when the action was called on and of the application to restore (*Cockle* v. *Joyce*, 7 C.D. 56; *Wright* v. *Clifford*, 26 W.R. 369), including all costs thrown away (*King* v. *Sandeman*, 26 W.R. 569; compare *Burgoine* v *Taylor*, 9 C.D. 1). In one case the solicitor through whose oversight the dismissal was caused had to pay the costs (*Birch* v. *Williams*, 24 W.R. 700). Where the plaintiff's absence at the trial is caused by the default of his solicitor, the time for applying to set aside the judgment will be enlarged (*Michel* v. *Wilson*, 25 W.R. 380; see *Attwood* v. *Chichester*, 3 Q.B.D. 722).

180. Every decree or order for an account of the estate of a testator or intestate shall, unless the Court shall otherwise direct, contain a direction for an inquiry as to what parts (if any) of such estate are outstanding or undisposed of.

This R. is taken from Cons. Ord. XXIII., r. 14.

181. Notice of a decree or order served pursuant to the 6th rule of the 7th section of the Equity Act of 1880 shall be entitled in the suit, and there shall be indorsed a memorandum in the form or to the effect following, that is to say:—"Take notice, that from the time of the service of this notice, you [*or, as the case may be,* the infant, or person of unsound mind] will be bound by the proceedings in the above suit in the same manner as if you [*or* the said infant or person of unsound mind] had been originally made a party to the suit; and that you [*or* the said infant or person of unsound

mind] are at liberty to attend the proceedings under the within mentioned Decree [*or* Order]; and that you [*or* the said infant or person of unsound mind] may, within one month after the service of this notice, apply to the Court to add to the Decree [*or* Order]."

This R. is taken from Cons. Ord. XXIII., r. 20.

See R. 50.

Mere liberty to attend the proceedings does not entitle the parties having the liberty to the costs of their attendance in Chambers as a matter of course. In order to entitle such parties to such costs, the order giving the liberty to attend should expressly provide that they are to be entitled thereto (*Day* v. *Batty*, 21 C.D. 830; and see *Sharp* v. *Lush*, 10 C.D. 468).

182. A memorandum of the service upon any person of notice of the decree in any suit under the 6th Rule of the same section shall be entered in the Equity Office, upon due proof by affidavit of such service.

This R. corresponds with Cons. Ord. XXIII., r. 19.

183. The time within which a party served with notice of a decree under the 6th Rule of the same section may apply to the Court to add to the decree shall be one month after such service, *unless the Court shall extend the time or shall otherwise direct.*

With the exception of the words italicised in the text (which have been added), this R. is taken from Cons. Ord. XXIII., r. 18.

184. Clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission, may at any time be corrected upon summons in Chambers.

Except that a summons is substituted for a motion or petition, this R. corresponds with Cons. Ord. XXIII., r. 21.

185. Where any person who has obtained any decree or order upon condition does not conform or comply with such condition, he shall be considered to have waived or abandoned such decree or order, so far as the same is beneficial to himself; and any other person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the decree or order may in such case warrant, or such proceedings as might have been taken, if no such decree or order had been made, unless the Court shall otherwise direct.

This R. is taken from Cons. Ord. XXIII., r. 22.

ORDERS ON FURTHER DIRECTIONS.

186. When any suit shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, the plaintiff or party having the conduct of the suit shall, after the expiration of eight days and within fourteen days from the filing of the certificate of the Master, set down the suit for hearing on further directions on some day (except by leave of the Court) not earlier than the eighth and not later than the fourteenth day after setting down the same, and the plaintiff or party having conduct of the suit shall forthwith serve notice of the suit being so set down upon the defendants or parties thereto other than the party having the conduct of the suit.

This R. and the next are taken from Cons. Ord. XXI., r. 10.

After the suit is set down for further consideration, notice thereof is forthwith to be served on the other parties to the suit: in the English r. the notice to be given is six days at least.

As to "short matters," see RR. 136, 138.

Where it is proposed to read, upon further consideration, evidence which has been used in Chambers, notice must be given

(*Re Chennell*, 8 C.D. 492; and see *Re Brier*, 26 C.D. 242; and *May* v. *Newton*, 34 C.D. 347).

See RR. 235-244 as to the Master's certificate.

187. If the plaintiff or other party having the conduct of the suit does not set down the suit for hearing on further directions within fourteen days from the filing of the Master's certificate as aforesaid, any defendant or party having the conduct of the suit may set down the same for such hearing within the periods as hereinbefore provided for setting down by the plaintiff, and shall forthwith serve on the plaintiff or party having the conduct of the suit notice thereof.

188. When any suit is so set down for hearing on further directions as aforesaid, the party so setting down the same shall at the same time lodge in the Master's Office short minutes (omitting formal parts) of the decree or order he deems himself entitled to.

PROCESS TO ENFORCE DECREES AND ORDERS.

189. No writ of attachment, sequestration, or assistance, shall be issued without special order, to be obtained on motion with affidavit of the circumstances of the case; but it shall not be necessary to serve the person against whom such writ is sought to be issued with notice of the motion.

So far as regards notice of an application for attachment, this R. differs from the English practice, according to which [O. XLIV., r. 2 (1883)] no writ of attachment is to be issued without leave, to be applied for on notice to the party against whom the attachment is to be issued.

See RR. 20, 177; Daniell's Ch. Pr. 5th ed. 903-938; Seton 4th ed. 1555-1598.

190. If any party directed by an order or decree to pay money (whether money only, or costs only, or money with costs) shall, after due service of such order or decree, neglect to pay the same as thereby directed, the party prosecuting such order or decree shall, at the expiration of the time limited for the performance thereof, be entitled to proceed by writ of *fieri facias* for the recovery of the money thereby payable in the manner directed by the Act of 5 Victoria, No. 9, section 43. Provided nevertheless, that an attachment may issue when the decree or order directs the payment of any money into Court.

A motion for attachment against a defendant, who was bankrupt, for non-payment of moneys into Court in pursuance of an order of the Court, was ordered to stand over until the defendant had obtained his certificate (*Glynn* v. *Gallagher*, 7 N.S.W. W.N. 79).

See R. 177.

This R. is compounded of RR. 3 and 4, and R. 191 is taken from R. 5, Chap. XXIII., of the N.S.W. Cons. Standing RR. of 1863. Under these RR. a writ of attachment could not issue for the non-payment of costs (*per* Windeyer, J., *Breden* v. *Breden*, 1 N.S.W.R. Div. 10; and *per* Owen, C.J. Eq., *Sachs* v. *Beaumont*, 9 N.S.W.R. Eq. 48). The rights of parties and the remedies applied by the Court in ordinary cases, are limited by the practice as laid down in the Rules, and therefore, as the Rules of Court, made in pursuance of the Equity Act of 1880, do not provide for remedy by attachment in case of disobedience of an order for the payment of costs, but provide a remedy of another kind, and as the Court is bound to regulate its practice by those rules which are laid down for the guidance of the Court and of suitors, an order for attachment for disobedience to the order of the Court in not paying costs of an appeal in the suit was discharged (*S.C.*).

191. In respect to the payment of costs, when the amount of such costs shall have been duly taxed and certified, and payment thereof demanded from the party by whom payable

or his solicitor, execution shall be issued under a writ of *fieri facias* upon an affidavit of due demand from the party by whom the same is payable or his solicitor.

192. Every person, not being a party to the suit, who shall have obtained an order, or in whose favour any order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the suit; and every person not being a party to the suit, against whom obedience to any order may be enforced, shall be liable to the same process for disobedience to such order as if he were a party to the suit.

This R. is taken from Cons. Ord. XXIX., r. 2.

193. When any party who by any order or decree is ordered to deliver possession of any lands, tenements, or hereditaments, within a limited time, shall, after due service of such decree or order, refuse or neglect to obey the same, the party prosecuting such order or decree shall (on proof made of demand and refusal to obey the same) be entitled to a writ of assistance or of *habere facias*.

An affidavit in support of an application for a writ of assistance need not show an *existing* non-compliance with the order or decree (*Webster* v. *Taylor*, 18 Jur. 869). The writ will not be granted to aid a receiver in distraining for rent (*White* v. *Phibbs*, S. & Sc. 88).

194. Where any party who by any order or decree is ordered within a limited time to do some act other than to pay money or deliver possession of lands, tenements, and hereditaments shall, after due service of such order or decree, refuse or neglect to obey the same, according to the exigency thereof, the party prosecuting such order or decree shall, at

the expiration of the time so limited, be entitled to a writ of attachment or to a writ for the delivery of any property other than money, lands, tenements, and hereditaments, which shall have been decreed or ordered to be delivered or a writ of sequestration, as the Court may in each case deem to be just.

195. Upon the Sheriff's return of *non est inventus* to an attachment, the party suing out the same, upon affidavit that due diligence has been used in endeavouring to apprehend the person, and stating the facts of such endeavour, shall be entitled to a writ of sequestration.

APPEALS.

196. Any person intending to appeal to the Full Court from any decree or order under s. 70 of the Equity Act of 1880, shall, within fourteen days next after the pronouncing of the same, or within such extended time as the Court below may have allowed, enter and file in the Equity Office a notice of appeal, signed by one counsel, and setting forth therein the grounds and reasons of and for such appeal; which notice shall be in a form similar to the form in Schedule F to these rules; and a copy of such notice of appeal shall, within ten days next after filing the same, or within such extended time as the Court below shall allow, be delivered to each of the Judges of the Supreme Court, and shall within the like time be served upon all parties intended to be served therewith, or their solicitors.

See ss. 70 and 72 of the Act, with the notes.

The signature of the notice of appeal by *one* counsel cannot be dispensed with (*Sempill* v. *Campbell*, 6 S.C.R. Eq. 1). The same ruling doubtless applies to a cross-notice under the next Rule.

An appeal where the notice of appeal was not signed by two counsel as prescribed by the old R. was dismissed with costs (*Reid* v. *Kearney*, 4 N.S.W. W.N. 158).

197. The time within which a respondent shall give notice that he intends upon the hearing of the appeal to contend that the decision of the Court below should be varied or altered shall be fourteen days from service of the appellant's notice of appeal; and such notice shall be signed by one counsel, and shall specially set forth the grounds and reasons for contending that the decision should be varied or altered.

This cross-notice is not compulsory on a respondent (see notes to s. 74 of the Act). Probably, therefore, the direction here given that he *shall* give the notice within the time limited must be construed only as intimating that, if on the hearing of the appeal he contends for a variation or alteration without having given the notice here prescribed, a special order will be made as to his costs, under the concluding words of s. 74, *q.v.* Compare *Ex parte Bishop*, 15 C.D. 400.

198. Every appeal shall hereafter be set down for the first day for the hearing of appeals in Equity which shall happen next after the making of the deposit or giving the security required, unless the Court shall otherwise order; and every appeal not so entered shall be deemed to have been abandoned.

As to obtaining the costs of an abandoned appeal, see notes to s. 70 of the Act.

An appeal from a decree of the Primary Judge will not be heard unless the decree has been drawn up, passed, and entered. Where the plaintiff appealed from a decree dismissing his bill with costs, but omitted to draw up such decree and get it passed and entered, his appeal was struck out of the paper with costs (presumably of the day only), but allowed to be set down for hearing on a subsequent day after the decree had been perfected (*Rattray* v. *Blanchard*, 6 S.C.R. Eq. 94, 100).

199 In appeals to the Full Court, the moving party, unless a Judge otherwise order or allow further time, shall, within twenty-eight days after the filing of the notice of appeal, lodge in the Equity Office seven printed copies of the pleadings (including petition, notice of motion, and summons), the evidence (other than the exhibits), the decree or order appealed from, and the judgment of the Judge on making such decree or order approved by him, and shall, within the like time, also serve a like number of such printed copies on each opposing party, or upon each solicitor, on the record.

The notice of appeal should also be printed.

As to non-compliance with this rule, see *Lion Fire Insurance Co.* v. *Neild*, cited *ante*, p. 92.

200. All documents of which printed copies are, by the preceding rules, ordered to be lodged, shall be printed upon cream-wove white foolscap folio paper, in pica type, leaded, with an inner margin an inch wide, and an outer margin two inches and a half wide.

REFERENCES, INQUIRIES, AND ACCOUNTS.

201. The Court may for the purpose of obtaining the assistance of conveyancing counsel, accountants, merchants, engineers, actuaries, or other scientific persons, under s. 46 of the Equity Act of 1880, refer to any such persons any matter at issue, or arising in the suit, for a report thereon, and may at the time of such reference and from time to time give such directions with relation thereto, as to the Court may seem necessary.

See notes to the section of the Act here referred to, and R. 235.

202. In case of reference to the Master, he shall enter in a book the names and title of every suit or matter referred to him, and the date and description of every step taken before him, and the attendance or non-attendance of the several parties on each of such steps, so that such book may exhibit the whole course of proceedings which is had before him in each particular suit or matter; and in case of reference to the Deputy Registrar, a similar book shall be kept and entered up by him.

203. Proceedings on reference to the Master shall be by summons or appointment. Such summons may be in the form set forth in Schedule G, and such appointment may be in the form set forth in Schedule H to these Rules.

204. At the time when any summons or appointment is obtained, an entry thereof shall be made in a book called the Summons and Appointment Book, stating the date on which the summons is issued or appointment made, the name of the suit or matter, and by what party, and shortly for what purpose, such summons or appointment is obtained.

205. A list of all matters to be heard, and business to be transacted, before the Master, in pursuance of such summons or appointment, shall be made out and kept exhibited in the Office.

206. When a reference has been made by the Court to settle any decree or order, the Master shall direct what proceedings shall be taken thereunder, and the decree or order so settled shall be submitted to the Court for approval.

See ss. 65, 66, 76 of the Act.

207. In directing what proceedings shall be taken under any decree or order the Master may direct what parties are entitled to attend future proceedings, the necessary advertisements, and which of the several proceedings may be properly going on *pari passu*, and the manner in which inquiries and accounts are to be prosecuted, and the evidence to be adduced in support thereof; and if the Master shall think it expedient so to do, a certain time or certain times shall be fixed within which the parties are to take any proceedings, and all such directions may afterwards be added to or varied from time to time.

See the references given under the last R., and as to costs of attendance in Chambers, the notes to R. 181.

208. Where the party entitled to prosecute a decree or order does not proceed therein within the time fixed or limited for that purpose by the Court or Master, or by any Rule for the time being in force in that behalf, then the Court or Master may, upon the production by any other party, interested either as a party to the suit or as one who has come in and established his claim under the decree or order, of the certificate of the Clerk of the Records in the Equity Office, that the party entitled to prosecute such decree or order has not proceeded therein within such time as aforesaid, commit to such other party the further prosecution of the said decree or order, and from thenceforth the party making default shall not be at liberty to attend as prosecutor of the said decree or order, and the certificate shall be indorsed accordingly, and such indorsement shall be signed by the Master.

The prosecution of a decree in a creditor's suit having been taken from the plaintiff, and committed to another creditor, the plaintiff's solicitor was ordered to allow the other creditor's

solicitor to inspect and take copies of all the papers in the cause in his possession (*Bennett* v. *Baxter*, 10 Sim. 417).

209. Where by any decree or order of the Court books, papers or writings are directed to be produced before the Master for the purposes of such decree or order, it shall be in the discretion of the Master to determine what books, papers, or writings are to be produced, and when and for how long they are to be left in the office; or, in case he shall not deem it necessary that such books, papers, or writings should be left in the office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.

210. The Master may of his own motion part with the custody of any exhibits put in evidence in the course of taking any accounts or making any inquiry before him.

211. No more than one summons or appointment shall be taken out for the time during which the Master shall continue or adjourn the proceedings under such summons or appointment.

212. Every summons or appointment before the Master shall be considered peremptory, and in case the Master shall not be attended by the solicitor or a competent person on behalf of the solicitor of any party, the Master shall in such case disallow the usual fee for the solicitor's attendance, and he shall mark such determination in his book.

213. Where some or one, but not all the parties, shall attend the Master at an appointed time, whether the same be fixed by the Master personally or upon summons or

appointment, then the Master shall be at liberty to proceed *ex parte* if he thinks proper, considering the nature of the case, so to do.

214. When the Master has proceeded *ex parte*, such proceeding shall not be reviewed by him unless he shall, upon special application made to him for that purpose by the party who was absent, be satisfied that the party was not guilty of wilful delay or negligence.

Compare R. 216.

215. Upon any application made by any person to the Court in the course of a reference, the Master, if required by the person making the application, shall, in as short a manner as he conveniently can, certify to the Court the several proceedings which shall have been had in the office in the same suit or matter, and the dates thereof.

Compare R. 238.

But, when the Master refuses to carry out a reference, there is no necessity for a certificate of his refusal before applying for an order directing him to proceed (*Hellyer* v. *Druitt*, 7 S.C.R. Eq. 26).

216. Unless ordered by the Court, no summons to review before the Master any proceedings taken before him shall be allowed, except by his permission upon special grounds.

Compare R. 214.

217. All affidavits and evidence which have been previously made or taken and read in Court upon any proceeding in a suit or matter may be used before the Master in all references to and proceedings before him; and, where any other or further evidence may be required, it shall be lawful for the Master to take such evidence as he shall think fit: Provided

that, if it shall be thought necessary to examine a witness who has given evidence at the hearing as to matters upon which he shall have been examined before, then, in case of objection, an order of the Court shall be obtained for that purpose.

The admission of further evidence in Chambers by a party who has already given evidence at the hearing may in many cases be dangerous, as affording him an opportunity of *malâ fide* qualifying or contradicting his previous testimony. See notes to s. 73 of the Act, as to the admission of further evidence on appeals.

Cf. R. 222.

218. Every summons or appointment to proceed upon any matter before the Master shall be issued and served two clear days before the time fixed, and, upon any proceeding whereon evidence is to be given, the Master shall be at liberty to direct, from time to time, that evidence shall be taken separately upon any selected point or points, and the evidence shall be taken accordingly.

219. All proceedings on which the Master's decision shall have to be endorsed shall be left in the office before taking evidence thereon; but they shall not be filed until his decision shall have been endorsed thereon, and no such matters shall be withdrawn, added to, or altered without his authority, or under an order of Court, or by consent.

220. The Master shall be at liberty to direct that service of any summons, document, or other matter formerly used to be served on any person, shall be dispensed with.

It is presumed that the Master will exercise the liberty here given him only in very special circumstances.

221. No affidavit shall ordinarily be made of any summons, appointment, document, or other matter requiring

service thereof, to be shown to the Master; but the Master may take proof thereof when requisite *vivâ voce* or by affidavit; and, where such proof shall have been required, the Master shall make and file, with the proceedings, a note stating that the party has given or failed to give such proof, as the case may be.

In connection with this R., see s. 67 of the Act, empowering the Master to administer oaths.

222. In cases where it shall be necessary for any party to go into evidence subsequently to the hearing, or on any inquiry, account, or reference before the Court or Master, such evidence shall be taken, proceeded with, and closed under the direction of the Court or Master, in the same manner (as nearly as may be) as upon an issue of fact at Common Law, or in such other manner as the Court may in any case specially direct.

See *Re Davies*, 44 C.D. 253.

223. If any party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the Master, on the ground that it is scandalous or irrelevant, or that any examination is insufficient, he shall be at liberty, without any order of reference by the Court, to apply to the Master to examine such matter, and the Master shall have authority to expunge any scandalous or irrelevant matter, and to direct any further examination as he shall see fit.

This Rule differs from Cons. Ord. XXXV., r. 60, under which a party, complaining of scandal, &c., in Chambers, had to take out a summons before the Judge.

The words "or that any examination is insufficient" depend, it is presumed, not on "on the ground that," but on "complain." The R., in fact, gives the Master, on the complaint of a party,

(1) a like power to expunge scandal, &c., in documents used before him to that possessed by the Judge in respect of pleadings or documents used before him (as to which see R. 151), (2) a power to direct a further examination of a witness (compare R. 217), when the examination already had before the Master appears to have been insufficient.

See s. 24 of the Act.

224. After the evidence shall have been closed, the Master shall endorse on the state of facts, account, or other matter whereon evidence shall have been given, his decision thereon; and after such endorsement, no further evidence shall be taken without an order of Court, or by consent; but he shall be at liberty, nevertheless, to alter his decision, and the endorsement thereof, at any time before signing his certificate or report.

Apparently the Master is to be at liberty to alter his decision and endorsement without notice to the parties, thus depriving the required endorsement of all value.

225. Whenever, in any proceeding before the Master, the same solicitor is employed for two or more parties, the Master may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed until such party is so represented.

This R. is substantially equivalent to Cons. Ord. XXXV., r. 21. Compare RR. 39, 306.

226. All references to the Master to appoint guardians, new trustees, or receivers shall be for appointment by the Master in the first instance, unless the Court shall otherwise order; and a certificate by him of such appointment shall be filed in the Equity Office.

227. In order to prevent inconvenient delays, the Master may allow any decree, order, certificate, report, or other document to be engrossed or copied by the solicitor requiring the same, and in such cases the solicitor shall be allowed sixpence per folio for such engrossment or copy, and no office fee shall be payable except, in case of office copies being obtained, the fee payable for certifying the same.

ACCOUNT.

228. All accounting parties shall bring in their accounts, verified by affidavit, in the form of debtor and creditor, and the items on each side are to be numbered consecutively; and any party not satisfied with the account so brought in shall be at liberty to examine the accounting party *vivâ voce*, or upon interrogatories, as the Master shall direct: Provided that, in taking any account directed by any decree or order, all just allowances shall be made, without any direction for that purpose in such decree or order.

This R. is principally compounded of provisions to be found in Cons. Ord. XXXV., r. 33; XXIII., r. 16.

It does not, however, in terms, adopt Cons. Ord. XXXV., r. 34, which runs as follows:—"Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, shall give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner." But it is submitted that, on common principles of fairness, and by virtue of R. VI., this Cons. Ord. and the English practice on the subject should be held applicable here. According to the English practice, an affidavit filed by an accounting party in an administration suit is subject to cross-examination even before his account is vouched (*Meacham* v. *Cooper*, 16 Eq. 102); but such party is entitled to notice of the points on which he is to be cross-examined, in default of which, it would seem, he may

decline to be sworn (*Lord* v. *Lord*, 2 Eq. 605; and see *Glover* v. *Ellison*, 20 W.R. 408), and it is not sufficient to inform him that all the items but one are objected to (*McArthur* v. *Dudgeon*, 15 Eq. 102); or the objecting party may examine the accounting party *vivâ voce* as his own witness, but in this case also he must give notice of the points as to which he wishes to examine (*Wormsley* v. *Sturt*, 22 Beav. 398). The rule as to notice applies to the case of a party seeking to charge by his account, as well as to the case of a merely accounting party (*Bates* v. *Eley*, 1 C.D. 473).

It is not usual for the Court to determine in the first instance what is a just allowance (*per* Lord Eldon, *Brown* v. *De Tastet*, Jac 294).

See the notes to s. 53 of the Act.

229. It shall not be necessary in any charge upon the debtor and creditor account to set forth all the items of receipt, but only the further items with which the accounting party is sought to be charged. No formal discharge by the accounting party shall be required, but the payments set forth in his debtor and creditor account shall be treated as his discharge, and he shall be bound to vouch his payments and establish their propriety, if disputed, in the same manner in all respects as if they had been included in a discharge.

ADMINISTRATION.

230. In suits wherein creditors are permitted or required to come in and prove their debts before the Master no creditor (other than a party to the suit) shall be entitled to attend on any matter not connected with the proof of his own debt, except by direction of the Master or order of the Court. Any creditor so proving shall be entitled to the costs of establishing his debt, and the sum to be allowed for

such costs shall be fixed by the Master, without taxation, at the time the Master allows the debt of such creditor, unless the Master shall think that such costs ought to be taxed in the regular mode. And in all such suits the Master may (if he shall think fit), where the proof is not opposed, or for a sum under £10, allow the debt on the affidavit of the claimant alone, and also, if he shall think fit, without any claim in writing having been brought in: Provided that in such last-mentioned case the allowance or disallowance of the debt shall be endorsed on such affidavit.

Subject as above, it has been frequently laid down that the unsupported testimony of any person on his own behalf cannot, in adjudicating upon claims of creditors and others, be acted on in a Court of Equity. "Though in many cases," said Lord Romilly, M.R., "it may prevent a person from receiving what he is justly entitled to, still the Court cannot act on the mere unsupported testimony of any claimant" (*Grant* v. *Grant*, 34 Beav. 623; see also *Down* v. *Ellis*, 35 Beav. 578; *Rogers* v. *Powell*, 38 L.J. Ch. 648; *Morley* v. *Finney*, 18 W.R. 490; *Whittaker* v. *Whittaker*, 21 C.D. 657; *Finch* v. *Finch*, 23 C.D. 267); but notwithstanding these cases it has been held that there is no absolute rule that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion (*Gandy* v. *Macaulay*, 31 C.D. 1; *Beckett* v. *Ramsdale*, *ibid.* 177; and see *Re Farman*, 57 L.J. Ch. 637).

A decree in Equity in an administration suit binds the parties and is of the same force and effect as if an order to the same effect had been made in the Probate Jurisdiction (Probate Act, 54 Vict., No. 25, s. 62).

Under s. 19 of 16 Vict., No. 3, the Court, on the application of the executors or administrators, may by order of course direct a reference to the Master to take an account of the debts and liabilities of deceased persons.

231. Where a decree or order is made directing an account of debts, claims, or liabilities, or an enquiry for next of kin or other unascertained persons, the Master shall cause

advertisements for the same to be inserted in the Government *Gazette* and other newspapers, as he may think fit, and fix a peremptory day for that purpose; and, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement shall be excluded from the benefit of the decree or order.

But by favour of the Court a claimant may be admitted to come in and establish his claim after the expiration of the time fixed by advertisement, and even after certificate (see Walker & Elgood's "Administration Actions," ch. ix.).

232. Where a decree or order is made directing an account of the debts of a deceased person, interest shall, unless otherwise ordered, be computed on such debts, as to such of them as carry interest, after the rate they respectively carry, and, as to all others, after the rate of 5 per cent. per annum, unless the Court shall otherwise order, from the date of the decree or order.

Except as to the rate of interest, this R. corresponds with Cons. Ord. XLII., r. 9.

If the debt accrues due after decree, interest will only run from the time of proof (*Lainson* v. *Lainson*, 18 Beav. 7).

As to the application of proceeds of security by a secured creditor, see *Re Talbott*, 39 C.D. 567.

233. A creditor whose debt does not carry interest, who comes in and establishes the same under a decree or order, shall be entitled to interest upon his debt after the rate aforesaid from the date of the decree or order out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest on such debts as by law carry interest.

This corresponds with Cons. Ord. XLII., r. 10.

234. Where a decree or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 per cent. per annum from the end of one year after the testator's death, unless the Court shall otherwise order, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will.

This corresponds with Cons. Ord. XLII., r. 11.

As to an implied direction by a testator as to payment of interest on a legacy, arising out of a direction to apply income in maintenance, see *Re Richards*, 8 Eq. 119, and cases there cited.

And see *Re Blachford*, 27 C.D. 676; *Re Waters*, 42 C.D. 517; *Re Bignold*, W.N. (1890) 164.

CERTIFICATE OR REPORT.

235. The certificate or report of the Master upon or in relation to any matter referred to him may be in the form set forth in Schedule I to these Rules, with such variations as the circumstances of the case may require; and, when prepared and settled, it shall be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the Master shall require, and shall then be signed by the Master at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate or report can be drawn and copied in the Master's office whilst the parties are present before the Master, the same shall be then completed and signed by him without any adjournment.

This R. is taken from Cons. Ord. XXXV., r. 48.

As to the form of the certificate, see further section 68 of the Act. The Master may not refer the whole of the accounts to an accountant, and then adopt his report as his own certificate (*Hill* v. *King*, 9 Jur. N.S. 527).

The Court on further consideration of the Master's certificate can deal with any costs incurred in the reference on which such certificate was made, but when an application had been made to the Primary Judge, who, without reserving costs, referred the matter to the Full Court, and the judgment of the Full Court was silent as to costs, the Court of Equity refused to make any order. One of the parties appealed to the Privy Council, and the appeal was dismissed for want of prosecution. *Held*, that the Privy Council alone had power to deal with the costs occasioned by such appeal (*In the will of James Underwood, Felton's Petition*, 10 N.S.W.R. Eq. 227).

See also notes to s. 69 of the Act.

236. No certificate or report to be made by the Master shall, unless the special circumstances of the case so require, set out the decree or order, or any documents or evidence or reasons; but shall refer to the decree or order, documents, and evidence, or particular paragraphs thereof, so that it may appear thereby to the Court upon what the result stated in such report or certificate is founded.

This R. is taken from Cons. Ord. XXXV., r. 47.

237. The Master shall be at liberty in all cases to state special circumstances in his certificate or report.

See notes to s. 68 of the Act.

238. In all matters referred to him the Master shall be at liberty, upon the application of any party interested, or without such application, to make a separate certificate or report from time to time as to him shall seem expedient, the costs of such separate certificate or report to be in the discretion of the Court.

Certificates are either general or separate. General certificates embrace the results of all the proceedings taken at Chambers,

under the decree or order. A separate certificate comprises the result of only some one or more of them. Separate certificates are made in cases where it is not desirable to wait till the whole proceedings are completed (Daniell's Ch. P. 5th ed. 1215). See R. 215.

239. Where the Master shall make a separate certificate or report of debts or legacies, he shall be at liberty to certify, as he thinks fit, with respect to the state of the assets; and every person interested shall thereupon be at liberty to apply to the Court, as he shall be advised.

240. The time within which any party is to be at liberty to take the opinion of the Court upon any proceedings which shall have been concluded, but as to which the certificate or report of the Master shall not have been adopted by the Court, shall be four clear days after the same shall have been signed by the Master.

This R. is taken from Cons. Ord. XXXV., r. 49.

241. Any party desiring to take the opinion of the Court as mentioned in the last preceding Rule, shall within four clear days after the certificate or report shall have been signed by the Master obtain a summons for such purpose.

This R. is taken from Cons. Ord. XXXV., r. 50.

242. At the expiration of four clear days after the certificate or report shall have been signed by the Master, if no party has in the meantime obtained a summons to take the opinion of the Court thereon, the Master shall submit the certificate to the Court for approval; and the Judge may thereupon, if he approve the same, testify his adoption thereof as follows:—"Approved this day of "; and thereupon the certificate or report shall be filed.

This R. corresponds with Cons. Ord. XXXV., r. 51.

243. The time within which an application may be made, by summons or motion, to discharge or vary any certificate which has been signed and adopted by the Judge in chambers, shall be eight clear days after the filing of such certificate.

This R. is taken from Cons. Ord. XXXV., r. 52.

The eight days run during vacations (*Ware* v. *Watson*, 7 De G. M. & G. 739). It is sufficient if a summons to vary be taken out within the eight days, although not returnable within that period (*Wycherley* v. *Barnard*, Johns, 41). But the practice has been otherwise laid down where the application is by motion ; in that case, it is not enough that notice of motion was served within the eight days, if the motion be not made until after their expiration (*Henshaw* v. *Angell*, 9 Eq. 451) ; where, however, it is necessary or advisable to proceed by motion, and it is impossible to move on any motion day within the eight days, the Court will give special leave to serve notice of motion for some day within the eight days not a motion day (*Cross* v. *Maltby*, 8 W.R. 646).

Leave was given to move to vary the certificate, though application was not made until after the expiration of the eight days, where the omission to apply arose from pressure of business and mistake on the part of the solicitor, and where there was error apparent on the certificate (*Briant* v. *Tibbut*, 17 W.R. 274 ; *Ashton* v. *Wood*, 8 De G.M. & G. 698 ; *Purcell* v. *Manning*, 3 Jur. N.S. 1070 ; and see *infra*) ; and in a recent case the Court of Appeal, notwithstanding lapse of time, varied the certificate (in which was a manifest error), and the order, on further consideration, so far as it proceeded on the erroneous finding, the fund not having been distributed (*Berry* v. *Gaukroger*, W.N. 1882, 64). So leave may be given after the eight days to take out a summons to vary ; but after the eight days have elapsed, the certificate will not be discharged or varied, except on special grounds (*Howell* v. *Keightley*, 8 De G. M. & G. 525), nor while a decree containing consequential directions founded on it stands (*Turner* v. *Turner*, 1 Sw. 154).

If no summons has been taken out to refer the certificate to the Judge (R. 239), and no summons has been taken out or motion made to vary it, the certificate cannot be objected to (*Lambe* v. *Orton*, 8 W.R. 111 ; *Smith* v. *Armstrong*, 6 De G. M. & G. 150 ;

Aspinall v. *Bourne*, 29 Beav. 462; and see *Leigh* v. *Turner*, 14 W.R. 361, and *Re Brier*, 26 C.D. 238. Where, however, there is error *apparent* in a decree or certificate, the Court of its own motion may, and indeed is bound, to set it right (*Cradock* v. *Owen*, 2 Sm. & G. 241, 247; *Adams* v. *Claxton*, 6 Ves. 226; *Richardson* v. *Ward*, 13 Beav. 111).

Applications to vary certificates are usually made by summons, and are almost always adjourned, so as to come on with the further consideration of the suit.

A creditor who has proved in an administration suit has a right to apply to vary the certificate (*Wilson* v. *Wilson*, 2 Moll. 328).

An affidavit which was not used before the Master cannot generally be used on an application to vary his certificate (*Davis* v. *Davis*, 2 Atk. 21; *Pierce* v. *Hammond*, 10 L.T. 261; *Baylis* v. *Watkins*, 9 Jur. N.S. 570); nor is cross-examination then allowed on affidavits which were used before him (*Dawkins* v. *Morton*, 10 W.R. 339); and *quære* whether on further consideration affidavits referred to in the certificate can be read when there is no summons to vary (*per Fry*, L.J., *Re Brier*, 26 C.D. 242).

244. In cases where any computation of interest, or the apportionment of any ascertained fund, is directed by the Court to be made and acted upon, it may be acted upon after four clear days from the filing of the report or certificate thereof.

CONVEYANCE—SETTLING OF.

245. When the Master is ordered to settle any conveyance, in case the parties differ about the same, a statement in writing of the required alterations shall be served by the party objecting to the draft on the party by whom the same was prepared within eight days after the service of notice of leaving such draft with the Master.

COSTS.

246. Whenever it shall appear to the Master that the costs, or part of the costs, of any attendance, or of any proof before him, or costs incurred through any non-attendance or review, ought not to abide the general event of the reference to him, but that it is just and reasonable that the same should be paid specially by any party or claimant, it shall be lawful for him, in his discretion, to award the payment of such costs, or part thereof, or a fixed sum in lieu of such costs, as, and by whom, he shall in that behalf direct.

SALE BY COURT.

247. Where an order is made directing any property to be sold, the same shall, unless otherwise ordered, be sold with the approbation of the Master to the best purchaser that can be got for the same, to be allowed by him and all proper parties are to join therein, as the Master shall direct.

And see "Settled Estates Act," 1886 (50 Vict., No. 20), s. 13, and R. 36 thereunder.

248. When any property is ordered to be sold by or by the direction of the Master, he shall by memorandum in writing without any proposal being laid before him, appoint an auctioneer to sell such property, who shall proceed to the sale in the usual manner, and be paid a percentage or stated sum, to be fixed by the Master at the time of such appointment; and such auctioneer shall immediately after he shall have received any deposit pay over the same to the Master to the credit of the suit in which the order was made, and shall state what he has done in respect of the sale, upon affidavit to be filed in the Office.

249. No order shall be necessary for allowing any party to the record to bid at such sale, if he would be allowed by law to bid at the same sale in case it had not been under an order of Court.

This R. seems to abolish by implication the old and wholesome rule of practice (*Domville* v. *Berrington*, 2 Y. & C. Ex. 723; *Sidny* v. *Ranger*, 12 Sim. 118; *Ex parte McGregor*, 4 De G. & Sm. 603) that leave to bid will not, except under special circumstances, be given to the party conducting a sale directed by the Court.

RECEIVERS.

250. Unless otherwise ordered, where an order is made appointing a receiver, the person to be appointed shall first give security, to be allowed by the Master, and to be taken before himself, or, if necessary, before a commissioner in the country, duly to account for the rents and profits for the receipt of which he is appointed, at such periods as the Court or Master shall appoint, and to pay the same as the Court shall direct, or, as the case may be, to be answerable for what he shall receive in respect of the personal estate for the getting in and collection of which he is to be appointed, and to account for and pay the same as the Court shall direct. And the person so to be appointed shall be allowed by the Court a proper salary or commission for his care and pains in receiving such rents and profits, or, as the case may be, shall have an allowance made to him in respect of his managing and collecting such estate.

This R. is taken with immaterial alterations from Cons. Ord. XXIV., r. 1.

The security usually required is the recognisance of the receiver, with two sureties. The security is usually for double the

annual rental; though two sureties are usual, the number may be increased, to reduce the amount of each. The sureties must be resident within the jurisdiction, and upon any event, such as death or bankruptcy, happening, which would prevent the recognisance being effectually put in force against them, an order will be made at Chambers on summons, directing the receiver to give a new security. After reference, the Court will not dispense with the usual security, even with the consent of the parties interested. If the parties desire it, they should nominate of their own authority, and then apply that the receiver appointed by themselves shall not be required to give security; and the parties so applying must be *sui juris* (Seton 4th ed. 426).

Part of the outstanding estate of an intestate, which a receiver was directed to get in, consisted of bank shares of great value, registered in the intestate's name. As it appeared that great difficulty would be experienced in finding sureties to enter into the receiver's recognisance, by reason of the great value of the shares, the administratrix was authorised to get such shares transferred into her own name, and ordered to transfer them, together with others then registered in her own name, into the name of the Master in Equity, the receiver to give security and be accountable in respect of such shares only for what he should receive of the dividends (*Malcolm* v. *Harris*, 7 S.C.R. Eq. 66).

The usual allowance (in England) is 5 per cent. on the gross rental of the estates; but, where the rental is very considerable, a percentage at a lower rate is allowed, or a fixed salary. If there is any special difficulty in collecting the rents, the allowance is increased; if facility, diminished. A receiver may be entitled to an allowance beyond his salary for extraordinary trouble and expenses, but not without previous order (Seton, 4th ed. 425).

See 26 Vict., No. 12, ss. 53, 57.

And see notes to s. 57 of the Act; and R. 226 as to references to the Master to appoint receivers.

Cf. s. 13 (2) of the Bankruptcy Act, 1887.

251. Unless otherwise ordered, when a receiver or guardian shall have been appointed, the Master shall fix the days

upon which the receiver or guardian shall (annually or at longer or shorter periods) leave and pass his accounts, *and shall also afterwards be at liberty to extend or diminish the same*, and on the passing of such accounts the Master shall fix the days upon which such receiver or guardian shall pay such sums as shall be found due and shall be directed to be paid. And with respect to such receivers or guardians as shall neglect to leave and pass their accounts, and pay the balances thereof at the time so to be fixed for that purpose as aforesaid, the Master shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries or commissions therein claimed by such receivers or guardians, but also charge them with interest after the rate of £8 per cent. per annum upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers or guardians.

With the exception of the words italicised (which, however, are probably superfluous, having regard to R. 296), this R. is taken from Cons. Ord. XXIV., r. 2, save that the rate of interest chargeable by the English r. against defaulting receivers is 5 per cent.

Where the default was made by *executors* of a receiver, it was held that they ought to be charged with interest at the rate, not of 5 per cent., but of 4 per cent. only (*Clements* v. *Beresford*, 10 Jur. 771).

252. Whenever the accounts of any guardian or receiver are not brought in to the Master's office, or are not proceeded with and completed, in the manner and within the time respectively prescribed in that behalf,—or whenever any party or solicitor has omitted duly to prosecute and enforce the matter, or to bring the case before the Court within a time limited by the Master, for that purpose,—the

Master may commit to the Crown Solicitor the conduct of such matter, and direct him to bring the case before the Court, or may certify the above facts to the Court.

This R. is taken from the RR. as to proceedings under the Statutory Jurisdiction (4th July, 1863, Chap. XXXI., R. 10).

253. Receivers of rents and profits of lands, now or hereafter appointed, shall, when the yearly value of any such land shall not exceed one hundred pounds, have power to let the land, with the approval of the Master: Provided that any such letting shall be void if the Court shall make an order to that effect at any time before the expiration of one month.

254. When the value shall not exceed the rate of fifty pounds yearly, receivers shall have power to let the land from year to year, or for a less period, without the approbation of the Master previously signified: Provided that every such case shall be subject to the Master's control as to future lettings, in case of any complaint made to him.

The joint result of RR. 253 and 254 seems to be as follows:— As to lands worth a rental not exceeding £50 a year, a receiver may, of his own motion, let it from year to year (*quære* for a year) or for a less period, subject to the Master's control as to any letting after the first; and, with the approval of the Master, may let the same land for a longer period, subject to avoidance by the Court within a month. As to lands worth a rental exceeding £50 but not exceeding £100 a year, a receiver can only let it with the approval of the Master, but with such approval may let it for a term of any length, subject to avoidance by the Court within a month. It is obvious that in the case of lands worth not more than £50 a year, which the receiver proposes to let for a longer term than from year to year (*quære* a year), and in the case of lands worth from £50 to £100 a year, which he proposes to let for any period whatever, an intending lessee cannot safely accept a lease

unless and until a month has passed since the Master's approval of the proposed lease, and the Court has not in the meanwhile put its veto upon it.

It is curious that the RR. make no express provision for the letting by a receiver of lands worth more than £100 a year. It is presumed that he may let them with the approval of the Master, but in this case there is no power of veto in the Court, the result being that the Court would scrutinise more closely the letting of lands worth less than £100 a year, than the letting of lands of a greater rental value. The difficulty might be avoided by the Master always referring to the Judge applications by a receiver to grant leases of land worth more than £100 a year; and perhaps this is what was contemplated.

255. In no case within either of the two last preceding Rules shall any certificate or report to the Court be made of any letting: Provided that the Master may in all cases direct such notices to be given of any proceeding under these Rules as he may think fit.

256. Receivers may, without the previous direction of the Master, lay out in repairing the property, when necessary, any sum not exceeding fifty pounds in one year, and the Master in passing their accounts shall allow the same, if he shall be of opinion that it has been expended for the benefit of the persons interested in the property.

STOP ORDERS.

257. Where any stock, funds, shares, securities, or moneys are standing in Court in trust in, or to the general credit of, any suit or matter, or to the account of any class of persons, and an order is made to prevent the transfer or payment of such stock, funds, shares, securities, or moneys, or any part thereof, without notice to the assignee of any person entitled

in expectancy, or otherwise, to any share or portion of such stock, funds, shares, securities, or moneys, the person by whom any such order shall be obtained, or the said share or portion of the stock, funds, shares, securities, or moneys, affected by such order shall be liable, at the discretion of the Court, to pay any costs, charges, and expenses which, by reason of any such order having been obtained, shall be occasioned to any party to the suit or matter, or any person interested in any such stock, funds, shares, securities, or moneys.

This R. is taken from Cons. Ord. XXVI., r. 1.

258. Any person making a motion or presenting a petition for any such order as aforesaid shall not be required to serve notice of such motion or petition upon the parties to the suit, or upon the persons interested in such part of the stock, funds, shares, securities, or moneys, as are not sought to be affected by any such order.

This R. is the same as Cons. Ord. XXVI., r. 2, except that the English r. runs:—"Any person presenting a petition *or taking out a summons*," &c. Accordingly, in the English practice, it is now settled that in all cases, even where the assignor opposes the application, though formerly it was by petition, must be by summons (*Wrench* v. *Wynne*, 17 W.R. 198; *Walsh* v. *Wason*, 22 W.R. 676); the costs of a petition will not be allowed (*Walsh* v. *Wason*), and the petitioner may be ordered to pay the difference between the costs of obtaining the order in Chambers and the costs of the petition (*Wellesley* v. *Mornington*, 41 L.J. Ch. 776; Seton 4th ed. 303). But the different wording of R. 258 indicates that *here* the application must be by either petition or motion, and not by summons; and the difference in practice is reasonable, for summonses being heard here by the Judge personally in the first instance, and counsel being therefore usually employed, there is by no means the same difference here as in England between the expense of proceedings had in Court and in Chambers.

And see generally Daniell's Ch. P. 5th ed. 1543-7; Seton 4th ed. 303.

MONEY IN COURT AND SECURITIES.

259. All moneys paid into Court, in any estate, cause, or matter in Equity, shall be forthwith deposited in such Bank as may for the time being be named by the Government of the Colony, in that behalf, to the credit of the Colonial Treasurer, at the rate of interest as arranged between the Court and the Colonial Treasurer: Provided that the Court may in its discretion invest any of the aforesaid moneys in Government debentures or stock of this or any other of the Australasian Colonies, or on real security in this Colony, or by deposit at interest in any incorporated Bank carrying on the business of banking in Sydney which shall have been approved by the said Court: Provided that no such deposit shall be made in any bank in which the liability of the shareholders thereof is limited to the amount of their shares in the subscribed capital, or wherein there shall not exist a further liability to not less than the like amount.

This R. is compounded of R.G. 30th March, 1862, R.G. 2nd Feb., 1883, R. 2, and R. 16 of Chapter XXXI. of the Cons. Standing RR. (N.S.W.) from July 4th, 1863—Nov. 30th, 1874; and see 26 Vict., No. 12, s. 34.

See R. 171.

260. Separate accounts shall be kept by the Master of all the estates, causes, or matters in respect of which any moneys shall have been paid to the credit of the Treasury, and of all payments thereout, whether for principal or interest.

261. The Master shall, in the months of January, April, July, and October, exhibit to the Primary Judge, and file

in the Equity Office of this Court, accounts of all payments received by him, and by him paid into the said Bank to the credit of the Treasury, and of all payments made thereout by him within the preceding period of three months; and every such account shall also show the balance to the credit of each account and the balance in the Treasury or Bank to the credit of the Court at the commencement and termination respectively at such period. A certified copy of such account shall be forwarded to the Colonial Treasury for safe custody.

262. For every sum so deposited duplicate receipts shall be required of and given by the Colonial Treasurer, or by some Officer of the Treasury or Bank duly authorized by him on that behalf, of which one receipt shall be kept by the Officer making the payment, and the other shall be forthwith lodged in the Equity Office and entered in a book to be kept for that purpose.

263. No money so deposited shall be withdrawn or paid from the Treasury or the said Bank on its account otherwise than under the authority of a decree or order of the Court. Provided that the said Bank or the Colonial Treasurer shall not be bound to inquire whether any such decree or order has been made, or whether it sufficiently authorizes such withdrawal or payment, but shall make payments under orders signed as hereinafter next mentioned.

264. No such withdrawal or payment shall be made by the said Bank or the Colonial Treasurer without an order signed by the Master or in his absence or illness by the Deputy-Registrar, or Chief Clerk respectively, and countersigned by the Accountant in Equity or in his absence by the assistant Accountant.

265. Every such order shall be payable to order, but shall mention thereon the name of the cause, matter, or estate, in which or in respect of which the same is drawn: Provided that the said Bank or Colonial Treasurer shall not be bound to inquire into the correctness of such particulars.

These RR. are taken from R.G., 2nd Feb., 1883, RR. 3-8, omitting the references to Lunacy, which is provided for under the Lunacy RR. of the 7th July, 1887.

266. Where the party to whom money exceeding £10 is ordered to be paid out of Court does not request payment thereof through the post, as in rule 273, hereafter mentioned, or attend the Equity Office in person, the power of attorney to receive the same must be in accordance with the provisions of the Act 17 Vict., No. 22. Provided that a common power of attorney without any declaration shall suffice where the money is paid on the day of the execution of such common power of attorney.

267. When any person is entitled under a decree or order to receive a dividend or any other periodical payments from the Master's Office, and the Master requires evidence of life or of the fulfilment of any conditions affecting such payments, such evidence may be furnished by statutory declaration or affidavit to be filed in the Master's office.

This R. is compounded of rr. 95, 96 of "The Supreme Court Funds Rules, 1884" (Eng.).

See RR. 174, 273 (*c*).

268. Any order or other document by which payment of money is effected, when endorsed or signed by the payee or his lawful attorney, shall be a good discharge to the Master for the amount therein expressed. Provided that nothing

herein contained shall prevent the Master from demanding a receipt for any payment made by him.

This R. corresponds with r. 50 of the same RR.

269. When money, debentures, or other securities in Court are by any decree (*or* order) directed to be paid, transferred, or delivered to any person (except he be entitled thereto as a trustee, executor, or administrator, or otherwise than in his own right or for his own use), such money, debentures, or other security, or any portion thereof, for the time being, remaining unpaid, or untransferred, or undelivered, may unless the decree (*or* order) otherwise directs, on proof of the death of such person, whether on or after, or in the case of payment directed to be made to creditors as such before the date of such decree (*or* order), be paid, or transferred, or delivered to the legal representatives of such deceased person, or to the survivors of them. If the Master is satisfied that no administration has been taken out to any such deceased person who has died intestate, and whose assets do not exceed the value of £100, including the amount of the money, debentures, or other securities directed to be so paid, transferred, or delivered to him, such money, debentures, or other securities may be paid, transferred, or delivered to the Curator of Intestate Estates to be administered by him.

This R. is taken from r. 62 of "The S.C. Funds Rules, 1884," as amended in 1886.

See RR. 173, 176.

270. When money in Court is by any decree (*or* order) directed to be paid to any persons described in the decree (*or* order), or in any certificate of the Master as co-partners, such money may be paid to any one or more of such co-partners, or to the survivor of them.

271. When money, debentures, or other securities in Court are by any decree (*or* order) directed to be paid, transferred, or delivered to any persons as legal representatives, such money, debentures, or other securities, or any portion thereof for the time being remaining unpaid, untransferred, or undelivered, may, upon proof to the satisfaction of the Master of the death of any of such representatives, whether on or after the date of the decree (*or* order) directing such payment, transfer, or delivery, be paid, transferred, or delivered to the survivors or survivor of them.

272. No money, debentures, or other securities shall under the last two rules be paid, transferred, or delivered out of Court to the legal personal representatives of any person under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the date of the decree (*or* order) directing such payment, transfer, or delivery, or in case such money, debentures, or other securities consist of interest or dividends from the date of the last receipt of such interest or dividends under such decree (*or* order).

These RR. are taken from "The S.C. Funds Rules, 1884," rr. 63-65.

See RR. 173, 176.

PAYMENTS TO BE MADE BY POST.

273. *(a)* When money (other than a periodical payment as in part *(c)* of this rule mentioned) is by a decree (*or* order) directed to be paid to a person who has an account at a Bank in this Colony, the Master shall remit the same by post by registered letter,

upon receiving a request to that effect, together with a receipt for such payment in the prescribed form, and signed by such person and attested by a Justice of the Peace, a Commissioner for Affidavits, or a Notary Public. The order for such payment will be sent to the address stated in the request, and will be specially crossed to his account at the named Bank, and will not be negotiable.

(b) When money not exceeding £500 (other than a periodical payment in part *(c)* of this rule mentioned) is by a decree (*or* order) directed to be paid to a person residing in this Colony who has not an account at a Bank in this Colony, the Master shall remit the same by post by registered letter to such person upon receiving a request to that effect, together with a receipt for such payment, both in the prescribed form, and signed by such person and attested in the same manner required in the preceding part of this rule *(a)*. The order for payment will be sent to the address stated in the request, and will be crossed so as to be payable only through a Bank.

(c) Any person residing within this Colony entitled under a decree (*or* order) to any interest, dividend, annuity, or other periodical payment may send to the Master a request in the prescribed form for the remittance of the same by post, from time to time, as it accrues due. Such request to be signed by such person and attested in the manner prescribed in the preceding parts of this rule *(a* and *b)*, and the Master may then afterwards, as such periodical payment falls due (and upon receiving a receipt

for each such payment together with evidence of life or of the fulfilments of any conditions of payment as referred to in rule 267) remit the same by post to the address stated in the request. The order for payment will be crossed so as to be payable only through a Bank.

Provided that the Master may refuse to make a remittance under this rule in any case in which he sees reason for so doing. And provided also that the transmission by post, upon a request, of any crossed order for payment shall be at the sole risk of the person at whose request it is sent.

Requests and receipts for payment under this rule, and notification of changes of addresses of persons entitled to periodical payments shall be in such form as may from time to time be prescribed by the Master with the approval of the Colonial Treasurer. The forms in Schedules L. M. N. have been duly settled by the Master and approved by the Colonial Treasurer.

This R. is taken *mutatis mutandis* from "The S.C. Funds Rules, 1884," r. 48, as amended in 1886.

* PROCEEDINGS UNDER THE STATUTORY JURISDICTION.

I.—*Trustee Relief and Security Act, 21 Vict., No. 7.*

274. Any trustee desiring to pay money to the account of the Master, or transfer or deposit stock or securities, into

[* The Rules relating to proceedings under the statutory jurisdiction 4th July, 1863, Chapter XXXI., and the Rules 1 to 7 inclusive of the 1st August, 1865, not rescinded by R. 1 of the Cons. Standing RR. of 29th June, 1883, have been consolidated in these RR.]

or in the Master's name, under the Statute 21 Vict., No. 7, shall file an affidavit entitled in the matter of the trust and in the matter of the Act, and setting forth—

(1) His own name and address.

(2) The place where he is to be served with any petition or any notice of any proceeding or order of the Court relating to the trust fund.

(3) The amount of money, stock, or securities which he proposes to pay, or transfer into, or deposit in Court to the credit of the trust.

(4) A short description of the trust and of the instrument creating it.

(5) The names of the persons interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.

(6) The submission of the trustee to answer all such inquiries relating to the application of the money, stock, or securities paid in, transferred or deposited under the Act, as the Court may think proper to direct.

See 21 Vict., No. 7, ss. 1, 5.

275. The Master, on production of the affidavit, shall give the necessary directions for payment, transfer, or deposit, and place the money, stock, or securities to the account of the particular trust; and such payment, transfer, or deposit shall be certified in the usual manner.

See 21 Vict., No. 7, s. 1, as to the Master's certificate.

276. The Trustee having made the payment, transfer, or deposit, shall forthwith give notice thereof to the several persons named in his affidavit as interested in or entitled to the fund.

277. Such persons, or any of them, or the Trustee, may apply by petition or motion, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends, or interest thereof.

See s. 3, *ib.*

278. The Trustees shall be served with notice of any application made to the Court respecting the fund, or the dividends or interest thereof, by any person interested therein or entitled thereto.

279. The persons interested in or entitled to the fund shall be served with notice of any application made by the Trustee to the Court, respecting the fund in Court, or the interest or dividends thereof.

280. No petition shall be set down to be heard, and no motion made, until the petitioner or applicant has first named in his petition, or notice of motion, a place where he may be served with any petition or notice of any proceeding or order of the Court, relating to the trust fund.

281. Petitions presented, and notices of motions served and affidavits filed, and all proceedings had under the said Act, shall be entitled in the matter of the particular trust, and in the matter of the Act 21 Victoria, No. 7.

282. Any order made, or direction given, by the Master in such matters may be discharged or varied by the Court; and the costs in every such matter shall be in the discretion of the Court, and shall be paid by such person or out of such fund as the Court shall direct.

II.—*Act 26 Vict., No. 12.*

283. All petitions, summonses, statements, affidavits, and other proceedings under the 30th section of the last-mentioned Act, shall be intituled in the matter of the particular trust, will, or administration, and in the matter of the Act 26 Victoria, No. 12; and every such petition or statement shall state the facts concisely, and shall be divided into paragraphs numbered consecutively; and every summons shall, as nearly as may be, and except as to its title, be similar to the form set out in Schedule K.

284. At the time when any such summons is issued, the statement upon which the same is grounded shall be filed in the Master's office.

285. Every such petition or summons shall be served eight clear days before the hearing thereof, unless the person served shall consent to a shorter time.

286. The opinion, advice, or direction of the Judge shall be passed and entered, and remain of record in the same manner as any order made by the Court or Judge; and the same shall be termed "a judicial opinion," or "judicial advice," or "judicial direction," as the case may be.

No affidavits should be filed in support of a petition under s. 30 of 26 Vict., No. 12; where such affidavits were filed, the Court refused to allow the costs of them (*Re Cox's will*, 11 N.S.W.R. Eq. 124, where it was laid down that the Equity Court has a wider discretion than the English Courts in granting remuneration to trustees, and will do so on petition under this Act, where it is clearly for the benefit of the estate).

And see 16 Vict., No. 3, s. 1, *et sqq.*, as to stating special case for the opinion of the Court.

III.—*Charter of Justice, s. 18, and 11 Vict., No. 27.*

287. Upon every application for the appointment of a guardian to an infant, or for an allowance for his maintenance, the evidence to support the same must show the following particulars:—

1. The age of the infant.
2. The nature and amount of his property and income.
3. Where and under whose charge the infant generally resides, and at whose expense he is maintained.
4. What relations he has.
5. The position in life of such infant and of his parents.
6. The residence, age, and position in life of the proposed guardian.
7. Any other circumstances showing his fitness for that office.
8. The written consent of such proposed guardian to act.

288. Unless special circumstances require a reference for such appointment and allowance, the costs of an application to the Court for a direct appointment only will be allowed.

The Act 11 Vict., No. 27, s. 2, enacts that the Primary Judge shall have full power to hear and determine all matters relating to the appointment of guardians of infants and their estates.

The jurisdiction will be exercised in a summary way upon summons in Chambers, see s. 62 of the Equity Act.

With regard to a reference by the Judge to the Master in Equity before making the order, *cf.* R. 293.

IV.—*Act 20 Vict., No. 2.*

289. Upon any application to obtain the sanction of the Court to an infant's making a settlement on marriage under the Act 20 Vict., No. 2, evidence must be produced in support of the same, showing the following particulars :—

1. The age of the infant.
2. Whether he has any parent or guardian.
3. With whom and under whose care he is living; and if no parent or guardian, what near relations such infant has.
4. The position in life of the infant and of his parents.
5. What his property consists of.
6. The age and position in life of the person whom such infant proposes to marry.
7. What property and income such person has.
8. The fitness of the proposed trustees under the settlement.
9. Their written consent to act.

The sanction of the Court may be obtained upon petition presented to the Primary Judge by the infant or his or her guardian in a summary way (20 Vict., No. 2, ss. 3, 5).

290. The heads also of the proposed settlement must be specified in the petition, or in some affidavit in support of such application.

291. These regulations apply severally to all infants, female as well as male.

The Act does not apply to male infants under the age of twenty years, or to female infants under the age of seventeen years, s. 4.

V.—*Acts 16 Vict., No. 19, 17 Vict., No. 4.*

292. Upon any application by petition, for the appointment of new trustees under the Trustee Acts of 1852 and 1853, the evidence to support the same must show the following particulars:—

1. The nature of the trusts still subsisting.
2. The nature and value of the property subject to such trusts.
3. The persons beneficially entitled.
4. The fitness of the proposed new trustees.
5. Their written consent to act.

See 16 Vict., No. 19, ss. 30-40; 17 Vict., No. 4, ss. 8-10.

293. Unless special circumstances require a reference for such appointment, the costs of an application to the Court for a direct appointment only will be allowed.

See 16 Vict., No. 19, ss. 36-40, 48.

RULES AS TO TIME.

294. Where time is prescribed by these rules to any party to a suit for doing any act, he shall be allowed half as many more days if he resides above 100 miles from Sydney, and twice the stated number of days if he resides above 200 miles from Sydney: Provided that the Court may enlarge or abridge such time on sufficient cause shown.

295. Service of all writs, notices, summonses, orders, documents, and other proceedings not requiring personal

service shall, unless otherwise ordered, be made before half-past 4 o'clock in the afternoon, except on Saturday, when it shall be made before 1 o'clock in the afternoon.

296. Where the Master is authorised to fix the time for doing any act, he may enlarge or abridge the time so fixed on sufficient cause shown.

The power of abridgment given by this R. will, it is presumed, be cautiously exercised.

297. Where any time from or after any date or event is appointed or allowed for doing any act or taking any proceeding, and such time is not limited by hours, the computations of such time shall not include the day of such date or of the happening of such event, but shall commence at the beginning of the next following day, and the act or proceeding shall be done or taken at the latest on the last day of such time according to such computation.

298. Where the time for doing any act or taking any proceeding is limited by months, such time shall be taken to be calendar months.

299. Where any limited time less than eight days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sundays and other days on which the offices are closed shall not be reckoned in the computation of such limited time.

300. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the office in which the act is required to be done or the proceeding to be taken is 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 such office shall next open.

With these RR. must be read Reg. Gen., 20th November, 1890:—

23.—During the Vacations, causes may be set down, and notices of trial, and to admit or produce documents, may be given, and all writs may be issued, executed, and returned; and in every case costs may be taxed if the Taxing Officers shall deem it necessary; and all necessary proceedings may be taken for the purposes of an appeal, or for obtaining or dissolving any injunction. And summonses in cases of emergency may be returnable in Chambers on any Friday.

24.—During the Vacations no other business than that above specified will be taken without the leave of a Judge, nor shall any pleadings be filed or delivered without such leave, nor shall time run at law or in equity.

COSTS, CHARGES, AND EXPENSES GENERALLY.

301. Where the Court appoints one of the solicitors of the Court to be guardian *ad litem* of an infant or person of unsound mind, the Court may direct that the costs to be incurred in the performance of the duties of such office, shall be borne and paid either by the parties or some one or more of the parties to the suit in which such appointment is made, or out of any fund in Court in which such infant or person of unsound mind may be interested; and may give directions for the repayment or allowance of such costs, as the justice and circumstances of the case may require.

This R. corresponds with Cons. Ord. XL., r. 4.

See Morgan and Wurtzburg, 343, 344.

302. Where costs are ordered to be paid to a party suing or defending *in formâ pauperis*, such costs shall be taxed as ordinary costs, unless the Court shall otherwise direct.

This R. corresponds with Cons. Ord. XL., r. 5.

The costs of an abandoned motion are within the Rule (*Mornington* v. *Keane*, 3 W.R. 429).

Plaintiff had obtained an order to dismiss his bill as against a pauper defendant; it was held that the defendant was entitled to *dives* costs (*Rubery* v. *Morris*, 18 L.J. Ch. 444).

See RR. 53, 117.

303. Where the plaintiff is directed to pay to the defendant the costs of the suit, the costs occasioned to a defendant by any amendment of the statement of claim shall be deemed to be part of such defendant's costs in the suit, except as to any amendment which may have been made by special leave of the Court or which shall appear to have been rendered necessary by the default of such defendant, but there shall be deducted from such costs any sum which may have been paid by the plaintiff, according to the course of the Court, at the time of any amendment.

This R. corresponds with Cons. Ord. XL., r. 7

See note to next R.

304. Where upon taxation a plaintiff, who has obtained a decree with costs, is not allowed the costs of any amendment of the statement of claim upon the ground of its having been unnecessarily made, the defendant's costs occasioned by such an amendment shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

This R. corresponds with Cons. Ord. XL., r. 8.

The Court may give special directions to the Master to look into the pleadings, and tax the costs occasioned by unnecessary amendments (*Burchell* v. *Giles*, 11 Beav. 34).

Where a plaintiff by amendment abandons a part of his claim, and it appears he has in that respect acted vexatiously, the Court on motion will direct him to pay the costs thereby occasioned (*Strickland* v. *Strickland*, 3 Beav. 242). But such a direction will not be given at the hearing, without a special application; the most convenient time for such an application is immediately upon the cause of complaint arising, and the amount of the costs complained of is material in reference to the propriety of the application (*Mounsey* v. *Burnham*, 1 Ha. 22).

See further Morgan and Wurtzburg, 35, 36.

305. Where the Court is of opinion that any petition or affidavit, or any part thereof, is improper or of unnecessary length, the Court may direct the Master to ascertain the costs occasioned to any party thereby, and may make such order as is just for the payment or allowance of such costs.

This R. (which in substance is taken from Cons. Ord. XL., r. 9) deals only with the costs occasioned by the impropriety or prolixity of *petitions* and *affidavits*. As to *pleadings*, see s. 6 of the Act (prolixity), s. 24 (impertinence), R. 151 (scandal and tending to embarrass, &c.).

The Master will not look into these matters under the common order to tax (*Re Farington*, 33 Beav. 347).

It has been said that such a direction as contemplated by this R. is of itself an intimation that the Court considers the affidavit or petition of unnecessary length (*Re Skidmore*, 1 Jur. N.S. 696); *sed quære*.

306. Where the same solicitor is employed for two or more defendants, and separate statements of defence are filed, or other proceeding had, by or for two or more of such defendants separately, the Master shall consider in the taxation of such solicitor's bill of costs, either between party

and party or between solicitor and client, whether such separate defence or other proceedings were necessary or proper; and, if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

This R. corresponds with Cons. Ord. XL., r. 12.

Where a solicitor set down a separate plea for each of two defendants, he was allowed, as against the plaintiff, the costs of one only (*Tarbuck* v. *Woodcock*, 3 Beav. 289). And, where a solicitor appeared in Chambers both for the receiver and for a party to the suit, only one copy of the receiver's accounts was allowed on taxation, the Taxing Masters certifying it to be a general rule that a solicitor concerned for two or more parties is not allowed to charge for supplying to himself copies of documents which he has himself prepared (*Sharp* v. *Wright*, 1 Eq. 634). And, where a solicitor attended in Chambers for two parties, though in different interests, the costs of only one attendance were allowed (*Brown* v. *Gellatly*, 15 W.R. 887). Where, however, the Court, at the instance of the plaintiff, ordered the solicitor to the suitor's fee fund to appear for an infant defendant, his appearing for other defendants suing *in formâ pauperis* did not disentitle him to the full costs of suit (*Frazer* v. *Thompson*, 1 Giff. 337).

Separate sets of costs were allowed to two defendants—partners, who, after suit brought dissolved partnership and severed (*Blakey* v. *Latham*, W.N., 1888, 126; and see *Stumm* v. *Dixon*, 22 Q.B.D. 529).

Different sets of costs allowed to different solicitors who by leave of the Court were employed by a defendant in distinct capacities (*Woolley* v. *Colman*, W.N. (1886) 6, 36).

See RR. 39, 225.

307. Where any party submits to exceptions for insufficiency, he shall pay to the excepting party twenty shillings costs if before the order of reference, and thirty shillings if before the report, unless other costs are specially certified by the Master. And, where the costs of suit are ordered to

be paid to any party, the costs occasioned to him by the insufficiency of any answer to interrogatories shall be deemed to be part of such costs; any sum being deducted therefrom which shall have been paid to him upon the exceptions being submitted to, or the answer certified to be insufficient.

This R. is an extension of Cons. Ord. XL., r. 13.

It only applies where the question of costs has not already been disposed of by the Court (*Poole* v. *Gordon*, 16 L.J. Ch. 265).

308. The plaintiff, having duly caused an appearance to be entered for any defendant, shall be entitled as against the same defendant to the costs of and incident to entering such appearance, whatever may be the event of the suit; and such costs shall be added to any costs which the plaintiff may be entitled to receive from such defendant, or be set off against any costs which he may be ordered to pay to such defendant; but payment thereof shall not be otherwise enforced without the leave of the Court.

This R. corresponds with Cons. Ord. XL., r. 15.

309. Where no account, payment, conveyance, or other relief is sought against a party, but the plaintiff (or the defendant under a counter-claim) requires such party to appear to the statement of claim or counter-claim, the costs occasioned by such party having been required so to appear, and the costs of all proceedings consequent thereon, shall be paid by the party requiring such appearance, unless the Court shall otherwise direct.

This R. is adopted from Cons. Ord. XL., r. 16, and extended to the case of a counter-claim.

Persons who, having the same interest as the plaintiffs, decline to be co-plaintiffs, may have their costs under this R. (*Abram* v. *Ward*, 6 Ha. 170).

310. Expenses incurred in consequence of affidavits being prepared or settled by Counsel shall be allowed only when the Master shall in his discretion, and on consideration of the special circumstances in each case, think such expenses properly incurred; and in such case he shall be at liberty to allow the same, or such parts thereof as he may consider just and reasonable, whether the taxation be between solicitor and client, or between party and party.

This R. is taken from Cons. Ord. XL., r. 17.

See R. 315.

It does not take the question of the costs out of the discretion of the Court (see *Davies* v. *Marshall*, 1 Dr. & Sm. 364).

Compare R. S. C. (costs), VII., r. 13, 1875 [O. LXV., r. 27 (15), 1883]:—Such costs of procuring the advice of Counsel on the pleadings, evidence, and proceedings in any cause or matter, as the Taxing Master shall, in his discretion, think just and reasonable, and of procuring Counsel to settle such pleadings and special affidavits, as the Taxing Master shall, in his discretion, think proper to be settled by Counsel, are to be allowed; but, as to affidavits, a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time. This r. (so far as regards affidavits) supersedes in England the R. in the text, but of course it is otherwise here.

311. Where a suit which stands for hearing is called on to be heard, but cannot be decided by reason of a want of parties, or other defect on the part of the plaintiff, and is therefore struck out of the paper, and the same suit is again set down, the defendant shall be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the suit.

This R. corresponds with Cons. Ord. XL., r. 21.

Where it is plain on the face of the statement of claim that a suit is defective for want of parties, a defendant raising the objection is entitled, if the hearing stands over to add parties, to the costs of the day, although he may have not taken the objection by his answer (*Rowsell* v. *Morris*, 17 Eq. 20, and cases there cited). But, where defendants admitted by their answer that all persons interested were parties, and at the hearing objected for want of parties, and the objection prevailed, it was held that, having misled the plaintiff, they ought to pay him the costs of the day (*Price* v. *Berrington*, 2 Beav. 285; and see *Wilson* v. *Broughton*, 7 L.J. Ch. 120). As to a defect of parties through an event happening after the suit is at issue, see *Sambrooke* v. *Hayes*, 6 L.J. Ch. 258; *Fussell* v. *Elwin*, 7 Ha. 29.

It is the duty of a plaintiff to come fully prepared at the hearing to ask the Court for a decree; and, if he is not so prepared, and the suit appears defective from his default, it is then a matter of discretion or indulgence to grant him leave to supply the defect (*Bierdermann* v. *Seymour*, 1 Beav. 594).

When a cause was set down as "short," and struck out, the defendants were held entitled to their costs of the day, unless they had concurred (*Mellish* v *Brooks*, C.P. Cooper, 474).

See notes to R. 178.

312. Where a suit, being in the paper for hearing, is ordered to be adjourned upon payment of the costs of the day, the party to pay the same shall pay the sum of ten pounds, unless the Court shall otherwise direct.

This R. is taken from Cons. Ord. XL., r. 22.

313. Where a party gives a notice of motion, and does not move accordingly, he shall pay to the other side costs to be taxed by the Master, unless the Court itself shall direct what sum shall be paid for costs.

This R. is taken from Cons. Ord. XL., r. 23.

As to what is an abandoned motion, see Morgan and Wurtzburg, 65; as to what costs will be allowed in respect of it, see *Harrison* v. *Leutner*, 16 C.D. 559.

The Court has allowed the costs of an abandoned motion at the close of the seal (*i.e.*, the time devoted to motions)—the motion presumably not having been saved—subject to the case being mentioned by the other side in the course of the day (*Yetts* v. *Biles*, 25 W.R. 452). But the usual course is to apply for the costs on the next seal after that for which notice was given (*Woodcock* v. *Oxford, &c., Co.*, 17 Jur. 33; and see *Wedderburne* v. *Llewellyn*, 13 W.R. 939). They must not be applied for on any later day, *e.g.*, at the hearing, or on speaking to minutes (*Eccles* v. *Liverpool Borough Bank*, Johns. 402). But in *Selfe* v. *Dalgety & Co.*, 10 N.S.W.R. Eq. 205, where a motion had lapsed through non-appearance of plaintiff, and the Primary Judge expressed an opinion that defendants should have their costs, but made no order to that effect, and defendants thereupon had their costs taxed by the Master, upon an application by them that plaintiff should pay their costs so taxed, it was held that the defendants were not limited to the next motion day, and that the application should be granted. Where a defendant procures a dismissal of a suit for want of prosecution, without having made a motion of which he had given notice, the plaintiff cannot afterwards obtain an order for the payment of the costs of such motion, as being abandoned (*Farquharson* v. *Pitcher*, 4 Russ. 510).

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

While the costs of an abandoned motion remain unpaid, no other motion for the same purpose can be made (*Bellchamber* v. *Giani*, 3 Madd. 550; *Killing* v. *K.*, 6 Madd. 68; and see *Re Youngs*, 31 C.D. 239; *Re Neal*, *ibid.* 437); but non-payment of costs of an interlocutory motion is not *per se* sufficient ground for ordering further proceedings to be stayed (*Re Wickham*, 35 C.D. 272).

As to costs of an abandoned appeal, see notes to s. 70 of the Act.

And see note to R. 302.

314. Where two *or more* Counsel appear for the same party, upon the hearing of any suit or matter, and it appears to the Master to have been proper for the party to retain such Counsel to appear, the costs occasioned thereby shall be allowed.

This R. corresponds with Cons. Ord. XL., r. 20, with the addition of the words italicised in the text. It will be seen that, with regard to the number of counsel employed on a side, the colonial practice is more liberal than the English. Consider *Sandeman* v. *Hinton*, 1 N.S.W.R 50; *Goode* v. *Onslow*, 2 N.S.W.R. 278.

315. Where costs are to be taxed as between party and party, the Master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been incurred in

Advising with Counsel as to the institution or defence of the suit;

The service and execution of writs, and the service of orders, notices, petitions, and summonses;

Advising with Counsel on the pleadings, evidence, and other proceedings in the suit;

Procuring Counsel to settle and sign pleadings and such petitions and affidavits as may appear to be proper to have been settled by Counsel;

Procuring consultations of Counsel, and procuring the attendance of Counsel in the Master's Office where the Master may consider the case proper for Counsel to attend;

Procuring evidence by deposition or affidavit, and the attendance of witnesses, and supplying Counsel with copies of or extracts from necessary documents.

316. But, in allowing such costs, the Master shall not allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights, or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

These two RR. correspond with Cons. Ord. XL., r. 32, with the addition of the words italicised in the text; from which it will be seen that here again the colonial practice is the more liberal. R. 264 (being the latter part of Cons. Ord. XL., r. 32) has been re-adopted in England by R.S.C. (costs), Ord VI., r. 26 (1875) (see *Warner* v. *Mosses*, 19 C.D. 72; Morgan and Wurtzburg 482).

317. Any party who may be dissatisfied with the allowance or disallowance by the Master of the whole or any part of any item or items in any bill of costs may, at any time before the certificate is signed, deliver to the other party interested therein, and carry in before the Master, an objection in writing to such allowance, or disallowance, specifying in a short and concise form the matter objected to, and may thereupon apply to the Master for a summons to review the taxation in respect of the same.

This R. corresponds with Cons. Ord. XL., r. 33, except that a summons is substituted for a warrant. Cons. Ord. XL., r. 33, has been re-adopted by R.S.C. (costs), Ord. VI., r. 30 (1875), with a modification, the last clause reading simply, "apply to the Taxing Officer to review," &c.

The party carrying in an objection is only bound to state the items to which he objects, not the reasons of his objection (*Simmons* v. *Storer*, 14 C.D. 154); but the words "and the grounds and reasons for such objections," have been added to the later English R.—O. LXV., r. 27 (39), 1883, and overrule this decision so far as England is concerned (*Re Hill*, 33 C.D. 266); see this case also as to appointment of time by a Taxing Officer to consider objections.

See also notes to R. 319.

A point not raised in the objections before the Taxing Officer cannot be raised on review (*Shrapnel* v. *Laing*, 20 Q.B.D. 337). See Daniell's Ch. Forms 2nd ed. 1852, for statement of objections.

318. Upon the application for such summons, or upon the return thereof, the Master shall reconsider and review his taxation upon such objection; and he may, if he shall think fit, receive further evidence in respect thereof; and, if so required by either party, he shall state either in his certificate of taxation, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

This R. corresponds with Cons. Ord. XL., r. 34, except as mentioned in the last note. As re-adopted by R.S.C. (costs), Ord VI., r. 31 (1875), O. LXV., r. 27 (40) (1883), it reads simply, "upon such application," &c., which avoids the difficulty now to be noticed.

The R. in the text seems to contemplate that the summons shall be returnable before the Master himself. If the Master should adhere to his taxation, he should, it is submitted, if he has granted a summons, first sign his certificate, and then adjourn the summons to review to the Judge; it will then form an application under the next R. But the better course would seem to be for the Master to reconsider his taxation on the *application* for a summons to review; then, if he adheres to his taxation, to grant the summons, have it brought on before him *pro formâ*, and at once and without argument adjourn it to the Judge. It cannot be contended that there should be one summons before the Master, and a second and independent summons before the Judge. The difficulty is caused by the R. making the summons returnable before the Master.

Where a party, objecting to the Master's disallowance, did not take proper steps to satisfy him when the matter was in his office he was, though successful on an application to the Court to review the taxation, ordered to pay the costs (*Sturge* v. *Dimsdale*, 9 Beav. 170. See notes to R. 317).

319. Any party who may be dissatisfied with the certificate of the Master, or with his allocatur, if the costs form a sum to be afterwards inserted in a report or certificate, may, as to any item or part of an item which may have been objected to, apply to the Court for an order to review the taxation as to the same, and the Court may thereupon make such order as to the Court shall seem just. But the certificate or allocatur of the Master shall be final and conclusive as to all matters which shall not have been so objected to.

This R. corresponds with Cons. Ord. XL., r. 35, with the omission of the words requiring the application to be made by summons in Chambers (see *Webster* v. *Manby*, 4 Ch. 372).

See notes to the last R.

As to what matters will be entertained on an application to review taxation, see Morgan and Wurtzburg 480; Seton 4th ed. 626-636.

Where the decision of a question of costs has been delegated to the Taxing Master, there is no appeal from his decision, unless he has failed to exercise his discretion at all (*Boswell* v. *Coaks*, 36 C.D. 444).

To entertain an application to review a Taxing Master's certificate, where the ground of objection is to the whole of the finding generally, it is not necessary that the objections raised to his finding should have been carried in before the signing of the certificate, R. 317, and this R. being applicable only where particular items are objected to (*Re Castle*, 36 C.D. 194).

The Court will not disturb the finding of the Master on a question of fact, unless satisfied that he was clearly wrong (*Re McCulloch's costs*, 8 N.S.W.R. Eq. 47), where on the taxation of a bill of costs it was held that the Master has jurisdiction to determine whether or not an agreement as to the scale on which costs were to be charged was made between the parties, and to tax the bill on the basis of such agreement. As to what matters of taxation are questions of principle, see *Brown* v. *McEncroe*, 12 N.S.W.R. Eq. 93.

320. Such applications shall be heard and determined upon the evidence which shall have been brought in before the Master; and no further evidence shall be received upon the hearing thereof, unless the Court shall otherwise direct.

This R. corresponds with Cons. Ord. XL., r. 36.

An affidavit of what took place before the Master is inadmissible (*Sturge* v. *Dimsdale*, 9 Beav. 175, and see *Charlton* v. *Charlton*, 31 W.R. 237 ; *Hester* v. *Hester*, 34 C.D. 617).

321. Upon interlocutory applications, where the Court deems it proper to award costs to either party, the Court may order payment of a sum in gross, in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid.

This R. is taken from Cons. Ord. XL., r. 37.

Wood, V.C., once said that the Court would not act under this R. unless the parties were poor, and anxious to put an end to the matter (*London, &c., Co.* v. *Limehouse Board of Works*, 26 L.J. Ch. 170; but see *Yearsley* v. *Yearsley*, 19 Beav. 1 ; *Dakins* v. *Garrett*, 4 Jur. N.S. 579).

The inflexible rule of Romilly, M.R., on a petition for the transfer of funds standing to the petitioner's separate account, and in which no other person was interested, was to allow £10 to the solicitor for his costs, without taxation (*Gover* v. *Stilwell*, 21 Beav. 182) ; and the same was also the rule of Jessel, M.R.

And see *Gosnell* v. *Bishop* cited under the next R., and, on costs of motions generally, Morgan and Wurtzburg 46-73.

322. Where a suit or petition *or a counter claim* is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order or decree directed to be paid, the Master may tax such costs without any order referring the same for taxation; unless the Court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs.

With the exception of the words italicised, this R. is taken from Cons. Ord., XL., r. 38.

As this Rule is only permissive, the Taxing Masters in England do not generally act upon it, and it is still the practice to insert the direction for taxation (Morgan and Wurtzburg 469).

A judgment dismissing an action with costs carries the costs of a motion by the plaintiff which stood over until the trial, and was not then brought on (*Gosnell* v. *Bishop*, 38 C.D. 387).

323. Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the Equity Office, and give notice of his having so done to the other party; and at any time within eight days of such notice, such other party shall have liberty to inspect the same, if he thinks fit. And at or before the expiration of the eight days, or such further time as the Master shall in his discretion allow, such other party shall either agree to pay the costs, or signify his dissent therefrom, and shall thereupon be at liberty to offer payment of a sum of money for the costs. But, when he makes no such offer, or when the party claiming the costs refuses to accept such offer, the Master shall proceed to tax the costs; and when the taxed costs shall not exceed the sum offered, the costs of the taxation shall be borne by the party claiming the costs.

This R. is taken from Cons. Ord. XL., r. 39, except that "offer" is substituted for "tender."

324. Where any costs are by any decree or order directed to be taxed, and to be paid out of any money in Court, the Master, in his certificate of taxation, shall state the total amount of all such costs as taxed.

This R. is taken from Cons. Ord. XL., r. 40.

325. There shall be no more than one Certificate of Costs under any decree or order unless the Master shall otherwise direct.

FEES, &c.

326. The amount of fees and allowances to Solicitors in reference to proceedings in Equity shall be those mentioned in the annexed scale.

TIME OF OPERATION, &c.

327. These rules shall come into operation on the 25th day of May, 1891, and may be cited as the "Consolidated Equity Rules of 1891."

SCALE REFERRED TO.

Instructions.

		£	s.	d.		£	s.	d.
To sue or defend	From		7	6	to 1	0	0	
For statement of claim, statement of defence, special case on petition	From	1	0	0	to 3	0	0	
For replication or interrogatories	From	0	5	0	to 0	10	0	
For documents to be brought into Master's Office, such as charges, discharges, or statement of facts	From	0	7	6	to 1	0	0	
To amend any pleading	From	0	10	0	to 1	0	0	
For affidavit	From	0	5	0	to 1	0	0	
To appeal	From	0	10	0	to 1	0	0	
For or in opposition to any motion to be made in Court	From	0	10	0	to 1	0	0	
For or in opposition to any application in Chambers	From	0	5	0	to 0	10	0	
For brief on hearing of suit, such fee may be allowed as the taxing officer shall think fit, having regard to the number of witnesses whose proofs shall have been taken, the time occupied in making searches and in procuring evidence, and to all the circumstances of the case..	..	.....			...	.....		

	£ s. d.	£ s. d.
For brief on motion, or on further consideration, or on appeal, or on examination of witnesses *de bene esse* ... From	0 10 0	to 2 0 0
For brief on application in Chambers ... From	0 7 6	to 1 0 0

DRAWING PLEADINGS AND OTHER DOCUMENTS.

Statement of claim or statement of defence	1 0 0
Or per folio	0 1 6
Replication, interrogatories, demurrer, plea, special case, statement of facts, charge, discharge, petition, minutes, affidavit, order, accounts, statements, advertisement, summons in Chambers, or pleadings of any kind	0 5 0
Or per folio	0 1 6
Will, conveyance, or other deed, per folio ... From 0 1 6	to 0 2 0
Briefs per sheet (including copy)	0 10 0
Or per folio	0 2 0
Bills of costs for taxation, including copy for the taxing officer, per folio	0 1 6
Indorsement on statement of claim under 13th section of Equity Act of 1880	0 5 0
Indorsement of fiat on petition	0 3 0
Marking each exhibit to affidavit	0 1 0

COPIES.

Of statement of claim and all other documents where no other provision is made	0 1 0
Or per folio	0 0 6
If attested, per folio	0 0 8
Of briefs, per sheet of 6 folios	0 3 6
Engrossment on parchment of any will or deed, per folio	0 0 8
Of any documents for printer, per folio	0 0 6
For printing the amount actually and properly paid to the printer	.....

PERUSALS.

Of statement of claim, statement of defence, and other pleading by the Solicitors of the party to whom the same are delivered	0 7 6
Or per folio	0 0 6
Of special affidavits by the Solicitor of the party against whom the same can be read—each affidavit, per folio	0 0 6
Of printed proof and revise, per folio	0 0 2

WRITS AND SUMMONSES

Writ of subpœna *ad testificandum* or *duces tecum*, including præcipe and attending to issue, but not including fees paid	0 12 6
Writ of execution, including affidavit of demand, præcipe, attending to issue and attending lodging with Sheriff, and fees paid on issuing and lodging with Sheriff	2 5 0
All other writs, drawing, and engrossing, at per folio	0 2 0

Services and Notices.

	£	s.	d.
Service of statement of claim, petition, order, or other document on a party personally ... From	0	7	6 to 0 15 0
If served at a distance of more than two miles from the place of business of the Solicitor serving the same, for each mile beyond such two miles therefrom	0	1	0
Where, in consequence of the distance of the party to be served, it is proper to effect such service through a bailiff or agent, for correspondence in addition	0	7	6
Where more than one attendance is necessary to effect service such further allowance may be made as the taxing officer shall think fit		.....	
Service of any statement of claim, statement of defence, replication, petition, or other similar document on the Solicitor of the opposite party	0	5	0
For preparing and serving on Solicitor of opposite party notice of appearance, of trial, or of hearing	0	5	0
For preparing and serving notice to produce or notice to admit	0	7	6
If special, or necessarily long, such allowance as the taxing officer shall think proper, not exceeding (including copy and service) per folio	0	2	0
For preparing notice of motion	0	5	0
Or per folio	0	1	6
Copy for service	0	2	0
Or per folio	0	0	6
For service of notice of motion, summons in Chambers, or appointment on Solicitor of other party	0	2	6
For preparing any necessary or proper notice not otherwise provided for, including copy and service on Solicitor of other party	0	5	0
Or at per folio	0	2	0

Attendances.

	£	s.	d.	£	s.	d.
To file statement of claim and have summons indorsed stamped				0	5	0
To file petition, including obtaining signature to fiat indorsed				0	5	0
To swear and file statement of defence				0	7	6
To enter appearance, file affidavit, notice of motion, copy Chamber summons, Judge's order, or other similar document				0	2	6
To obtain consent of next friend to sue in his name or of a guardian *ad litem*				0	10	0
At Master's Office to obtain decree or order after being passed or entered				0	5	0
To inspect or produce for inspection documents pursuant to a notice to admit ... From	0	5	0 to	0	10	0

		£	s.	d.		£	s.	d.
To serve notice of appearance, notice of motion, copy Chamber summons, Chamber order, or other similar document						0	2	6
For every hour after the first						0	10	0
To obtain or give any necessary or proper consent	From	0	5	0	to	0	10	0
To obtain an appointment to examine witnesses *de bene esse*	From	0	5	0	to	0	10	0
On examination of witnesses before Master in Equity, Commissioner, or other person with counsel						1	0	0
For every hour after the first						0	10	0
On examination of witnesses *de bene esse* without counsel	From	2	2	0	to	3	3	0
Every hour after the first						0	15	0
If examination more than two miles from place of business of Solicitor, then such additional allowance as the taxing officer may deem reasonable							.....	
On deponent to read over and with him to be sworn to affidavit	From	0	5	0	to	0	10	0
By a Solicitor or his clerk to be sworn to an affidavit						0	5	0
On a summons in Chambers with counsel	From	0	10	0	to	1	0	0
If without counsel	From	1	0	0	to	3	0	0
To file Chief Clerk's and Taxing Master's certificates, or to get copy marked as an office copy	From	0	5	0	to	0	7	6
On counsel, with brief or other papers—								
If counsel's fee one guinea						0	5	0
If more and under five guineas						0	7	6
If five guineas and under twenty guineas						0	10	0
If twenty guineas and under thirty guineas						1	0	0
If more than thirty guineas						2	0	0
Attendance on counsel to mark refresher, or to appoint consultation						0	5	0
On consultation or conference with counsel	From	0	7	6	to	2	0	0
To enter or set down suit, special case, or appeal for hearing on trial						0	5	0
In Court on hearing of motion, special case, petition, appeal, or any other hearing where no witnesses examined	From	1	0	0	to	3	0	0
To present petition for order of course and for order						0	7	6
In Court on every suit or special motion when same in list and not heard						0	15	0
On hearing of any suit per day where witnesses examined	From	5	0	0	to	7	0	0

	£ s. d.	£ s. d.
To hear judgment		1 0 0
Before Master or Chief Clerk on any appointment, settlement of minutes, or inquiry, or for any purpose whatsoever necessary in the progress of the suit or proceeding...	From 0 7 6	to 2 0 0
On taxation of bill of costs	From 0 10 0	to 3 0 0
Unless the same shall necessarily occupy so much time that the taxing officer shall consider such amount inadequate, in which case he may allow such further fee as he shall think proper		.....
To obtain or give undertaking to appear		0 5 0
At Gazette Office or other newspaper with notice for insertion		0 5 0
On counsel to procure certificate that cause proper to be heard as a short cause		0 10 0
To procure signature of Judge to any order in Chambers		0 7 6
To examine an abstract of title with deeds, per hour, in a cause or matter		0 10 0
To produce deeds for such purpose, per hour		0 5 0
To obtain appointment to tax or other appointment necessarily signed by the Chief Clerk or other clerk in the office of the Master in Equity, and including drawing, copy, and service of any such appointment (but not including fees paid)		0 7 6
If served on more than one party, for every additional party		0 5 0
On printer, and instructing him		0 10 0
For examining the proof print at per folio		0 0 2
Attending to return proof		0 5 0
Examining revise	From 0 5 0	to 1 0 0
Attending to search cause list during each Term	From 0 10 0	to 2 0 0

Term Fees, Letters, &c.

Term Fee, for every Term during which any proceeding shall be taken in the suit	0 15 0
And further, in country agency, suits for letters	0 6 0
Where no proceeding in the cause or matter is taken which carries a Term fee, a charge for letters may be allowed if the circumstances require it	.....
For letter before suit, and every necessary letter during the course of a suit	From 0 3 6 to 0 7 6
For circular letters, after the first letter, for each letter	0 1 6

	£ s. d.	£ s. d.
In addition to the above, an allowance is to be made for special letters, and for ths necessary expense of postages, carriage, and transmission of documents.....		... .

ALLOWANCES TO TOWN WITNESSES.

Merchants, bankers, master mariners, and professional men, per diem.....	From	0	15	0	to	1	0	0
Tradesmen, auctioneers, accountants, and clerks, per diem	From	0	7	6	to	0	15	0
Artizans, journeymen, sailors, labourers, and the like, per diem.....	From	0	6	0	to	0	7	6

ALLOWANCE TO COUNTRY WITNESSES.

From four shillings to eight shillings per day, in addition to the above-mentioned allowances, and in addition to the sum reasonably paid for travelling expenses.

SCHEDULES

A.

(Referred to in Rule 60.)

FORM OF STATEMENT OF CLAIM.

In the Supreme Court of New South Wales.
In Equity.

Between John Lee Plaintiff and James Styles and Henry Jones Defendants.
Statement of claim :

1. The defendant James Styles being seised in fee simple of a farm called Blackacre in the parish of A in the County of B and Colony of New South Wales with the appurtenances did by an indenture dated the 1st of May 1870 and made between the defendant James Styles of the one part and the plaintiff of the other part grant and convey the said farm with the appurtenances unto and to the use of the plaintiff his heirs and assigns subject to a proviso for redemption thereof in case the defendant James Styles his heirs executors administrators or assigns should on the 1st of May 1871 pay to the plaintiff his executors administrators or assigns the sum of £5000 with interest thereon at the rate of £5 per centum per annum as by the said Indenture will appear.

2. The whole of the said sum of £5000 together with interest thereon at the rate aforesaid is now due to the plaintiff.

3. The defendant Henry Joncs claims to have some charge upon the farm and premises comprised in the said indenture of mortgage which charge is subsequent to the plaintiff's said mortgage.

4. The plaintiff has frequently applied to the defendants James Styles and Henry Jones and required them either to pay the said mortgage debt and interest or else to release the equity of redemption of the premises but they have refused so to do.

5. The defendants James Styles and Henry Jones allege that there are some other mortgages charges or incumbrances affecting the premises but they refuse to discover the particulars thereof.

6. There are divers valuable timber and timber-like trees growing and standing on the farms and lands comprised in the indenture of mortgage of the 1st May 1870 which trees and timber are a material part of the plaintiff's said security and if the same or any of them were felled or taken away the said mortgaged premises would be an insufficient security to the plaintiff for the money due thereon.

7. The defendant James Styles who is in possession of the said farm has marked for felling a large quantity of the said trees and he has by hand-bills published on the 2nd December instant announced the same for sale and he threatens and intends forthwith to cut down and dispose of a considerable quantity of the said trees on the said farm.

The plaintiff prays as follows :—

1. That an account may be taken of what is due for principal and interest on the said mortgage.
2. That the defendants James Styles and Henry Jones may be decreed to pay to the plaintiff the amount which shall be so found due together with his costs of this suit by a short day to be appointed for that purpose or in default thereof that the defendants James Styles and Henry Jones and all persons claiming under them may be absolutely foreclosed of all right and Equity of Redemption in or to the said mortgaged premises.
3. That the defendant James Styles may be restrained by the injunction of this Honorable Court from felling or cutting or disposing of any of the timber or timber-like trees now standing or growing in or upon the said farm and premises comprised in the said Indenture of Mortgage or any part thereof.
4. That the plaintiff may have such further or other relief as the nature of the case may require.

M.M.
Counsel for the plaintiff.

NOTE.—This statement of claim is filed by Messrs. B. & Co. 281 George-street Sydney solicitors for John Lee of George-street aforesaid Esquire the above-named plaintiff.

B

(Referred to in Rule 99.)

FORM OF STATEMENT OF DEFENCE.

In the Supreme Court of New South Wales. In Equity.

Between John Lee plaintiff and James Styles and Henry Jones defendants.

Statement of defence by James Styles one of the above-named defendants.

I James Styles do on my oath say as follows :—

1. I do not know and am not able to admit that the contents of the indenture of the 1st day of May 1870 in the first paragraph of the plaintiff's statement of claim are correctly stated therein and I crave leave to refer to the said indenture when produced.

2. I believe that the defendant Henry Jones does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the 1st day of May 1870 in the plaintiff's statement of claim mentioned.

3. Such charge was created by an indenture dated the 1st day of November 1870 between myself of the one part and the said defendant Henry Jones of the other part whereby I granted and conveyed the said farm and premises (subject to the mortgage made by the said indenture of the 1st of May 1870) unto the defendant Henry Jones for securing the sum of £2000 and interest at the rate of £5 per centum per annum and the amount due thereon is the said sum of £2000 with interest thereon from the date of such mortgage.

4. To the best of my knowledge remembrance and belief there is not any other mortgage charge or encumbrance affecting the aforesaid premises.

(Signed) JAMES STYLES.

By way of counter-claim the defendant James Styles states as follows :—

1. On the 1st day of August 1880 the defendant James Styles entered into a contract in writing with the plaintiff for the sale to him of a farm called Whiteacre in the county of C. and Colony of New South Wales containing 3000 acres or thereabouts for the price of £5000 and it was mutually agreed by and between the plaintiff and the said defendant that the said purchase money should be set off against the debt secured by the said indenture of mortgage of the 1st day of May 1870 and that the plaintiff should forthwith reconvey to the said defendant the said farm of Blackacre freed and discharged from the said mortgage debt.

The defendant James Styles prays as follows :—

1. The the plaintiff may be decreed specifically to perform his said contract and to reconvey to the defendant James Styles the said farm of Blackacre freed and discharged from the said debt secured by the said indenture of mortgage of the 1st day of May 1870 the said defendant being ready and willing to perform the said contract on his part.
2. That for the purpose aforesaid all proper directions may be given declarations made and accounts taken.

3. That the said defendant may have such further or other relief as the nature of the case may require.

S.W.,
Counsel for the defendant,
JAMES STYLES.

NOTE.—This statement of defence and counter-claim is filed by Messrs. E. and F. 500 Pitt-street Sydney solicitors for James Styles of Parramatta in the Colony of New South Wales one of the abovenamed defendants.

The above statement of defence was sworn by the abovenamed James Styles at Sydney this 1st day of August 1880 before me

Master in Equity (*or* Chief Clerk *or* Commissioner *or* Deputy Registrar).

C.

(Referred to in Rule 35.)

FORM OF NOTICE TO ADMIT AND INSPECT DOCUMENTS.

Title of cause or matter.

TAKE notice that the plaintiff [*or* defendant *or* petitioner *or* respondent] proposes to adduce in evidence on the trial in this cause [*or* matter] the several documents hereunder specified and the same may be inspected by the defendant [*or* plaintiff *or* respondent *or* petitioner] his solicitor or agent at on between the hours of and the defendant [*or* plaintiff *or* respondent *or* petitioner] 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 that 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 on such trial.

Dated &c

To E.F. solicitor [*or* agent] for { defendant / respondent / *or* / petitioner }

G.H. solicitor [*or* agent] for { plaintiff / defendant / petitioner / *or* / respondent }

Here describe the documents. The description may be as follows:—

Originals.

Description of the Documents.	Date.
Deed of covenant between A. B. and C. D. 1st part and E. F. of the 2nd part	1st Jan. 1878
Indenture of lease from A. B. to C. D.	1st Feb. 1878
Indenture of release between A. B. C. D. 1st part &c.	2nd Feb. 1878
Letter from defendant to plaintiff	1st Mar. 1878
Policy of insurance on goods	3rd Dec. 1878
Bill of exchange for £100 at 3 months drawn by A. B. on and accepted by C. D. endorsed by E. F. and G. H.	1st May 1870

Copies.

Descriptions of Documents.	Dates.	Original or duplicate served sent or delivered. When how and by whom.
Register of baptism of A. B. in parish of X	1st. Jan. 1858	
Letter from plaintiff to defendant...	1st Feb. 1878	Sent by General Post 2nd Feb. 1878.....
Notice to produce papers.....	1st Mar. 1878	Served 2nd March 1878 on defendant's attorney by E.F. of—

D.

(Referred to in Rule 122.)

AFFIDAVIT AS TO PRODUCTION OF DOCUMENTS PURSUANT TO AN ORDER.

Title of suit or matter.

ON this day of in the year the plaintiff [*or* defendant] being duly sworn maketh oath and saith as follows :—

1. I say 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 part of the First Schedule hereto annexed.

2. I further say that I object to produce the said documents set forth in the second part of the said First Schedule hereto.

3. I further say [*state upon what grounds the objection is made and verify the facts as far as may be*].

4. I further say that 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 annexed.

5. I further say that the last-mentioned documents were last in my power or possession on [*state when*].

6. I further say [*state what has become of the last-mentioned documents and in whose possession they now are*].

7. I further say according to the best of my knowledge remembrance information and belief that I have not now and never have had in my own possession custody or power or in the possession custody or power of my solicitor or agents or solicitors 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.

NOTE.—*If the party denies having any document, he is to make an affidavit in form of the 7th paragraph, omitting the exception.*

E.

(Referred to in Rule 142.)

1. Form of Record of a Question or Questions of Fact.

Title of cause or matter.

By an order made in this cause [*or* matter] dated &c. the Court hath directed that the following question [*or* questions] of fact be tried by a jury before the Court itself [*or* before the Court itself without a jury] (that is to say):

Whether, &c.

N.B.—If more questions than one, number them consecutively—1, 2, 3, &c.

2. Form of Record for Trial as to Amount of Damages.

Title of cause or matter.

Whereas by an order made in this cause [*or* matter] dated &c. the Court hath awarded damages to in respect of the matters in the said order mentioned and hath directed that the amount of such damages shall be assessed by a jury before the Court itself [*or* before the Court itself without a jury].

The question is what amount of damages the plaintiff hath sustained by reason of the matters in the said order mentioned.

F.

(Referred to in Rule 196.)

Form of Notice of Appeal.

In the Supreme Court of New South Wales. In Equity.

Between A.B. Plaintiff and C.D. Defendant.

Take notice that the plaintiff [*or* defendant] appeals against the Decree [*or* Order] of His Honour the Primary Judge in Equity dated the day of 18 [*or* against so much of the Decree (*or* Order) of His Honour, dated the day of 18 as declares &c. *or* directs &c.] for the following among other grounds and reasons that is to say :—

N.B.—If more than one ground, number them consecutively—1, 2, 3, &c.

I certify that this suit [*or* matter] is proper to be re-heard before the Full Court.

A.B.
Counsel for Appellants.

G.

(Referred to in Rule 203.)

FORM OF SUMMONS BY MASTER IN EQUITY.

In the Supreme Court of New South Wales. In Equity.

IN the matter of the estate of late of in the said Colony deceased [*or* .]

Between A. B. Plaintiff and C. D. Defendant.

E.F. of &c. [*or*] the Defendant C.D. is hereby summoned to attend at the Equity Office of the Supreme Court, at Chancery Square, Sydney, on the day of at of the clock in the noon to be examined on the part of [*or* the Plaintiff] for the purpose of the proceedings directed by the Court to be taken before me.

Dated this day of 18 .

A.T.H.
Master in Equity.

This summons was taken out by Messrs. B. & Co. 281 George Street Sydney solicitors for [*or* the Plaintiff].

H.

(Referred to in Rule 203.)

In the Supreme Court of New South Wales.

IN EQUITY.

(Short title of cause or matter.)

I APPOINT the day of at my chambers, Equity Office Chancery-square, to [*settle minutes of order of &c. or as the case may be*].

Dated the day of 18 .

Master in Equity.

I.

(Referred to in Rule 235.)

FORM OF REPORT OR CERTIFICATE OF MASTER IN EQUITY.

In the Supreme Court of New South Wales. In Equity.

Between A.B. Plaintiff and C.D. Defendant.

In pursuance of the Decree [*or* Order] made on the hearing of this Suit [*or as the case may be*] on the day of 18 I have been attended by the Solicitors [*or by the Solicitors and Counsel as the case may be*] for both sides and I have proceeded to take the accounts and

make the enquiries ordered by the said Decree [*or* Order] and I find and certify as follows :—

1. The Defendant the Executor of the Testator has received personal estate to the amount of £ and he has paid or is entitled to be allowed on account thereof sums to the amount of £ leaving a balance due from [*or* to] him of £ on that account.

The particulars of the above receipts and payments appear in the account marked verified by the affidavit of filed on the day of and which account is to be filed with this report [*or* certificate] except that in addition to the sums appearing on such account to have been received the said defendant is charged with the following sums [*state the same here or in a Schedule*] and except that I have disallowed the items of disbursement in the said account numbered and [*or in cases where a transcript has been made*] The defendant has brought in an account verified by the affidavit of filed on the day of and which account is marked and is to be filed with this report [*or* certificate] The account has been altered and the account marked which is also to be filed with this report [*or* certificate] is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the Schedule hereto and with the interest thereon and costs mentioned in the Schedule are due to the persons therein named and amount together to £ .

3. The funeral expenses of the testator amount to the sum of £ which I have allowed the said executor in the said account of personal estate.

4. The legacies given by the testator are set forth in the Schedule hereto and with the interest therein mentioned remain due to the persons therein named and amount altogether to £ .

5. The outstanding personal estate of the testator consists in the particulars set forth in the Schedule hereto.

6. The real estate to which the testator was entitled consists of the particulars set forth in the Schedule hereto.

7. The defendant has received rents and profits of the testator's real estate (*in a form similar to that provided with respect to the personal estate.*)

8. The incumbrances affecting the testator's real estate are specified in the Schedule hereto.

9. The real estates of the testator directed to be sold have been sold and the purchase moneys amounting altogether to £ have been paid into Court.

[N.B.—*Above numbers are to correspond with numbers in the decree.*]

After each statement the evidence produced is to be stated as follows :—

The evidence produced on this account [*or* inquiry] consists of the probate of the testator's will the affidavit of A.B. filed and paragraph number of the affidavit of C. D. filed

J.

(Referred to in Rule 29.)

In the Supreme Court of New South Wales.

In Equity.

The day of in the year of our Lord one thousand eight hundred and

Let all parties concerned in the matter of the within Petition attend before the Primary Judge in Equity at this Court on the day of at o'clock in the forenoon and hereof let all parties have due notice.

Chief Clerk in Equity.

K.

(Referred to in Rule 283.)

In the Supreme Court of New South Wales. In Equity.

(In the matter of the Trust, Will, or Administration and in the matter of the Act 26 Vict., No. 12.

Let all parties concerned attend at my Chambers, Supreme Court, Chancery Square, Sydney, on the day of next, at 10 o'clock in the forenoon 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 189

Primary Judge in Equity.

Note:—If you do not attend, either in person or by solicitor at the time and place above mentioned, such Order will be made and proceedings taken in your absence as the Judge may think just.

Master in Equity.

This summons was taken out by Mr. of Pitt Street, Sydney, solicitor for the above named applicant.

L.

(Referred to in Rule 273.)

In the Supreme Court of New South Wales. In Equity.

Postal address
Date

Title of Cause (*or Matter*).

I, the undersigned, declare that I am the person to whom the sum of £ is payable pursuant to the Decree [*or* Order] dated the

of and made in the above Cause [*or* Matter]. And I further declare that I have an Account in the Bank of †
and I request the Master in Equity to transmit to me by post to the above address the necessary Cheque payable to my order and specially crossed to my Account at the said Bank and marked not negotiable ; such transmission to be at my sole risk.

Signed

Subscribed in my presence at this day of 189

Signature of a Justice of the Peace, a Commissioner for Affidavits, or Notary Public.

*Received from the Master in Equity this day of 189 the sum of by Cheque No. being the sum payable to me pursuant to the above mentioned Order.

Witness Signed

†*Fill in the name of Bank.*

**The date of this receipt should be left blank to be filled in on the date of posting Cheque.*

M.

(Referred to in Rule 273.)

In the Supreme Court of New South Wales. In Equity.

Postal address
Date

Title of Cause (*or Matter*).

I, the undersigned, declare that I am the person to whom the sum of £ (*under* £500) is payable pursuant to the Decree [*or* Order] dated the day of 189 and made in the above Cause [*or* Matter]. And I further declare that I have no Account at any Bank in this Colony and I request the Master in Equity to transmit to me by Post to the above address the necessary Cheque payable to my order and crossed so as to be payable only through a Bank ; such transmission to be at my sole risk.

Signed

Subscribed in my presence at this day of 189

Signature of a Justice of the Peace, a Commissioner for Affidavits, or a Notary Public.

*Received from the Master in Equity this day of 189 the sum of by Cheque No. being the sum payable to me pursuant to the above mentioned Order.

Witness Signed

**The date of this Receipt should be left blank to be filled in on date of posting Cheque.*

N.

(Referred to in Rule 273.)

In the Supreme Court of New South Wales. In Equity.

Postal address
Date

Title of Cause (*or Matter*).

I, the undersigned, declare that I am the person to whom Interest on the sum of £ now in Court is payable half-yearly (*or as the case may be*) during my lifetime (*or as the case may be*) pursuant to the Decree [*or* Order] dated the day of and made in the above Cause [*or* Matter] and I request the Master in Equity from time to time as each payment accrues due upon receiving a proper Receipt for the same together with evidence to his satisfaction of my being alive at the date of each payment to transmit by post to the above address from time to time a Cheque therefor payable to my order and crossed so as to be payable only through a Bank; such periodical transmissions to be at my sole risk.

FREDK. M. DARLEY, C.J.
W. C. WINDEYER, J.
J. GEO. LONG INNES, J.
M. H. STEPHEN, J.
WM. OWEN, J.
W. J. FOSTER, J.
C. J. MANNING, J.

TIME TABLE.

ABATEMENT	See Suit. See Revivor.
ACCOUNTS	The Court may, *at any stage* of the proceedings in a suit or matter, direct any necessary inquiries or accounts, &c., R. 123.
ADMINISTRATION . . . See Money, R. 272.	Where a decree or order is made directing an account of legacies, interest shall be computed on such legacies at the rate of 4 per cent. per annum *from the end of* 1 *year* after testator's death, unless the Court otherwise order, R. 234.
ADMISSION, order upon .	Any party to a suit may *at any stage* apply by motion on notice [16 *days*, R. 124] to the Court for such order upon any admission of fact as he may be entitled to, R. 28.
AFFIDAVITS	*Before any affidavit is used* in Court or before the Master, it should be first filed in the Equity Office, R. 19.
by plaintiff	All affidavits to be used in support of any motion for a decree or decretal order under s. 28 should be filed *before service* of notice of such motion, and a list thereof should be set forth at foot of notice, R. 125.
by defendant	The defendant, *within* 10 *days* after service, should file his affidavits in answer, and deliver to the plaintiff a list thereof, R. 126.
by plaintiff in reply . .	*Within* 4 *days* after the expiration of the 10 days mentioned in R. 126, or other enlarged period, the plaintiff should file his affidavits in reply, and deliver to the defendant a list thereof, R. 127.
AMENDMENT	The Court may, *at any stage*, allow either party to alter his statement of claim, or defence, or reply, R. 151.

AMENDMENT *(continued)*—	
	The plaintiff may, without any leave, amend his statement of claim once, *at any time before expiration of time limited for replying* and *before replying*, or where no defence is filed, *at any time before the expiration of* **4** *weeks* from the appearance of the defendant who shall have last appeared, R. 152.
after set-off or counter-claim	Where set-off or counter-claim is pleaded, amendment may be made without leave *any time before expiration of time for pleading to reply*, or if no reply, then *before expiration of* **21** *days* from filing of defence, R. 153.
application to disallow .	After amendment under R. 152 or 153, the opposite party may, *within* **8** *days* after filing amended pleading, apply to Court to disallow such pleading either entirely or in part, R. 154.
pleading to amended pleading	Where any party has amended his pleading under R. 153 or 154, the opposite party should plead to amended pleading or amend his pleading *within the time he then has to plead*, or *within* **8** *days* from the delivery of the amendment, whichever shall last expire, R. 155.
leave to amend in other cases	In all cases not otherwise provided for, application for leave to amend any pleading may be made by either party to the Court, and either *before or at the trial* of the cause, R. 156.
when leave to amend becomes void	If leave to amend has been obtained, and advantage has not been taken of such *within time allowed*, or *within* **14** *days* from leave, such leave becomes void, unless extended, R. 157.
APPEAL to Full Court . .	Appeal to Full Court from any decree or order under s. 70 must be made *within* **14** *days* next after the pronouncing of the same, or *within extended time*, R. 196.
respondent's notice. . .	Respondent intending on hearing of an appeal to contend that the decision of the Court below should be varied or altered must give notice *within* **14** *days* from service of appellant's notice of appeal, R. 197.

APPEAL *(continued)*—

lodging copies of pleadings, order, &c., appealed from in Equity Office . . . . . In appeals to the Full Court, the moving party, unless otherwise ordered, should lodge in Equity Office, *within* **28** *days* after the filing of the notice of appeal, seven printed copies of pleadings, evidence, decree, or order appealed from, and judgment of Judge, and should, *within like time*, also serve a like number of said printed copies on each opposing party, or upon each solicitor, on the record, R. 199.

time for entering appeal. Every appeal should hereafter be set down *for the first day* for the hearing of appeals in Equity, next after the making of the deposit or giving the security required, unless otherwise ordered; and every appeal not so entered will be deemed to have been abandoned, R. 198.

from Master . . . . . See Report.

APPEARANCE . . . Appearance must be entered by a defendant within the jurisdiction, who resides within 100 miles of Sydney, *within* **8** *days;* if above 100 miles and less than 200 miles, *within* **12** *days;* and if above 200 miles, *within* **16** *days*, after service, R. 66.

default of appearance . . When any defendant, not being an infant or person of unsound mind unable of himself to defend the suit, does not enter an appearance thereto *within the time limited by indorsement*, plaintiff may, *after* **7** *days* from time so limited for appearing thereto, apply to Court for decree against such defendant in his absence, R. 72.

A defendant, notwithstanding his default of appearance, may *at any time* apply to Court for leave to appear and defend, R. 73.

Where any defendant is an infant or a person of unsound mind not so found by inquisition or declared under the Lunacy Act of 1878, the Court may upon application of plaintiff order that one of the solicitors of the Court be assigned guardian of such defendant by whom he may appear to and defend the

APPEARANCE *(continued)*—

suit, but not unless notice of such application was *after the expiration of the time allowed for appearing* and *at least* **6** *clear days* before the day in such notice named for hearing the application, served upon the person in whose charge such defendant was, R. 74.

ARREST on writ of attachment . . . . . The Sheriff should bring to the bar of the Court every person arrested upon any writ of attachment *on the first day* on which the Court sits in Equity next after such arrest, or as soon afterwards as practicable, R. 20.

In case of continued disobedience of the rule, decree, or order for a period of **8** *days* after discharge, the Court may order a fresh attachment to issue, R. 21.

Where a party is in prison under an attachment, and is not brought to the bar of the Court *within* **30** *days*, he shall be discharged; but in case of continued disobedience of the rule, decree or order for a period of **8** *days* after such discharge, the Court may order a fresh attachment to issue, R. 22.

CERTIFICATE . . . . . See Report.

CLAIM, statement of . . . See Amendment.

CONSENT MATTERS . . See Suit.

CONVEYANCE, settling of . When the Master is ordered to settle any conveyance, in case the parties differ about the same, a statement in writing of the required alterations shall be served by the parties objecting to the draft on the party by whom the same was prepared *within* **8** *days* after the service of notice of leaving such draft with the Master, R. 245.

COSTS . . . . . Where costs are to be taxed in case the parties differ, the party claiming the costs should bring the bill of costs into the Equity Office, and give notice thereof to the other party; and *at any time within* **8** *days* of such notice, such other party may inspect the same, R. 323.

review of taxation of . . *At any time* before certificate signed application may be made to the Master for a summons to review, R. 317.

DECREE, drawing up of . . No decree or order should be drawn up without the leave of the Court *after* **6** *months* from when it has been pronounced, R. 169.

under s. 28 . . . . . **16** *days' notice* should be given to defendant of any motion for a decree or decretal order under s. 28, R. 124.

failure to prosecute . . Where the party entitled to prosecute a decree or order does not proceed therein *within the time fixed or limited*, the Court or Master may commit to any other party the further prosecution of the said decree or order, R. 208.

appointment to proceed on . . . . . The party who has carriage of any decree or order should *within* **10** *clear days* of the same being pronounced, or *within further time directed*, lodge the minutes of the same in the Equity Office, and take out an appointment to proceed therein, R. 164.

settle minutes of . . **2** *clear days'* notice should be given of any appointment to settle minutes, provided that in cases of emergency the summons may be made returnable *immediately*, R. 166.

draft minutes of . . Draft minutes of the decree or order should be left in the Equity Office *on taking out* an appointment to settle the same, R. 167.

settling decree without appointment . . . . The Court or Master may in case of expediency settle and pass the decree or order, *without making any appointment*, and *without notice* to any party, R. 168.

time within which decree may be added to . . The time within which a party served with notice of a decree under the 6th rule of s. 7 may apply to Court to add to the decree is **1** *month* after such service, unless time extended, &c., R. 183.

on further directions . . When a suit has been adjourned for further consideration, the plaintiff or party having the conduct of the suit should, *after the expiration of* **8** *days*, and *within* **14** *days from the filing* of the Master's certificate, set down the suit for hearing on further directions on some day (except by leave of the Court) *not earlier than the eighth*, and *not*

DECREE on further directions *(continued)*—

later than the fourteenth day after setting down the same, and the plaintiff or party having conduct of the suit should *forthwith* serve notice of the suit being so set down upon the defendants or parties thereto other than the party having the conduct of the suit, R. 186.

defendant may set down suit for hearing in default of plaintiff. . . If plaintiff, or other party having conduct of suit, does not set down suit for hearing on further directions *within* **14** *days* of filing of Master's certificate as aforesaid, any defendant, or party having conduct of suit, may set down same for hearing within the periods as hereinbefore provided for setting down by plaintiff, and shall forthwith serve on plaintiff, or party having conduct of the suit, notice thereof, R. 187.

short minutes to be lodged in Master's office when suit is set down . . When any suit is so set down for hearing on further direction as aforesaid, the party so setting down the same shall, *at the same time*, lodge in the Master's office short minutes (omitting formal parts) of the decree or order he deems himself entitled to, R. 188.

process to enforce . . . If any party directed by an order or decree to pay money, after due service of such order or decree, neglect to pay the same as thereby directed, the party prosecuting such order or decree will, at the *expiration of the time limited* for the performance thereof, be entitled to proceed by writ of *fi. fa.*, R. 190 (see also RR. 191-194).

DEFAULT of appearance . . See Appearance.

DEFENCE . . . . . *The day on which* an order that a plaintiff give security for costs is served, and *the time thenceforward until* and *including the day on which* such security is given, is not reckoned in the computation of time allowed to a defendant to plead or otherwise make his defence, R. 77.

DEFENCE *(continued)*—	
statement of	Statement of defence must be filed *within* **3** *weeks* after time limited for the appearance of defendant, or *within such extended time* as may be consented to by the plaintiff or as Court may allow, R. 97.
amendment of	See Amendment. See Patent.
DEMURRER.	A defendant demurring alone may file a demurrer *within* **8** *days* after appearance but not afterwards; and either party may set down the demurrer for argument *immediately*, R. 79.
	Where a demurrer is not set down for argument *within* **12** *days* after the filing thereof, and plaintiff does not *within such* **12** *days* serve an order for leave to amend, the demurrer will be held sufficient, &c., R. 82.
DIRECTIONS, hearing on further	See Decree.
ELECTION of jurisdiction .	Defendant may *at any time* after appearance or in case the plaintiff has filed interrogatories, **7** *days* after filing a sufficient answer thereto, apply in Chambers, for an order of course that the plaintiff make his election in which Court he will proceed, with the usual directions in that behalf, R. 26.
ERROR in subpœna . . .	*In the interval between suing out and service* of any subpœna the party suing out the same may correct any error in the names of parties or witnesses, &c., R. 44.
EVIDENCE by commission .	Notice of the time and place of examination of witnesses should be served by the party who has obtained commission on the parties entitled to notice **7** *days at least* before the day of examination, R. 141.
EXCEPTIONS for insufficiency	Exceptions for insufficiency may be filed to any answer or further answer to interrogatories *within* **7** *days* after the filing of such answer or further answer, R. 113. See also Interrogatories, R. 109.
FURTHER CONSIDERATION	See Decree.

GUARDIAN *ad litem* . . .	*At any time* during proceedings in any suit or matter, the Court may require a guardian *ad litem* to be appointed for any infant or person of unsound mind, R. 52.
HEARING	See Suit.
on further directions . .	See Decree.
INQUIRIES	See Accounts.
INQUIRY, filing of writ of .	A writ of inquiry together with the return thereto of the verdict or inquisition should, *within* **7** *days* after such return, be filed at the Equity Office, or within other time allowed, R. 147.
INTERROGATORIES for examination of defendant	A plaintiff may, by leave of the Court, and *at any time before the end of* **14** *days* after the suit is at issue, file interrogatories; and the defendant must file answers thereto on oath *within* **14** *days* after service, and the answer will be deemed sufficient, unless exceptions are filed thereto *within* **7** *days* after the filing of such answer, R. 109.
for examination of plaintiff	A defendant may, by leave of the Court, and either *at the time of filing his statement of defence* or *subsequently, before the expiration of* **14** *days* after the suit is at issue, file interrogatories; and the plaintiff must file answers thereto on oath *within* **14** *days* after service: provided always that it shall not be competent to any defendant to file interrogatories *until* he has answered any interrogatories previously filed by plaintiff, R. 110.
at a later period . . .	Under special circumstances, the Court may allow either party to file interrogatories *at a later period* in the suit, R. 112.
JURY	See Trial.
MOTION for decree . . .	See Decree.
affidavits in support of notice of	See Affidavits.
ORDERS	See Decree.
PATENT	A defendant disputing the validity of a patent must deliver particulars *at the time of delivering statement of defence* or *within further time directed*, R. 98.

PLEA . . . . . A defendant may file a plea *within* **14** *days* after appearance, *but not afterwards*, except by leave of the Court, R. 90.

order of course for enquiry as to truth of . . . . An order of course for enquiry as to the truth of plea, and the report in pursuance thereof, should be obtained *within* **21** *days* after the filing and service of such plea; otherwise defendant may obtain as of course an order to dismiss the suit with costs, R. 92.

where held good . . . Where a plea is not set down for argument *within* **14** *days* after the filing thereof, and the plaintiff does not *within such time* either serve an order for leave to amend, or by notice undertake to reply, the plea will be held good to the same extent and for the same purposes, and the same costs must be paid by the plaintiff as in the case of a plea to the whole or part of a statement of

order to dismiss suit on . . claim allowed upon argument: and where the plea is to the whole statement of claim, the defendant may at any time *after* **14** *days* obtain an order of course to dismiss the suit with costs, R. 95.

proceedings by plaintiff after. . . . . Where plaintiff undertakes to reply, he must not, without special leave of the Court, take any proceedings against the defendant *till after replication*, R. 96.

PLEADING, close of . . . *As soon as either party has joined issue* upon any pleading of the opposite party simply the pleadings as between such parties are to be deemed to be closed, R. 130.

If the plaintiff does not file a reply or demurrer, or any party does not file any subsequent pleading or 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 filed shall be deemed to be admitted, R. 131.

PROCESS to enforce decree . See Decree.

PROSECUTION, dismissal of suit for want of . . . See Suit.

RECEIVERS to leave and pass accounts . . . Unless otherwise ordered, the Master is to fix the days upon which a receiver or guardian must leave and pass his accounts, and is also afterwards at liberty to extend or dismiss the same, R. 251.

Any letting of land by a receiver will be void if the Court makes an order to that effect, *at any time before the expiration of* **1** *month*, R. 253.

REPLY . . . . . A reply must be delivered *within* **2** *weeks after* the defence, unless time extended, R. 105.

No pleading subsequent to reply, other than a joinder of issue, should be pleaded without leave of the Court, and then upon such terms as the Court may think fit, R. 106.

pleadings subsequent to reply . . . . . Subject to R. 106 every pleading subsequent to reply must be delivered *within* **1** *week* after the delivery of the previous pleading, unless time extended, R. 107.

REPORT . . . . . The certificate or report of the Master must be transcribed *within such time* as the Master may require, R. 235.

taking opinion of Court on The time within which any party may take the opinion of the Court upon any proceedings as to which the certificate or report of the Master has not been adopted by the Court, is **4** *clear days* after the same has been signed by the Master, R. 240.

summons to take opinion of Court . . . . . Any party taking the opinion of the Court as mentioned in R. 240 must *within* **4** *clear days* after the certificate or report has been signed by the Master, obtain a summons therefor, R. 241.

adoption by Judge . . At the expiration of **4** *clear days* after the certificate or report has been signed by the Master, if no party has obtained a summons to take the opinion of the Court, the Judge may adopt the same, R. 242.

application to discharge or vary. . . . . The time within which to apply to discharge or vary any certificate which has been signed and adopted by the Judge in Chambers, is **8** *clear days* after filing, R. 243.

REVIVOR	Order of revivor may on application be discharged *within* **12** *days* of service of order, and any person under disability other than coverture who may be served may apply to Court to discharge such order *within* **12** *days* after the appointment of a guardian or guardians *ad litem* for such person; and *until such period of* 12 *days* has expired such order has no force or effect as against such last mentioned person, R. 160.
SECURITY for costs . . .	No further proceedings can be taken in a suit except by leave *until after* security has been given, R. 75.
on appeal.	Every person appealing to Full Court against a decree or order of the Judge must *within* **14** *days* from time of filing such appeal deposit in the hands of the Master such sum not exceeding one hundred pounds, &c., sec. 70.
SERVICE of notice of motion	There must be **2** *clear days* between service of notice of motion or petition and the day of hearing, R. 33.
subpœna. . .	The service of any subpœna not valid if not made *within* **12** *weeks* after the teste of the writ, R. 47.
pleadiugs . .	Attested copy of statement of defence, or any subsequent pleading should be *forthwith* served on opposite party, R. 13.
SHORT MATTERS . . .	See Suit.
STATEMENT of claim . .	See Claim.
of defence	See Defence.
amendment of	See Amendment.
STATUTORY jurisdiction .	Every petition or summons under 26 Vic. No. 12, s. 30, should be served **8** *clear days* before the hearing thereof, unless the person served shall consent to a shorter time, R. 285.
SUIT, abated or compromised for one year	Any suit marked as "abated" or "compromised" for one year in the suit book, or stood over generally will *at the expiration of the year* be struck out of Suit Book, R. 15.

SUIT *(continued)*—	
dismissal of for want of prosecution	Any party may move to dismiss a suit or counter claim for want of prosecution when the opposite party has not, *within the time* fixed by the rules in that behalf, or by an order of the Court, taken the necessary steps, R. 119, and see sec. 27.
setting down for hearing by plaintiff	*Within* **7** *days* after a joinder of issue, the plaintiff must set down the suit for hearing on some day, except by leave of the Court, not earlier than the fourteenth, nor later than the twenty-eighth day after so setting down the suit; and the plaintiff should *forthwith* serve notice of the suit being so set down for hearing upon all the defendants thereto, R. 134.
by defendant . . .	If the plaintiff does not set down the suit for hearing *within* **7** *days* after joinder of issue, any defendant may set it down *within like periods* as hereinbefore provided for setting down by the plaintiff, and should *forthwith* serve on the plaintiff and the other defendants notice thereof, R. 135.
consent or short matters.	Consent matters or short matters should be set down for hearing *on such days* as the Court may specially appoint for the hearing of such matters and suits, R. 136.
	If the parties to any suit have agreed upon the terms of the decree, the suit may come on to be heard *on any day* after it has been set down that may be appointed for hearing consent matters, R. 137.
	Any suit may by consent or by order made with notice in Chambers come on to be heard as a short matter *upon any day after* it has been set down that may be appointed for hearing such matters, or that the parties may agree upon and the Court may order, R. 138.
SUMMONS before Master .	Every summons or appointment to proceed upon any matter before the Master should be issued and served **2** *clear days* before the time fixed, R. 218.
TAXATION	See Costs.

TIME . . . . . Where any computation of interest, or the apportionment of any ascertained fund is directed, it may be acted upon *after* **4** *clear days* from the filing of the report or certificate of the Master, R. 244.

generally . . . . . Where time limited by months, such time shall be calendar months, R. 298.

Sundays and other days on which the offices are closed not reckoned in periods of less than **8** *days*, R. 299.

In the computation of the **2** *clear days* which must elapse between the service of a notice of motion or petition and the hearing, Sundays and Holidays are not to be reckoned, R. 33.

Where time expires on a Sunday or other day on which the office is closed, it is extended to a day on which office is next open, R. 300.

Service of writs, &c., to be made *before* **4.30** *o'clock* in the afternoon; on Saturdays *before* **1** *o'clock* in the afternoon, unless otherwise ordered, R. 295.

A party residing above 100 miles from Sydney has *half as many more days*, and party residing above 200 miles from Sydney has *twice the stated number of days* for doing any act limited by time, but the time may be enlarged or abridged, R. 294.

Time fixed by Master may be enlarged or abridged by him, R. 296.

Where time is not limited by hours, it shall not include the day of date or of event from or after which any act is to be done or proceeding taken, and the act or proceeding is to be done or taken at the latest on the last day of such time, R. 297.

During the Vacations, time does not run at Law or in Equity, and pleadings cannot be filed or delivered without leave of a Judge, *ante*, p. 217.

TRIAL . . . . . Notice of application for a new trial should be given *within* **8** *days* after verdict filed, or *within other time directed*, R. 144.

TRIAL *(continued)*—

Any application to set aside a verdict or inquisition on any writ of enquiry should be made *within* 8 *days* after the finding thereof, or *within other time allowed*, R. 148.

On the day of trial, and previously to commencement thereof, a copy of the Record for Trial, together with the pleadings, should be left with the Judge, R. 149.

"Record for Trial" should be filed *within* 2 *days* after order, and *within* 7 *days* after filing should be entered for trial, R. 142.

The course of proceedings on a trial by jury are in accordance with the Common Law practice, R. 143.

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