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THE
JURISDICTION & PRACTICE
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THE COUNTY COURTS
IN
Equity,

IN ADMIRALTY, PROBATE, AND ADMINISTRATION CASES,

AND IN

Bankruptcy.

BY

JAMES EDWARD DAVIS,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

LONDON:
BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most excellent Majesty.

HODGES, FOSTER & CO., DUBLIN.

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LONDON:
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PREFACE.



THE present Work forms a Second Volume to the recently published Fourth Edition of the Author's "Practice and Evidence in Actions in the County Courts." As stated in the Preface to that Work, it was "found necessary to devote a separate Volume to the Equitable Jurisdiction and Practice in Bankruptcy, and in various miscellaneous matters."

The rapid sale of the First Volume leads the Author to hope that the corresponding arrangement and treatment of the subjects will render this Volume equally acceptable.

The insertion of carefully selected additional Forms of Plaints and other proceedings in Equity, is one feature to which attention may be called here, as it is not disclosed on the Title-page.

JUNE, 1872.

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The Practice and Evidence

IN

THE COUNTY COURTS.

PART IV.

THE JURISDICTION AND PRACTICE OF THE COUNTY COURTS IN EQUITY.

CHAPTER I.

THE JURISDICTION IN EQUITY.

- § 1.—EQUITABLE JURISDICTION IN GENERAL.
- § 2.—JURISDICTION IN SUITS BY CREDITORS, LEGATEES, DEVISEES, HEIRS-AT-LAW AND NEXT OF KIN.
- § 3.—JURISDICTION IN SUITS FOR THE EXECUTION OF TRUSTS.
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- § 11.—JURISDICTION IN PROCEEDINGS FOR ORDERS' IN THE NATURE OF INJUNCTIONS, OR FOR STAY OF PROCEEDINGS AT LAW.
- § 12.—JURISDICTION IN SUITS TRANSFERRED TO THE COUNTY COURTS.

§ 1.—EQUITABLE JURISDICTION IN GENERAL.

It has been elsewhere observed that no proposition can be clearer than that the rights of suitors, under the primary and ordinary jurisdiction of the county courts, are governed and controlled by the common law of this country, and that the judges of the county courts are equally bound with the judges of the superior courts of common law to administer the law according to the course of that common law, as distinguished from the principles and practice of the courts of equity (*a*).

Nevertheless, in particular cases, the jurisdiction and powers of the Court of Chancery have been from time to time conferred on the county courts. Under the original County Court Act (9 & 10 Vict. c. 95, s. 65), the jurisdiction of the county court extended to the recovery of any demand not exceeding the sum of twenty pounds (*b*), which is the whole or part of the unliquidated balance of a partnership account, or the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will (*c*).

So far as relates to partnerships, however, this was but a trifling extension of the common law jurisdiction; for it is a settled rule that if partners finally balance all their accounts, an action at law lies for the ascertained balance; and it seems that, to give the county court jurisdiction under this provision, the partnership must be determined, although the balance be not settled (*d*).

By the Charitable Trusts Acts (16 & 17 Vict. c. 137, s. 33; 23 & 24 Vict. c. 136, s. 11) jurisdiction was conferred on the county court, in the case of small charities, to give such equitable relief and make such orders and directions as might be given by the Court of Chancery.

So in the case of the dissolution of literary and scientific institutions by 17 & 18 Vict. c. 112, and again by the statute 18 & 19 Vict. c. 63, the county court has all the powers of the Court of Chancery in disputes and other matters arising in relation to friendly societies, and by the 25 & 26 Vict. c. 87, in winding up industrial and provident societies.

As already remarked (*e*), however, all this jurisdiction is trifling compared with the jurisdiction subsequently conferred by "The County Courts Act, 1865" (28 & 29 Vict. c. 99).

That act, reciting that "it is desirable to confer on the county courts jurisdiction in equity," enacted:—

Sect. 1. "The county courts held by virtue of an act passed in the session of parliament holden in the ninth and tenth years of the reign of her present majesty, chapter ninety-five, shall have and exercise all the

(*a*) See Vol. I. p. 58.

(*b*) Subsequently extended to 50*l*.

(*c*) See Vol. I. pp. 29, 767.

(*d*) See Vol. I. p. 29.

(*e*) Vol. I. p. 46.

power and authority of the High Court of Chancery in the suits or matters hereinafter mentioned; that is to say,

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- "1. In all suits by creditors, legatees (whether specific, pecuniary or residuary), devisees (whether in trust or otherwise), heirs at law or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds :
- "2. In all suits for the execution of trust in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds :
- "3. In all suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge or lien shall not exceed in amount the sum of five hundred pounds :
- "4. In all suits for specific performance (*f*), or for the delivering up or cancelling any agreement for the sale or purchase of any property, where the purchase-money shall not exceed the sum of five hundred pounds :
- "5. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such acts, in which the trust estate or fund to which the proceeding relates shall not exceed in amount or value the sum of five hundred pounds (*g*) :
- "6. In all proceedings relating to the maintenance or advancement of infants in which the property of the infant shall not exceed in amount or value the sum of five hundred pounds :
- "7. In all suits for the dissolution or winding-up of any partnership in which the whole property, stock and credits of such partnership shall not exceed in amount or value the sum of five hundred pounds :
- "8. In all proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by this act to the County Court, or for stay of proceedings at law to recover any debt proveable under a decree for the administration of an estate made by the court to which the application for the order to stay proceedings is made."

courts in certain suits and matters.

Sect. 2. "In all such suits or matters the judge of a county court shall, in addition to the powers and authorities now possessed by him, have all the powers and authorities, for the purposes of this act, of a judge of the High Court of Chancery; and the treasurer, registrar and bailiff shall, in all matters in which the county court has jurisdiction under this act, discharge any duties which an officer of the Court of Chancery can discharge, either under the order of a judge of such court or the practice thereof, and all officers of the county courts shall in discharging such duties conform to any rules or orders to be framed as hereinafter provided."

In matters under this act, judge and officers of the county courts to have the powers and authorities of a judge and officers of the Court of Chancery.

As to the power to frame rules and orders, see sect. 16 of the same act, *ante*, Vol. I. p. 59, note.—(*h*)

(*f*) See *post*, pp. 12, 13.

(*g*) See also 30 & 31 Vict. c. 142, ss. 24 and 25, *post*, p. 18.

(*h*) Rule 27 of Order XXIII. of the County Court Orders and Rules

in Equity, 1868, provides that, "The rules and forms and practice in actions in the county courts shall, subject to these orders, be adopted with reference to suits and proceedings in equity

It is to be observed that the general orders of the Court of Chancery do not apply to the county courts (*i*).

The jurisdiction in all the above cases is, it will be noticed, limited to where the amount at stake does not exceed five hundred pounds.

The same act (28 & 29 Vict. c. 99, s. 9) enacts, however, that where the subject-matter of the suit exceeds the limit, in point of amount, of the jurisdiction of the county courts, the suit may be remitted to the Court of Chancery, &c. (*k*).

The jurisdiction thus given is merely concurrent with that of the existing courts of equity. Unlike proceedings in the superior courts of common law for debts or damages under a certain amount, where the suitors are deprived of costs as a penalty for selecting the more expensive tribunal, the claimant in equity is still left the option of proceeding in the higher courts. Nevertheless, as costs in equity do not follow the result, but are in the discretion of the court, an unnecessary or unreasonable selection of the higher court is regarded by the equity judge as a ground for withholding costs (*l*).

“The County Courts Act, 1865” (28 & 29 Vict. c. 99) further enacts, that—

Sect. 6. “Nothing in this act contained shall be construed to impair the jurisdiction of the Stannaries Court, or to give authority to any county court judge to entertain jurisdiction in any case to which the equitable jurisdiction of the said court at present extends.”

Act not to
impair juris-
diction of
Stannaries
Court.

so far as they shall be respectively applicable.”

(*i*) See *Cheesewright v. Thorn*, 38 L. J. (N. S.) Ch. 615.

(*k*) See the section at length *post*, Chap. IX., “Transfer of Proceedings.”

(*l*) See *Simons v. M'Adam*, 37 L. J. (N. S.) Ch. 751; Law Rep., 6 Eq. 324; where in an ordinary foreclosure suit in the Court of Chancery in respect of a mortgage debt of 40*l.*, and both parties resided near each other, costs were only allowed according to the county court scale, *Malins v. C.*, observing, that the object of the county court jurisdiction being to relieve the superior courts of petty cases and to save expense, by bringing justice home to every man's door, he should do all in his power to discourage suitors from bringing such cases to the court. *Scotto v. Heritage*, L. R., 3 Eq. 212; 36 L. J. (N. S.) Ch. 123, a suit instituted before the repeal of the 9 & 10 Vict. c. 95, s. 128

(see *ante*, Vol. I. p. 52, note), is no longer applicable, and therefore not to be relied on.

It is to be observed that “The County Courts Act, 1867” (30 & 31 Vict. c. 142), s. 29, expressly enacts, that “Where any action or *suit* shall be brought in any other court than the superior courts of law which could have been brought in a county court, and the verdict recovered is for a less sum than ten pounds, the plaintiff shall not recover from the defendant a greater amount of costs than he would have been allowed if the action or suit had been brought in such county court, unless the judge shall certify that the action or suit was a fit one to be brought in such other court.” See Vol. I. p. 53, and note (*f*).

The application of this provision to suits in equity must, however, be very limited, as it is apparently confined to a recovery *by verdict*. See as to trials by jury *post*, Chap. V. § 4.

Formerly there was in the stannaries in Devonshire and Cornwall a steward's court, with a common law jurisdiction, and the vice-warden's court, with an original equitable jurisdiction. Both jurisdictions were consolidated by the statute 6 & 7 Will. 4, c. 106 (amended and extended by 2 & 3 Vict. c. 58, 11 & 12 Vict. c. 83, 18 & 19 Vict. c. 32 and 32 & 33 Vict. c. 19). This court exercises the original jurisdiction of both the former courts (*m*).

Sect. 21 of "The County Courts Act, 1865," enacts, that—

"This act and the act passed in the session of parliament holden in the ninth and tenth years of the reign of her present majesty, chapter ninety-five, and any act amending or altering the same, shall be read and construed as one act, as if the several provisions contained in the said acts referred to, not inconsistent with the provisions of this act, were repeated and re-enacted in this act."

This act and 9 & 10 Vict. c. 95, and any act amending or altering the same, to be construed together.

This provision, although a common one in modern acts of parliament, will probably give rise to various questions as to the application of provisions in the County Courts Acts to the equitable jurisdiction.

It seems that provisions relating to *actions*, may, under this section, be applied to *suits*, if not otherwise inapplicable (*n*).

The act also gave power to the county court judges appointed to frame rules and orders for regulating the general procedure of the county courts, to frame rules and orders for the equitable jurisdiction and also to frame a scale of costs and charges (*o*).

Although a concurrent equitable jurisdiction was thus conferred, the county courts remained for some time without the equitable powers of the superior courts of common law conferred on them by "The Common Law Procedure Act, 1854," permitting parties to set up equitable answers to actions and to defences to actions. This anomaly was remedied in 1867, by an order in council extending these and other provisions of "The Common Law Procedure Act, 1854," to county courts (*p*).

Further special jurisdiction was given to county courts in respect of suits for partition, by "The Partition Act, 1868" (31 & 32 Vict. c. 40), and in respect of the separate property of married women, by "The Married Women's Property Act, 1870" (33 & 34 Vict. c. 94) (*q*).

(*m*) See *ante*, Vol. I. p. 55, note (*k*). Power is given to the county courts to enforce execution of judgments, decrees and orders of the Vice-Warden's Courts not exceeding 250*l*. See 18 & 19 Vict. c. 32, ss. 9, 10; and 32 & 33 Vict. c. 19, s. 29. As to the City of London Court, now a county court for all the purposes of equitable jurisdiction, see also *ante*, Vol. I. p. 108.

(*n*) See *Linford v. Gudgeon*, 40 L. J. (N. S.) Ch. 514.

(*o*) 28 & 29 Vict. c. 99, ss. 16 and 17; see s. 16, *ante*, Vol. I. p. 59, note, and s. 17, *ante*, Vol. I. p. 69. The body of existing orders and rules in equity came in force on 1st January, 1868.

(*p*) See Vol. I. Chap. VII., "Equitable Defences." The Order in Council is given in Vol. I. p. 225, note.

(*q*) See *post*, pp. 17, 21.

§ 2.—JURISDICTION IN SUITS BY CREDITORS, LEGATEES, DEVI- SEES, HEIRS AT LAW AND NEXT OF KIN.

Passing over for the present the special jurisdiction of the county courts under the Charitable Trusts Acts and relating to literary and scientific institutions and to friendly societies, and the winding-up of societies and companies (*r*), and dealing principally with the jurisdiction under the heads and in the order mentioned in "The County Courts Act, 1865," the first is "All suits by creditors, legatees (whether specific, pecuniary or residuary), devisees (whether in trust or otherwise), heirs at law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds" (*s*).

The jurisdiction given by this first branch of the section is for an account or administration of real or personal estate.

Account.

It has been said that in consequence of the former inability of the courts of common law to examine interested parties as witnesses, and the power of a court of equity to compel a defendant to answer upon oath with regard to the truth of a transaction, the courts of equity acquired a concurrent jurisdiction with every other court in all matters of account; but, in modern times, the true foundation of the jurisdiction of courts of equity in accounts is placed upon the fact that the remedy is generally more complete and adequate than it can be at law (Story's Equity Juris. § 450, 451). Although this equitable jurisdiction exists in a variety of cases, the jurisdiction conferred by this part of the section on the county courts appears to be confined to an account in the matter of the estate of a deceased person.

Administration.

Courts of equity take cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators (3 Bla. Com. 437). This jurisdiction is, to a great extent, founded on the principle that it is the duty of the court to enforce the execution of trusts; and that the executor or administrator, who has the property in his hands, is bound to apply that property to the payment of debts and legacies, and to apply the surplus according to the will of the testator, or, in cases of intestacy, according to the Statute of Distributions; but the jurisdiction now assumed by courts of equity to so wide an extent over all administrations in cases of testacy and intestacy, rests on auxiliary grounds, such as the necessity for taking accounts, and the consideration that the remedy at law, when it exists, is not plain, adequate and complete (Story's Equity Juris. § 532—535).

(*r*) As to these matters see *post*,
Chap. XII.

(*s*) 28 & 29 Vict. c. 99, s. 1, sub-s.
(1), *ante*, p. 3.

Suits by Creditors.]—In suits at common law nothing more can be done than to establish the debt of the creditor, and if the assets are not of a *legal* nature, or if a *marshalling of the assets* is indispensable to a due payment of the creditor's claim, the remedy at law cannot be effectual, and recourse must be had to equity.

A creditor may proceed for payment of his own debt, and seek a discovery of the assets for this purpose only. If he does so, and an account is taken, the court will, upon the footing of such an account, proceed to make a final decree in favour of the creditor without sending him back to law for the recovery of his debt. The more usual course, however, pursued in the case of creditors is for one or more creditors to proceed by and on behalf of him or themselves, and all other creditors who shall come in, for an account of the assets and a due division of the estate (Story, Equity Juris. § 546, 547). The application to the Court of Chancery for relief in the administration of estates made by the executor or administrator himself, when he finds the affairs of his testator or intestate so much involved that he cannot safely administer the estate except under the direction of the court, or when for other reasons he desires to have the protection of the court, is now made under the Trustees Relief Acts, as to which see *post*, p. 18.

Legal and Equitable Assets.]—Those portions only of the assets of a deceased person are deemed legal assets which by law are directly liable, in the hands of his executor or administrator, to the payment of debts and legacies, and which can be reached by a suit at law against him, either by a common judgment, or by a judgment upon a *devastavit* against him personally. But it is, perhaps, more accurate to say, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration. In other words, whatever an executor or administrator takes *quâ* executor or administrator, or in respect to his office, is to be considered as legal assets. Equitable assets are, on the other hand, all assets which are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets. They are called equitable assets because, in obtaining payment out of them, they can be reached only by the aid and instrumentality of a court of equity. They are also called equitable for another reason, and that is, that the rules of distribution by which they are governed are different from those of the distribution of legal assets (see *infra*). It may be laid down as a general principle, that everything is considered as equitable assets which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to the payment of his debts generally (*t*).

(*t*) Story's Equity Jurist. § 551, is *Bain v. Sadler*, 40 L. J. (N. S.) 552. The latest case on this subject Ch. 791.

Administration and Marshalling of Assets.]—The personalty is the primary fund for the payment of debts and legacies, and, in the administration of assets, courts of equity follow the same rules in regard to legal assets which are adopted by courts of law, and give the same priority to the different classes of creditors which is enjoyed at law; but in regard to equitable assets courts of equity, in the actual administration of them, adopt very different rules from those adopted in courts of law in the administration of legal assets. Thus, in equity, it is a general rule that equitable assets shall be distributed equally and *pari passu*, among all the creditors, without any reference to the priority or dignity of the debts, and if the fund falls short, all the creditors are required to abate in proportion.

See now 32 & 33 Vict. c. 46, abolishing the distinction as to priority of payment between specialty and simple contract debts, *ante*, Vol. I. pp. 625, 626, note.

In the sense of courts of equity, the *marshalling of assets* is such an arrangement of the different funds under administration as shall enable all the parties, having equities thereon, to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds. Thus, where there exist two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund for satisfaction, but the others can come upon one only, these courts of equity exercise the authority to marshal (as it is called) the funds, and by this means enable the parties whose remedy at law is confined to one fund only, to receive due satisfaction (Story's Equity Juris. § 553, 558).

As to the payment of mortgage debts out of personalty, see 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69.

Suits by Legatees.]—Courts of equity exercise jurisdiction in regard to legacies, whether pecuniary or specific. No suit will lie at the common law to recover them unless the executor has assented thereto. In cases of specific legacies of goods and chattels, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at law for their recovery. The same rule has been attempted to be applied at law to cases of pecuniary legacies, where the executor had *expressly* assented thereto, and there are certainly decisions that, in the case of an express promise to pay a pecuniary legacy in consideration of assets, an action will lie; but these cases seem not to have been decided upon satisfactory principles, and have been doubted and disapproved (Story's Equity Juris. § 591). But whether a pecuniary legacy is recoverable at law or not, after an assent thereto by an executor, it is very certain that courts of equity now exercise a concurrent jurisdiction with all other courts in cases of legacies, whether the executor has assented thereto or not (*Id.*).

Legatees are in general entitled to the same equities as creditors where the personal estate is exhausted by specialty creditors. They are therefore permitted to stand in the place of the specialty creditors against the real assets descended to the heir (Story's Equity Juris. § 565).

The jurisdiction of the original County Court Act, 9 & 10 Vict. c. 96, s. 65, as enlarged by the 13 & 14 Vict. c. 61, s. 1, extended to the recovery of any demand not exceeding the sum of 50*l.*, which is the amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will. For legacies within this amount, proceedings may still be taken as heretofore. As to the practice and cases decided under this provision, see *ante*, Vol. I. p. 767.

§ 3.—JURISDICTION IN SUITS FOR THE EXECUTION OF TRUSTS.

“All suits for the execution of trusts in which the trust estate or fund shall not exceed in amount or value the sum of five hundred pounds” (*u*).

What are technically called trusts, that is, estates vested in persons upon particular trusts and confidences, are wholly without any cognizance at the common law; and the abuses of such trusts and confidences are beyond the reach of any legal process. But they are cognizable in courts of equity; and hence they are called equitable estates; and an ample remedy is there given in favour of the *cestuis que trust* (the parties beneficially interested) for all wrongs and injuries, whether arising from negligence or positive misconduct (Story's Equity Juris. § 29).

Independently of the cases obviously within this branch of jurisdiction, the power here conferred will be useful in a class of cases which have been held to be just without the jurisdiction of the county court conferred by the original act giving power to sue in the county court for small legacies. Thus, where a testator devised to his son certain freehold and leasehold estates and chattels, on condition of his son paying (*inter alia*) to his mother the sum of 4*s.* a week during her life, it was held, that the mother's claim was not a claim of a legacy within the provision referred to (*Longbottom v. Longbottom*, 22 L. J. (N. S.) Exch. 74). A testator bequeathed to the defendant 100*l.* in trust to pay that amount to the plaintiff on his attaining twenty-one years, and in the meantime to invest it and to pay the plaintiff the interest, with power to the defendant, whom he styled “trustee,” to advance either the part or the whole for the education, &c. of the plaintiff, or otherwise for his benefit during his infancy. The plaintiff, on attaining his majority, sued the defendant in the county court for a balance of 50*l.* of the 100*l.*, part having been applied pursuant to the terms of the will; it was held, that the county court had no

(*u*) 28 & 29 Vict. c. 99, s. 1, sub-s. (2), *ante*, p. 3.

jurisdiction under the original act, the 100*l.* not having been given as a legacy but by way of trust (*Phillips v. Hewston*, 25 L. J. (N. S.) Exch. 133, and see *ante*, Vol. I. p. 770).

It is clear that the claimants in both the above cases would be entitled to relief in the county court under either the first or second sub-sections of sect. 1 of "The County Courts Act, 1865."

It is to be observed that the county court jurisdiction extends to constructive or implied trusts as well as to express trusts (*x*).

—◆—

§ 4.—JURISDICTION IN SUITS FOR FORECLOSURE OR REDEMPTION,
OR FOR ENFORCING ANY CHARGE OR LIEN.

"All suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage, charge or lien shall not exceed in amount the sum of five hundred pounds" (*y*).

Rights of Mortgagors and Mortgagees.]—Although upon non-payment of the mortgage debt at the time stipulated by the deed the property becomes forfeited and the estate absolutely vested in the mortgagee at the common law, the courts of equity interpose and consider the real value of the tenements compared with the sum borrowed; "and if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest and expenses: for otherwise, in strictness of law, an estate worth 1,000*l.* might be forfeited for non-payment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest (*z*). But, on the other hand, the mort-

(*x*) *Clayton v. Renton*, Law Rep., 4 Eq. 158; 36 L. J. (N. S.) Ch. 428.

(*y*) 28 & 29 Vict. c. 99, s. 1, sub-s. (3), *ante*, p. 3. Where a second mortgagee filed a plaint against the first mortgagee and a purchaser from him (after notice of the second mortgage and claim to redeem), and the mortgagor's representatives, praying that the sale might be declared invalid and set aside, and also praying for an order for redemption and foreclosure; it was held, that the suit was within the county court jurisdiction although the offer to redeem was disputed (and, therefore, not being an ordinary redemption suit), and although the suit

prayed for the deed to be set aside. *Powell v. Roberts*, Law Rep. 9 Eq. 169; 39 L. J. (N. S.) Ch. 44. In holding that the county court had jurisdiction, it appears to have been on the ground that the prayer should not have been to set aside the deed, as it would not be proper in a suit of that kind, and that the decree was properly silent on the point.

(*z*) "It is now firmly established that the mortgagor has an estate in the land in equity, in the nature of a trust estate, which may be granted, devised and entailed." Story's Equity Juris. § 1015.

gagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall" (2 Bla. Comm. 158, 159).

If the mortgagor permits the mortgagee to hold possession of the mortgaged property for twenty years without accounting, or without admitting that he possesses a mortgage title only, the mortgagor loses his right of redemption, and the title of a mortgagee becomes as absolute in equity as it previously was in law. So with respect to a mortgagee: If he has suffered the mortgagor to remain in possession for twenty years after the breach of the condition without any payment of interest or any admission of the debt, or other duty, the right of foreclosure will generally be deemed to be barred and extinguished. However, in cases of this sort, as the bar is not positive, but is founded upon a presumption of payment, it is open to be rebutted by circumstances. (Story's Equity Juris. § 1028*a*, 1028*b*, 8th edit.)

As powers of sale are now generally inserted in mortgages, there will seldom be any necessity for resorting to the court to compel a sale in the case of express mortgages; but, on the other hand, in suits for foreclosure the court may direct a sale of the mortgaged property instead of a foreclosure, on such terms as it may think fit (15 & 16 Vict. c. 86, s. 48); and in most cases, it is presumed, the judge of the county court would act on this power, unless indeed it were apparent that a sale would not realize more than the mortgage debt and costs.

It may be observed here that by the statute 4 & 5 W. & M. c. 16 (still in force), if any person mortgages his estate and does not previously inform the mortgagee in writing of a prior mortgage, or of any judgment or incumbrance which he has voluntarily brought upon the estate, the mortgagee holds the estate as an absolute purchaser, free from the equity of redemption of the mortgagor.

Equitable Mortgages.—“Mortgages may not only be created by the express deeds and contracts of the parties, but they may also be implied in equity, from the nature of the transactions between the parties; and then they are termed equitable mortgages. Thus for instance, it is now settled in England, that if the debtor deposits his title deeds to an estate with a creditor, as security for an antecedent debt, or upon a fresh loan of money, it is a valid agreement for a mortgage between the parties, and is not within the operation of the Statute of Frauds” (*a*).

This doctrine is not “ordinarily applied to enforce parol agreements to make a mortgage, or to make a deposit of title deeds for

(*a*) Story's Equity Juris. § 1020.

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such a purpose; but it is strictly confined to an actual immediate and *bonâ fide* deposit of the title deeds with the creditor, as a security, in order to create the lien" (*b*).

An equitable mortgage will not, in general, avail against a subsequent mortgagee by deed without notice of the prior deposit of the title deeds. Still the second mortgagee may, by not inquiring from the mortgagor for the title deeds, be guilty of gross negligence, sufficient to invalidate his title; but it is otherwise if he has made such inquiry and a reasonable excuse was given for their non-delivery (*c*).

Priority between actual Mortgagees.—In the case of actual mortgage, the mere fact that a first mortgagee has left the title deeds in the possession of the mortgagor, without any attendant circumstances of fraud, will not be sufficient to postpone such first mortgagee to a second, who has taken the title deeds with his mortgage without any notice of the prior mortgage (*d*).

"The Bankruptcy Act, 1869," reserves the remedies of mortgagees, and if a mortgagee desires to foreclose against a bankrupt, he can only get that by an equitable suit, but if he only desires a sale, he ought to proceed in the bankruptcy court, although he has the right to proceed in equity (*e*).

As to the right and mode of redeeming in the case of ejectionment by mortgagee against mortgagor, see County Court Rules, 1868, Rule 256, *ante*, Vol. I. pp. 410, 411 (*f*).

Where in a mortgagee's suit, the estate is sold under the direction of the court; and the purchase-money is insufficient to pay all the incumbrances, no *puisne* incumbrancer is entitled to his costs incident to the sale until the debts and costs of all prior incumbrances have been fully discharged (*g*).

§ 5.—JURISDICTION IN SUITS FOR SPECIFIC PERFORMANCE OF, OR FOR THE DELIVERING UP OR CANCELLING, ANY AGREEMENT FOR THE SALE OR PURCHASE OF PROPERTY.

"The County Courts Act, 1865," under the fourth head in sect. 1, gave jurisdiction to the county courts in "all suits for

(*b*) Story's Equity Juris. § 1020.

(*c*) *Id.* See as a recent case on this subject, where the authorities are cited, *Ratcliffe v. Barnard*, 40 L. J. (N. S.) Ch. 147, 777. As to the effect of non-registration of mortgage deeds where registration necessary, see *Holland v. Hart*, 40 L. J. (N. S.) Ch. 345.

(*d*) Story's Equity Juris. § 1020. As to priority in general see the rule laid down in *Hopkinson v. Rolt*, 9

H. L. Cas. 514; 34 L. J. (N. S.) Ch. 468.

(*e*) *White v. Simmons* 40 L. J. (N. S.) Ch. 689; see also *The Metropolitan Bank v. Offord*, 39 L. J. (N. S.) Ch. 820.

(*f*) See also *Bourton v. Williams*, Law Rep. 9 Eq. 297; 39 L. J. (N. S.) Ch. 800.

(*g*) *Wonham v. Machin*, Law Rep. 10 Eq. 447; 39 L. J. (N. S.) Ch. 789.

specific performance, or for the delivering up or cancelling any agreement for the sale or purchase of any property, where the purchase-money shall not exceed the sum of five hundred pounds" (*h*)

In consequence of the omission of the word "of," after "specific performance," the precise effect of the above head, was to give the county court jurisdiction in *all* suits for specific performance, although it was intended to be confined to agreements for the sale or purchase of any property where the purchase-money shall not exceed 500*l.*

This very material, although verbal, omission was remedied or attempted to be remedied by "The County Courts Act, 1867" (30 & 31 Vict. c. 142). Sect. 9 of that act enacts, that—

"The jurisdiction which is given by the act passed in the session holden in the twenty-eighth and twenty-ninth years of the reign of her Majesty, intituled an act to confer on the county courts a limited jurisdiction in equity, so far as relates to cases coming within the fourth head of the first section of the said act, may, from and after the passing of this act, be exercised in all suits for specific performance of or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase, or lease of any property where, in the case of a sale, or purchase, the purchase-money, or in the case of a lease, the value of the property, shall not exceed five hundred pounds."

Suits in which jurisdiction under 28 & 29 Vict. c. 99, may be exercised.

The act, it will be seen, introduces the omitted word "of," and is intended to wholly supersede the fourth head of the original act. It is to be regretted that this intention was not carried out by expressly repealing the fourth head. As the 9th section is framed it is capable of being read simply as an *extension* of jurisdiction, leaving the fourth head to stand as before with the doubtful jurisdiction "in *all* suits for specific performance."

Nevertheless as there are no orders or rules or forms provided for the fourth sub-section of the first section of "The County Courts Act, 1865," that sub-section must be treated as no longer having any operation.

The amended provision also expressly includes leases (*i*), and also the reforming of agreements.

Suits for Specific Performance.—A court of equity may compel executory agreements to be carried into strict execution unless where it is improper or impossible: and hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally (3 Bla. Comm. 438).

(*h*) 28 & 29 Vict. c. 99, s. 1, sub-s. (4), *ante*, p. 3.

(*i*) Although agreements for leases were not originally expressly mentioned in the fourth head of jurisdic-

tion, it was held that a liberal construction would include them. *Willcox v. Marshall*, Law Rep., 3 Eq. 270; 36 L. J. (N. S.) Ch. 358.

By the common law every covenant to sell or transfer a thing, if there is no actual transfer, is treated as a mere personal contract, and as such, if it is unperformed by the party, no redress can be had except in damages; thus allowing the party the election, either to pay damages, or to perform the contract, at his sole pleasure. But courts of equity have deemed such a course wholly inadequate for the purposes of justice; and they have not hesitated to interpose and require from the conscience of the offending party a strict performance of what he cannot without manifest wrong or fraud refuse (Story's Equity Juris. § 714). The Court of Chancery may, however, if it thinks fit, award damages to the party injured either in addition to or in substitution for such specific performance, and such damages may be assessed in such manner as the court directs (21 & 22 Vict. c. 27, s. 2). This same power is conferred (by force of ss. 1 and 2 of "The County Courts Act, 1865,") upon the county court.

As to the mode of assessing the damages, see *post*, Chap. VI. § 4.

Agreements may be made respecting personal acts, personal property and real property. The county court jurisdiction is, however, confined to agreements for the sale or purchase of property, and the most ordinary suit of this kind is for the performance of a contract for the sale of land, which may be brought either by the seller to compel the other party to complete the purchase to which he has agreed, or by the buyer to compel the seller to make a conveyance of the land; and the general rule is not to entertain jurisdiction in equity for a specific performance of such agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature, where a compensation in damages furnishes a complete and satisfactory remedy (Story's Equity Juris. § 718). It may be observed, that although under "The Common Law Procedure Act, 1854," the plaintiff, in an action in any of the superior courts, may claim a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, it has been decided that this provision does not extend to a duty arising out of a personal contract, but refers to the class of cases in which there is a duty of a public nature, or a duty created by act of parliament in the fulfilment of which some one has a personal interest (*Benson v. Paul*, 6 E. & B. 273; 25 L. J. (N. S.) Q. B. 274). It does not therefore interfere with the cases which are ordinarily the subject of a suit in equity for specific performance, and clearly does not apply to suits for specific performance of agreements for the sale or purchase of property to which this branch of the equitable jurisdiction of the county court is confined.

Suits for delivering up or cancelling Agreements.—When deeds are wrongfully withheld from those whose estates they

concern, the courts of equity will render assistance to obtain the delivery of them; and those courts will also generally set aside, cancel, and direct to be delivered up, agreements and other instruments, however solemn in their form or operation, which, though good in law, justice or public policy require to be annulled; *first*, when there is actual fraud in the defendant, in which the plaintiff has not participated; *secondly*, when there is a constructive fraud against public policy, and the plaintiff has not participated therein; *thirdly*, when there is a fraud against public policy, and the plaintiff has participated therein, but public policy would be defeated by allowing it to stand; and *fourthly*, when there is a constructive fraud by both parties, but they are not *in pari delicto* (Story's Equity Juris. § 695).

As to the *first* class of cases: When one party complains that another has circumvented him in a bargain by some misrepresentation, he must show that such misrepresentation involved not only an actual falsity, but a falsity which materially influenced him in entering into the bargain. Thus false descriptions of non-essential and unimportant particulars will vitiate no bargain; nay, even a material misrepresentation will not be regarded by a court of equity in cases where the one party cannot be presumed to have placed any trust and confidence in the other. In matters of mere opinion, or those which are equally open to each side for examination and inquiry, this rule will hold good. The mere puffing and praise of a seller, bestowed upon his own commodity, will not be supposed to influence the judgment of a buyer of ordinary sagacity, and it is not the province of courts of justice to aid those who will not use their own sense and discretion (*k*). But the case is otherwise when the seller misrepresents or conceals some fact with regard to which the buyer must needs trust him for information; some matter which could alone be in the seller's cognizance, or upon which he would be the best authority. If a man bargain to sell another a house in a distant town, knowing at the same time that the house has been burnt down, such a bargain will be set aside; for each party is, as a general rule, bound in every case to communicate to the other his knowledge of mutual facts, provided he knows the other to be ignorant of them, and they be not naked and

(*h*) "The Sale of Land by Auction Act, 1867" (30 & 31 Vict. c. 48), s. 4, recites that, "whereas there is at present a conflict between her Majesty's courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the

rule is unsettled; and whereas it is expedient that an end should be put to such conflicting and unsettled opinions;" and enacts, that "whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law." Sects. 5 and 6 provide for a reserved price, and sect. 7 restricts the practice of the courts of equity to open biddings. See *Gilliat v. Gilliat*, 39 L. J. (N. S.) Ch. 142.

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open, or equally within the reach of his observation. But this must be restricted to facts immediately relating to the thing in question, for the mere concealment of extrinsic facts, which may possibly influence the market value of a commodity, and of which one party happens to have private and exclusive information, will not affect the validity of a bargain. Whenever, however, a *fiduciary* relation of any sort subsists between the parties, then the smallest concealment of anything whatever which tends to the disadvantage of the one, whose interest the other is bound in faith to protect, will be scrutinized with the sharpest eye. It is a well-known rule of a court of equity, that no person standing in the situation of a trustee can purchase the property of his *cestui que trust*; this rule applies to all persons having either a fiduciary character, or having a power given them by their situation which it is possible they may abuse.

The *second* class of cases consists of *constructive frauds*, or such acts or contracts, as although not originating in any evil design to defraud or injure another, yet having a tendency to deceive, or to violate public or private confidence, are deemed worthy of repression equally with frauds of the more gross or palpable sort. This class may be illustrated by secret dispositions of property by women in contemplation of marriage, without her intended husband's privity, which are held void as being in derogation of the marital rights of the husband, and a fraud upon his just expectations. And a secret conveyance made by a woman, under like circumstances, in favour of a person for whom she is under no moral obligation to provide, would be similarly treated. But if she only reasonably provides for her children by a former marriage, in the absence of any palpable deception practised on the intended husband, such an arrangement will, it seems, stand good (3 Bla. Comm. by Kerr, 501, 502).

It must be observed that the county court jurisdiction is confined to the case of *agreements for sale or purchase (i. e. for money)*, so that settlements of the above description would scarcely fall within the cognizance of these courts.

The *third* class may be illustrated by the common case of a gaming security, which will be decreed to be given up, notwithstanding both parties have participated in the violation of the law, because public policy will be best subserved by such a course.

The *fourth* comprises a class of cases where, although both parties have participated in the guilty transaction, yet the one who seeks relief has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of age or condition, so that in a *moral*, as well as in a legal point of view, his guilt may be deemed less than that of his associate (Story's Eq. Juris. 8th edit. § 695a).

It may be observed that no purchase made *bonâ fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate, can now be opened or set aside merely on the ground

of undervalue (*l*); but this does not take away the protection thrown by the courts of equity "around unwary young men who are in the hands of unscrupulous persons ready to take advantage of their necessities" (*m*).

§ 6.—JURISDICTION IN SUITS FOR PARTITION.

"The Partition Act, 1868" (31 & 32 Vict. c. 40), (which provides for a sale and distribution of the proceeds, instead of a partition of property, under certain circumstances), enacts—

Sect. 12. "In England the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner, and subject to the like provisions, as the power and authority conferred by section one of the County Courts Act, 1865" (*n*).

Where in a partition suit the question was one of disputed legal title, and the plaintiff had not clearly established his claim, the court retained the bill for a year, with liberty to the plaintiff to bring such action as he might be advised (*o*).

A joint tenant, or tenant in common, in reversion or remainder, cannot maintain a suit for partition (*p*); and if a plaintiff is not entitled to the relief prayed at the commencement of the suit, the defect is not cured by a subsequent acquisition of title (*q*).

The court may, in a partition suit, direct a sale of part of the property and a partition of the remainder (*r*).

The general rule is that all the costs of a partition suit are to be borne by the parties according to the benefit they gain under the partition, that is to say, in proportion to the value of their shares. Otherwise, if one party has misconducted himself (*s*).

Costs of partition suit.

(*l*) 31 & 32 Vict. c. 4.

(*m*) *Tyler v. Yates*, 40 L. J. (N. S.) Ch. 768.

(*n*) See also sect. 9 of 31 & 32 Vict. c. 40, respecting parties to the suit. As to the construction of the Partition Act, see *Pemberton v. Barnes*, 40 L. J. (N. S.) Ch. 675. The prayer of a petition may be for a sale and not for a partition. *Aston v. Meredith*, *id.* p. 241. An order for sale may be made although one of the parties entitled is out of the jurisdiction. *Teall v. Watts*, 40

L. J., Ch. 176. But notice should be given by advertisement. *Peters v. Bacon*, 39 L. J. (N. S.) Ch. 571.

(*o*) *Giffard v. Williams*, 39 L. J. (N. S.) Ch. 735; see also *Silver v. Udall*, *id.* p. 118; and *Slade v. Barlow*, 38 *id.* 369.

(*p*) *Evans v. Bagshaw*, 39 L. J. (N. S.) Ch. 145.

(*q*) *Id.*

(*r*) *Roebuck v. Chadebet*, 38 L. J. (N. S.) Ch. 488.

(*s*) *Cannon v. Johnson*, 40 L. J. (N. S.) Ch. 46.

§ 7.—JURISDICTION IN PROCEEDINGS UNDER THE TRUSTEES
RELIEF ACTS, OR UNDER THE TRUSTEE ACTS.

“All proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such acts, in which the trust estate or fund to which the proceeding relates shall not exceed in amount or value the sum of five hundred pounds” (*t*).

The jurisdiction here given is somewhat difficult to define. In the first place, it seems uncertain what acts are included in the terms “Trustees Relief Acts” and “Trustee Acts,” for there are acts containing important provisions relating to trustees which have no such general title, and yet there can be little doubt they were intended to be included. Again, the acts relating to trustees also relate to other matters, and to persons filling various other characters, fiduciary and otherwise, and to whom therefore this jurisdiction seems to extend. Further, “proceedings” under the acts are indefinite.

Without attempting to settle these points, it may be observed, that by the 10 & 11 Vict. c. 96, (for better securing trust funds, and for the relief of trustees,) trustees, executors, administrators, &c., or the majority where the consent of the others cannot be had (12 & 13 Vict. c. 74), may pay trust moneys, or transfer stocks into the Court of Chancery, and the court may make orders on petition, without bill, for application of the funds and administration of the trust (see more fully Sidney Smith’s Chancery Practice, 7th edit., pp. 1113—1120); and by the more recent act, 22 & 23 Vict. c. 35, “to further amend the law of property and to relieve trustees,” “any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court of Chancery, or by summons upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property, or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application; provided nevertheless, that this act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator, shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application

(*t*) 28 & 29 Vict. c. 99, s. 1, sub-s. (5), *ante*, p. 3.

as aforesaid shall be in the discretion of the judge to whom the said application shall be made" (u). (It may be observed, that although the statute allows the application to be by petition or summons, in the County Court the application must be by petition; see Order XI., Rule 1, *post*, p. 49.)

On the other hand, by "The Trustee Act, 1850" (13 & 14 Vict. c. 60, extended and amended by the 15 & 16 Vict. c. 55), the Court of Chancery may make orders vesting, or may appoint a person to convey, the real and personal estate of trustees or mortgagees being lunatics, or of unsound mind, or infants, or of trustees out of the jurisdiction of the court, or who cannot be found, and of trustees jointly seised with parties out of the jurisdiction, &c., or where it is uncertain which of several trustees was the survivor, or whether the last trustee be living or dead, and of trustees dying intestate without an heir, or dying and it not being known who is his heir or devisee, and contingent rights of unborn persons, &c. Further, on the neglect of any person to transfer stock, or receive dividends, or to sue for any chose in action, an order may be made vesting the right in another person; and a new trustee may be appointed in the place of a trustee convicted of felony; and in all cases where it shall be expedient to appoint new trustees. (See, however, the 23 & 24 Vict. c. 145, s. 27, empowering co-trustees, &c. to appoint fresh trustees in certain cases.) By 15 & 16 Vict. c. 86, any one of several *cestuis que trust*, without serving the others, and any trustee, may obtain a decree against any one *cestui que trust* for the execution of the trusts (x).

"The County Courts Act, 1867" (30 & 31 Vict. c. 142), enacts that—

Sect. 24. "Any moneys, annuities, stocks, or securities vested in any persons as trustees, executors, administrators, or otherwise, upon trusts within the meaning of an Act passed in the session of Parliament holden in the tenth and eleventh years of the reign of her present Majesty, chapter ninety-six, "for better securing trust funds, and for the relief of trustees" (y), where the same does not exceed in amount or value the sum of five hundred pounds, upon the filing by such trustees or other persons, or the major part of them, to or with the registrar of the county court within the district of which such persons or any of them shall reside, an affidavit shortly describing the instrument creating the trust according to the best of their knowledge, may in the case of money be paid into a Post Office Savings Bank established in the town in which the county court is held in the name of the registrar of such court, in trust to attend the orders of the court, and upon such persons filing with the registrar the receipt or other document given to them by the officer of the said bank, the registrar shall record the same, and give to them an acknowledgment in such form as may be directed by any

Trustees may pay trust moneys or transfer stock and securities into the court.

(u) As to the costs of trustees, see *Gunnell v. Whitear*, 39 L. J. (N. S.) Ch. 869, and cases there cited.

parties to suits, see *Pointon v. Pointon*, 40 L. J. (N. S.) Ch. 609.

(y) See a notice of this statute, *ante*, p. 18.

(x) As to the effect of this act on

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rule of practice, which acknowledgment shall be a sufficient discharge to such persons for the money so paid, and in the case of stocks or securities may be transferred or deposited into or in the names of the treasurer and registrars of such court, in trust to attend the orders of the court, and the certificate of the proper officer of the transfer or deposit of such stocks or securities shall be a sufficient discharge to such persons for the stocks or securities so transferred or deposited; provided that where there is not a treasurer a person shall be nominated by rule of practice to whom the transfer or deposit in conjunction with the registrar may be made."

Extension of powers given by 12 & 13 Vict. c. 74, to Court of Chancery to county courts.

Sect. 25. "For the purposes of the last section all the powers and authorities given to the Court of Chancery by the act passed in the session of Parliament holden in the twelfth and thirteenth years of the reign of her present Majesty, chapter seventy-four, "for the further relief of trustees" (z), shall be possessed and exercised by the county courts, and any order made by virtue of such powers and authorities shall fully protect and indemnify all persons acting under or in pursuance of such order."

§ 8.—JURISDICTION IN PROCEEDINGS RELATING TO THE MAINTENANCE OR ADVANCEMENT OF INFANTS.

"All proceedings relating to the maintenance or advancement of infants in which the property of the infant shall not exceed in amount or value the sum of five hundred pounds" (a).

The courts of equity possess an exclusive jurisdiction in respect to the guardianship over the person and property of infants. When a child has no other guardian, or the father, by his misconduct, has disqualified himself for the charge of his child, the Court of Chancery has a right to appoint one. The jurisdiction of the court, which extends to the care of the person of the infant, so far as is necessary for his protection, and to the care of his property for its due management and preservation, arises whenever a suit has been instituted relative to an infant's estate or person; but it cannot be exercised unless the court has some property of the infant; a guardian may, however, be appointed upon petition of the infant himself, or some other person on his behalf, without a suit being instituted (see 3 Bla. Com. by Kerr, ch. 28).

It will be observed that the jurisdiction of the county court is confined to "proceedings relating to the maintenance or advancement of infants." This may give rise to some questions.

(z) See a reference to this statute, *ante*, p. 18.

(a) 28 & 29 Vict. c. 99, s. 1, sub-s. (6), *ante*, p. 3.

§ 9.—JURISDICTION IN QUESTIONS AS TO THE SEPARATE PROPERTY OF MARRIED WOMEN.

“The Married Women’s Property Act, 1870” (33 & 34 Vict. c. 93), by which property of various specified descriptions is, under certain circumstances, declared and deemed to be the separate property of married women, enacts that—

Sect. 9. “In any question between husband and wife as to property declared by this act to be the separate property of the wife, either party may apply by summons or motion in a summary way, either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) the judge of the county court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs as he shall think fit; provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit, or on an equitable plaint would have been, and the judge may, if either party so requires, hear the application in his private room.”

The act itself must be referred to to ascertain what cases are within it, and as to whether in each instance women married before, as well as after the passing of the act (9th August, 1870), are within its provisions, the act not being uniform in this respect (*b*).



§ 10.—JURISDICTION IN SUITS FOR THE DISSOLUTION OR WINDING-UP OF ANY PARTNERSHIP.

“All suits for the dissolution or winding-up of any partnership in which the whole property, stock and credits of such partnership shall not exceed in amount or value the sum of five hundred pounds” (*c*).

It is a clear general rule, that one partner cannot sue his co-partner *at law* in respect of the partnership accounts, or in any other matter connected with the partnership transactions, whether the firm exist for general purposes, or have reference only to a particular trade or branch thereof;—for this reason, that a court of law cannot do effectual justice between the parties—the investigation and settlement of their accounts and affairs being peculiarly the province of a court of equity (Chitty on Contracts, 7th edit. p. 225).

By the County Court Act, 9 & 10 Vict. c. 95, s. 65, as extended by the 13 & 14 Vict. c. 61, s. 1, the jurisdiction of the county court extends to the recovery of any demand not exceeding 50*l.*, which is the whole or part of the unliquidated balance of a part-

(*b*) See also *ante*, Vol. I. p. 509.

(*c*) 28 & 29 Vict. c. 99, s. 1, sub-s. (7), *ante*, p. 3.

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nership account, but the action will, it seems, only lie after the dissolution of the partnership (see *ante*, Vol. I., p. 767).

Courts of equity, however, have jurisdiction in all cases of partnership, and these courts have therefore been long resorted to for obtaining effectual redress in the case of disputes. They can decree an account, and wind up the affairs of the partnership, and can appoint a manager or receiver to close the business and make sale of the property, so that a final distribution may be made of the partnership effects. If deemed expedient, the court will restrain the partners from collecting the debts or disposing of the property of the concern, and will direct the moneys of the firm received by them to be paid into court, thus adapting its remedial authority to the exigencies of each particular case (Story's Equity Juris. § 672).

In conformity with the practice of the Court of Chancery, the accounts of a partnership dissolved or wound-up in the county court will in general be directed to be taken, the registrar being the officer for the purpose of taking accounts. (See Order VI. Rule 2, *post*, Chap. VII.)

It appears that the jurisdiction given to the county courts is confined to ordinary partnerships (*d*), and does not apply to the winding-up of registered joint stock companies. But it also seems that the provisions of "The Companies Act, 1862" (25 & 26 Vict. c. 89), allowing any unregistered partnership of more than seven members to be wound up under that act, might be adopted in the winding up in the county court of such a partnership. It will seldom happen, however, that the whole property, &c., of a partnership of more than seven persons will not exceed 500*l*.

By s. 126, however, of "The Companies Act, 1862," judges of county courts sitting at places more than twenty miles from the General Post Office are appointed commissioners for taking evidence in cases where companies are wound up, and the court may refer the whole or any part of the examination of any witnesses to any such judge, who is vested with full powers for that purpose (*e*).

§ 11. — JURISDICTION IN PROCEEDINGS FOR ORDERS IN THE NATURE OF INJUNCTIONS, OR FOR STAY OF PROCEEDINGS AT LAW.

"All proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by this act to the county court, or for stay of proceedings at law to recover any debt proveable under a decree for the administration of an estate made by the court

(*d*) As to what constitutes a partnership, see *ante*, Vol. I. pp. 596—604.

(*e*) See *post*, Chap. XII. § 4.

to which the application for the order to stay proceedings is made" (*f*).

It will be seen that orders in the nature of injunctions are confined to those matters over which jurisdiction is given by the new act, and that orders for stay of proceedings are confined to the case of actions brought to recover debts proveable under a decree for the administration of an estate made under the first or fifth sub-sections of "The County Courts Act, 1865," s. 1 (see *ante*, pp. 3, 6, 18); and further, that the application for stay of proceedings must be made to the court which made the decree.

It seems that under this provision proceedings at law may be stayed not only in the court to which application is made, but in other courts, whether county courts or superior courts. A county court judge may, therefore, stay an action in the Court of Queen's Bench. This is, perhaps, the first time such a power has been given to an inferior court.

In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, the court may award damages to the party injured, either in addition to or in substitution for such injunction, just as in the case of applications for specific performance (21 & 22 Vict. c. 28, s. 2): but this power seems scarcely to apply to the proceedings mentioned in the text, because, in the first place, it is not proceedings for injunctions, but for "*orders in the nature of injunctions*," that jurisdiction is conferred; and secondly, jurisdiction is given *only where such orders are requisite for granting relief*, and the power to substitute damages would not apply, for it would be a contradiction in terms to substitute damages where an order is requisite.



§ 12.—JURISDICTION IN SUITS TRANSFERRED TO THE COUNTY COURTS.

"The County Courts Act, 1867" (30 & 31 Vict. c. 142), sect. 8, enacts, that proceedings in equity, which might have been commenced in a county court, may be transferred to the county courts (*g*).

By giving power to any of the parties to apply to transfer a suit to the county court, the right of an unsuccessful defendant to set up as a ground for the suit being dismissed without costs that it was unnecessary to resort to the superior courts of equity is in some measure taken away.

(*f*) 28 & 29 Vict. c. 99, s. 1, sub-s. (8), *ante*, p. 3.

(*g*) See the section at length, *post*, Chap. IX. § 3.

CHAPTER II.

THE GENERAL COURSE OF PROCEEDING IN AN EQUITY SUIT IN THE COUNTY COURTS.

It has been elsewhere stated that the equitable jurisdiction of the county courts is to be governed and closely controlled, so far as principles and doctrine of relief and parties are concerned, by the established principles and rules of the superior courts of equity; but the practice as regards the conduct of a claim under the county court jurisdiction, is essentially distinct from the existing practice of the Court of Chancery. The county court practice in equity is a practice of its own, but having a much greater affinity to the practice in the county courts under their original common law jurisdiction than to the established practice in any other court (*a*): as a proof of this, it is only necessary to refer to the fact, that "The County Court Act, 1865," incorporates all the prior statutes relating to the county courts, and that the rules in equity direct that the rules and forms and practice theretofore in force in the county courts shall be adopted in equity, so far as they are applicable.

The rules, therefore, coupled with the original practice of the county courts, must be looked to for the outline of practice in equity (*b*).

(*a*) See *ante*, Vol. I. p. 58.

(*b*) Order XXIV. of the County Court Orders in Equity, 1868, provides that—

"In the orders in equity the following words shall have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; (*viz.*):

(1.) The words "the act" shall mean 28 & 29 Viet. c. 99:

(2.) The word "party" shall mean a party to a suit or proceeding; and "person" shall mean any person, whether a party to the suit or proceeding or not; and the words "person" or "party"

shall include a body politic or corporate:

(3.) The word "affidavit" shall include statutable affirmations and attestations upon honour, and the word "sworn" shall include affirmed according to the statute and attested upon honour:

(4.) Where any number of days is mentioned it shall mean "clear days:"

(5.) The word "court" shall mean the county court having jurisdiction in the suit or proceeding, and the words "judge" and "registrar" shall respectively mean the judge and registrar of that court."

The proceedings are taken in the county court in the district of which the property is situated, or business carried on, or where the parties or one of them reside or carry on business, according to the subject-matter of complaint.

Nearly all suits, except proceedings under the Trustees Relief Act or under the Trustee Acts, and except proceedings relating to the maintenance of or advancement of infants, and except proceedings for orders in the nature of injunctions, are begun by a plaint containing the names and addresses of the parties, and a concise statement of the grounds upon which the plaintiff seeks relief, and a summons with a copy of the plaint is served upon the defendants.

Proceedings under the Trustees Relief Act and under the Trustee Acts, and proceedings relating to the maintenance or advancement of infants, are by petition, stating names and descriptions of the parties, the nature of the trust and how created, the property to which it relates, and the substance of the order sought for; and proceedings for orders in the nature of injunctions are begun by notice of application, stating the names, &c., and the substance of the order sought for. Copies of these petitions and notices are served upon the defendants with a notice from the registrar informing them of the time when the petition or application will be heard (*c*).

Service is in general effected by the bailiff of the court, according to the present practice of the courts. Provision is made, however, for substituted service, "where justice requires it," and for service on a defendant who is out of England.

The defendant is not obliged to give any notice of defence or to take any step corresponding with putting in an "answer," but may reserve his full defence, whether of law or fact, for the hearing (unless, perhaps, in those exceptional cases where notice of a defence is required under the present law and practice of the county courts). He *may*, however, if so inclined, within eight days after the service of the summons, "by a statement in writing signed by him, disclaim any interest in the subject-matter of the suit, or admit or deny any of the statements in the plaint, or raise any question of law on such statements without admitting the

(*c*) "The County Courts Act, 1867" (30 & 31 Vict. c. 142), enacts, sect. 27, that "any proceeding taken in the county courts under 'The County Courts Act, 1865,' conferring an equitable jurisdiction on such courts, may, if so directed by rules and orders to be made under such act, be commenced by summons." "The County Courts Act, 1865," did not prescribe the mode of commencing suits in the county courts. The orders framed under that act directed

the proceedings under the 5th, 6th, and 8th clauses of the first section of the act, (that is to say) proceedings under the Trustees Relief Acts, or under the Trustee Acts, proceedings relating to the maintenance or advancement of infants, and proceedings for orders in the nature of injunctions to be by petition, but in other cases the procedure was by plaint and summons. The existing equity orders retain this arrangement. See *ante*, Vol. I. pp. 61, 62.

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truth thereof; or he may state concisely any new fact or document upon which he intends to rely as a defence at the hearing, or which he thinks advisable to bring to the notice of the court;” and in exercising his discretion as to costs, the judge is to consider the fact of a defendant’s having or not having availed himself of these powers.

On the other hand, the defendant may, to save expense, sign an admission of the plaint and submit to the judgment of the court. A plaintiff, moreover, may before the hearing withdraw altogether or as against some of the defendants, and have the plaint dismissed as against all or any of the defendants, but he must pay the costs.

On the return day of the summons the suit is heard in open court (*d*), and all parties must be prepared, as far as the nature of the case admits, with evidence to enable the judge to try the whole matter of the suit upon the merits and to determine it by a final decree, or to make such decretal order, or give such directions, for adding parties to the suit for making inquiries, taking accounts, realizing assets, or doing any act which the judge may consider necessary to enable him to make a final decree upon a subsequent adjourned day.

In those cases in which a plaint and summons are issued, the evidence of witnesses is taken *vivâ voce* on oath, but affidavits may be used if notice of the intention be given to the opposite party and no notice of objection given. Upon the hearing of any petition or application under the Trustee Acts, or in relation to infants or for injunctions, as already mentioned, the facts relied upon in support of or in opposition to such petition or application are proved by affidavit, unless the judge otherwise directs.

The amount of damages in any case where the court may award damages, or any question of fact arising in any suit or proceeding, may, by order of the judge, be tried by a jury summoned and chosen as in other cases in the county court. The question of fact, or as to the amount of damages for the jury, must be put in writing by the judge, and it is then called the “Record for Trial.”

There is an important provision with regard to evidence: “Where any documents are produced to the court from proper custody, they shall be read without further proof if they appear genuine, and if no objection be taken thereto; and if the admission of any document so produced be objected to, the judge may adjourn the hearing, and the party objecting shall pay the costs caused by such objection in case the same shall afterwards be proved, unless the judge shall otherwise order.”

(*d*) The rules provide, that “the times of the sitting of a county court in matters of equity shall be those appointed for the transaction of the general business of the court, unless

the judge otherwise orders, and shall appoint a special day or days for a sitting of the court in matters of equity.”

The above rule is a somewhat strong invasion on the duties and rights of parties with respect to the burden of proof. Under the rule, it seems that a promissory note produced by the holder, or a bill of exchange by the drawer or indorsee, or a receipt produced by the debtor, or a letter by the person to whom it is addressed, will be presumed and taken as proved without any proof whatever in fact; and that a party asking to have the documents proved in the usual way must submit to be mulcted in the costs, even if successful in the suit, and although he may never have seen or heard of the document before it is tendered. Still, there is no doubt that in many cases the rule will work well (*e*).

It is to be observed, that this rule, so far as costs are concerned, may be found to conflict with a previous rule, that no costs of proving any document shall be allowed unless a notice to inspect and admit has been given, except in cases where, in the opinion of the registrar, the omission to give such notice has been a saving of expense.

The inspection of documents in the possession or control of the opposite party, and the production of documents by third persons, and the attendance of witnesses, are fully provided for in conformity with the statute 15 & 16 Vict. c. 86, ss. 18 and 20.

The common law rules of the county courts with respect to amendments are expressly applied to proceedings in equity. The effects of death, marriage, or of any change or transmission of interest or liability, may be remedied by an order of revival, or supplementary decree or order, as may be necessary.

A vice-chancellor may, on an *ex parte* application, or, if he think fit, after hearing a summons, transfer a suit or matter to the Court of Chancery, upon such terms as to security for costs or otherwise as he thinks fit. On the other hand, if it appears to the judge of the county court that the suit or matter could be more conveniently prosecuted in some other county court, it may be transferred to such other county court; or if, during the progress of any suit or matter, it appears that the subject-matter exceeds the limit in point of amount of the county court jurisdiction, it must be transferred to such one of the vice-chancellor's courts as the lord chancellor by general order directs. The vice-chancellor may, however, direct the suit to proceed in the county court notwithstanding such excess in amount.

So, also, where suits or proceedings are commenced in different courts by parties in the same interest, such suits or proceedings are transferred to the court in which the first plaint or petition was filed and there proceeded with.

“Upon the hearing the court may dismiss the suit or grant the relief asked by the plaint or any part thereof, or may grant any other relief consistent with the case made by the plaint, or make

(*e*) There is a similar rule in the Common Law Rules. See the observations upon it, *ante*, Vol. I. p. 464.

any order giving directions for or with respect to the prosecution of the suit, as the circumstances of the case may require, and also make such order as to costs as the court may think fit." Decretal orders are drawn up by the registrar, the rules providing for their form and contents in various special cases, as orders for sale of property, taking accounts and preparation and execution of deeds.

Accounts and inquiries directed to be taken are taken and made by the registrar, who has for that purpose all the powers and discharges all the duties of a chief clerk of the Master of the Rolls or a vice-chancellor in the Court of Chancery.

In conformity with the power given to the Court of Chancery by the 15 & 16 Vict. c. 86, s. 54, a rule provides that "where a decretal order directs accounts to be taken, any books of accounts in which the accounts required to be taken, or any of them, have been kept, shall, unless the judge shall otherwise direct, be taken as *prima 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."

Various rules are provided with respect to the payment of money into court, and its investment, the proof of debts, the sale of property, the preparation of deeds and various interlocutory matters.

When the court has determined all the questions raised between the parties, the registrar draws up a final decree in accordance with the judgment of the court. Every decretal order and final decree is transmitted for registration to the registrar of county court judgments in London. No decree or order once made is reheard unless the judge on special grounds thinks such rehearing necessary, and then only on such terms as the judge thinks fit.

An appeal is, nevertheless, given to parties dissatisfied with the determination or direction of the judge, on any matter of law or equity or on the admission or rejection of any evidence. The appeal is to such one of the vice-chancellors as the lord chancellor by general order directs. The decision of the county court judge is, however, final upon questions as to the value of property for the purpose of determining the question of the jurisdiction of the court, nor is there an appeal against the decision of the judge on the ground that the proceedings might or should have been taken in any other county court.

The costs of suits are in the discretion of the court (*f*). A scale of costs and charges to be paid to counsel and attorneys in the county courts has been framed. The registrar is the taxing officer of the court.

Judgments, decrees and orders of the county court are executed and enforced by process of the court. A copy of every decree is at the instance of the successful party served upon the party bound by it, and after the expiration of three days, the decree or order

(*f*) See *post*, Chap. XI. § 2.

may be enforced by a warrant of *fi. fa.* in the case of a decree or order for the payment of money, or by a warrant of possession or warrant of assistance in the case of a decree or order for the delivery up to any person of lands or tenements, goods or chattels. These warrants are executed by the bailiff of the court.

No special provision whatever is made by act of parliament for process against the person by attachment for contempt or otherwise, but the rules assume the existence of a power of committal for contempt in disobeying orders in the nature of injunctions, and decrees or orders to pay money or do an act within a certain time. The power of commitment to prison on a judgment summons in the county court can, it seems clear, be applied to a decree or order in equity for payment of money (*g*).

Having given an outline of County Court Practice in Equity, the various steps in the progress of a suit form the subject of subsequent chapters.

(*g*) See *ante*, Vol. I. p. 335.

CHAPTER III.

OF THE PLAINTIFF'S PROCEEDINGS IN ORDER TO COMMENCE A SUIT IN EQUITY.

- § 1.—THE COURT IN WHICH PROCEEDINGS ARE TO BE TAKEN.
- § 2.—PROCEEDINGS BY PLAINT AND SUMMONS.
- § 3.—PROCEEDINGS BY PETITION.
- § 4.—PROCEEDINGS FOR ORDERS IN THE NATURE OF INJUNCTIONS.
- § 5.—PROCEEDINGS BY TRUSTEES AND EXECUTORS ON PAYMENT INTO COURT UNDER SECT. 24 OF "THE COUNTY COURTS ACT, 1867."
- § 6.—SERVICE OF PROCESS.



§ 1.—THE COURT IN WHICH PROCEEDINGS ARE TO BE TAKEN.

"THE County Courts Act, 1865" (28 & 29 Vict. c. 99), enacts:—
Sect. 10. "With respect to the court in which proceedings in equity shall be taken—

In what
courts pro-
ceedings shall
be taken.

- "1. Proceedings under this act which relate to the recovery or sale of any mortgage, charge or lien on lands, tenements or hereditaments shall be taken in that County Court within the district of which the lands, tenements or hereditaments, or any part thereof, are situate :
- "2. Proceedings under the Trustee Acts, 1850 and 1852, shall be taken in the County Court within the district of which the persons making the application, or any of them, reside or resides :
- "3. Proceedings for the administration of the assets of a deceased person shall be taken in the County Court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode :
- "4. Proceedings in partnership cases shall be taken in the County Court within the district of which the partnership business was or is carried on :
- "5. Proceedings for the specific performance or the delivery up or cancelling of agreements shall be taken in the County Courts within the district of which the defendants, or any one of them, reside or resides, or carry on or carries on business :
- "6. Proceedings in any suit or other matter under this act, which are not otherwise provided for, shall be taken or instituted in the

County Court within the district of which the defendants, or any or either of them, shall reside or carry on business" (a).

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This statute employs, it will be seen, the words "reside," and "place of abode," and "last place of abode," while the County Courts Act (1867) uses the term "dwell" (b). Still, some of the decisions as to what constitutes a dwelling place may be useful in the construction of "reside" and "place of abode" (c).

Where Officer of County Court a Party.—“The County Courts Act, 1856” (19 & 20 Vict. c. 108, s. 21), which enacts, that “if an *action* be brought against an officer of a County Court, the summons may issue in the district of which he is an officer, or in any adjoining district the judge of which is not the judge of a court of which the defendant is an officer,” applies to *suits* in equity, as well as to actions, by force of “The County Courts Act, 1865” (28 & 29 Vict. c. 99), conferring equitable jurisdiction, s. 21 of which enacts, that that act and the other County Court Acts shall be read and construed as one act (d).

§ 2.—PROCEEDINGS BY PLAINT AND SUMMONS.

Suits by creditors, legatees, devisees, heirs-at-law, or next of kin; suits for the execution of trusts; suits for foreclosure or redemption, or for enforcing any charge or lien; suits for the dissolution or winding-up of any partnership; and suits for specific performance of, or for the reforming, delivering up, or cancelling of any agreement for the sale, purchase or lease of any property; are commenced by filing a plaint.

The following rules relate to the plaint and summons in the above cases:—

“All suits under the 1st, 2nd, 3rd, or 7th clauses of the first section of the act (e), and under the ninth section of 30 & 31 Vict. c. 142, shall be commenced by filing a plaint in equity in the county court to which jurisdiction in the matter is given by the tenth section of the act (f).

Order I.
Rule 1.
Commencement of suit.

“Every plaint in equity shall state the name, address and description of the plaintiff, and of the person intended to be brought before the court as defendant: and where any party sues or is sued in a representative character he shall be so described in the plaint; but this rule shall be subject to the 38th Rule of the preceding County Court Rules” (g).

Rule 2.
Names.
C. C. Rule 38.

(a) As to the transfer of suits to another more convenient county court, see 28 & 29 Vict. c. 99, s. 11, *post*, Chap. IX. § 4.

L. J. (N. S.) Ch. 514.

(e) See *ante*, p. 3.

(f) County Court Orders and Rules in Equity, 1868, Order I. Rule 1.

(g) *Id.* Rule 2.

(b) See *ante*, Vol. I. p. 130.

(c) See *ante*, Vol. I. pp. 131, 132.

(d) See *Linford v. Gudgeon*, 40

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The 38th Rule of the County Courts (Common Law) referred to, provides that—

“Where the plaintiff is unacquainted with the defendant's christian name, the defendant may be described by his surname, or by his surname and the initial of his christian name, or by such name as he is generally known by, and the defendant may be so described in the summons; and in the event of the plaintiff or defendant not appearing, the proceedings under sects. 79 and 80 of 9 & 10 Vict. c. 95 (*h*), may be taken as if the true christian name and surname had been stated in the summons, and all subsequent proceedings thereon may be taken in conformity with such description, but without prejudice to any amendment made at any future time by direction of the judge.”

The County Court Rules in Equity further provide that—

Order XXIII.
Rule 7.
Where christian name unknown.

“Where any party to any suit or proceeding is unacquainted with the christian name of any person whose name he desires to insert in any plaint, proceeding, or document, he may describe such person by his surname or by his surname and the initial of his christian name or by such name as he is generally known by” (*i*).

Order I.
Rule 3.
Plaint.

“Every plaint in equity shall contain a concise statement of the grounds upon which the plaintiff seeks to obtain relief; and shall ask for the specific relief to which he conceives himself entitled, and also for general relief” (*k*).

Rule 4.
Plaint filed by attorney.

“Where the plaint is filed by an attorney, he shall indorse thereon his name or firm and place of business, and that the plaintiff sues by him as attorney; and where there is more than one plaintiff, and the plaint is not filed by an attorney, the plaintiff who actually files the same shall indorse thereon his name and address” (*l*).

Rule 5.
Form of plaint.

“Plaints in equity may be in forms similar to those set out in the schedule to these orders, with such variations as the nature and circumstances of each particular case may require” (*m*).

Rule 6.
Delivery to registrar and filing of plaints.

“The plaintiff or his attorney shall deliver at the office of the registrar the plaint, with as many copies thereof as there are persons to be brought before the court as defendants, and the registrar shall forthwith indorse on the plaint a memorandum of the day on which the same was received by him, and when such plaint shall be so indorsed it shall be taken for all purposes to have been duly filed on the date so indorsed thereon” (*n*).

(*h*) These sections provide for dealing with cases where either party is absent. See *ante*, Vol. I. pp. 250, 255.

(*i*) County Court Orders and Rules in Equity, 1868, Order XXIII. Rule 7.

(*k*) County Court Orders and Rules in Equity, Order I. Rule 3.

(*l*) *Id.* Rule 4.

(*m*) *Id.* Rule 5, Order XXIII. Rule 26, provides that “all proceedings and documents may be in forms similar to the forms in the schedule to these orders where the same are applicable;

and in cases where no forms are provided, parties shall frame the proceedings or documents, using as guides those contained in the schedule.”

(*n*) *Id.* Rule 6. “The registrar shall keep a book to be called ‘The Suits and Proceedings in Equity Book,’ and shall enter and number in such book each suit or proceeding consecutively in the order in which they are entered, and shall also enter therein a note of all documents filed and steps taken in such suit or proceeding. Order XX. Rule 1.”

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as the court shall order, all such costs of such cause as the court shall direct him to pay to the said C. D., I will forthwith pay the same.

Dated this day of

(Signed)

General Form of Heading and Conclusion for Plaints (y).

In the County Court of holden at No. of plaint in equity.
A. B., of, etc. [*address and description*], plaintiff,
and
C. D., of, etc. [*address and description*], defendant.

This plaint was filed by
of
attorney for the plaintiff,
[or by of].

Mem. to be placed at Foot of every Summons, Notice, Decree or Order of Court, or any other Process of the Court (z).

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Administration :— [Clause 1 of Sect. 1 of the Act.]

By Creditor (a).

A. B., the above-named plaintiff, states as follows :—

1. E. F., late of was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of [*here insert nature of debt and security, if any*].

2. The said E. F. duly made his last will, dated the day of and thereof appointed C. D. executor [*or devised his estate in trust, etc., or died intestate, as the case may be*].

3. The said will was duly proved by the said C. D. [*or letters of administration were granted, etc.*].

4. The defendant has possessed himself of the personal [and real, or the proceeds of the real] estate of the said E. F., and has not paid the plaintiff his said debt.

5. The said E. F. died on or about the day of and had his last place of abode within the jurisdiction of this court. [*Omit this if C. D. has his place of abode within the jurisdiction of this court.*]

6. The whole of the personal [and real] estate of the said E. F. does not exceed in amount [*or value*] the sum of 500*l.* (b).

7. The plaintiff prays that an account may be taken of the personal [and real] estate of the said E. F. deceased, and that the same may be duly administered under the decree of the court, and for such further or other relief as the court may think fit.

(y) County Court Forms in Equity,
1868.

(z) *Id.*

(a) *Id.* No. 4. See heading and conclusion, *supra*.

(b) It seems that a specific statement as to the value is not absolutely necessary. *Cheeswright v. Thorn*, 38 L. J. (N. S.) Ch. 615.

By Legatees (Specific).

Omit paragraph 1, and commence paragraph 2. E. F., late of , duly made his last will, dated the day of , and thereof appointed C. D. executor, "and by such will bequeathed to the plaintiff [*here state the specific legacy*].

For paragraph 4, substitute—

The defendant is in possession of the personal estate of the said E. F. and, inter alia, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7, substitute—

The plaintiff prays that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that, etc.

By Legatees (Pecuniary).

Omit paragraph 1 and substitute for paragraph 2—E. F., late of , duly made his last will, dated the day of , and thereof appointed C. D. executor, and by such will bequeathed to the plaintiff a legacy of £ .

In paragraph 4, substitute "legacy" for "debt."

By Legatees (Residuary).

Omit paragraph 1, and substitute for paragraph 2—E. F., late of , duly made his last will, dated the day of , and thereof appointed C. D. executor, and by such will bequeathed to the plaintiff the residue [*or a part of the residue*] of his personal [*or and the proceeds of his real*] estate.

In paragraph 4 substitute "the residue [*or share of residue*] so bequeathed" for "said debt."

Next of Kin.

For paragraphs 1, 2, 3 and 4, substitute—

1. E. F., late of was at the time of his death possessed and entitled of personal estate.

2. He died on or about the day of intestate.

3. Letters of administration were duly granted to the defendant, and that he has possessed himself of the personal estate of the deceased [*leave out "letters of administration were duly granted to the defendant and that" if none have been granted*].

4. That the plaintiff is next of kin [*or one of the next of kin*] of the said E. F.

Execution of Trusts (c).

[Clause 2 of Section 1 of the Act.]

Plaint in Equity.

In the County Court of holden at .

A. B. of, etc. [*address and description*] plaintiff,
and

C. D. of, etc. [*address and description*], the or one
of the cestui que trusts (*see rule 6 of 15 & 16*
Vict. cap. 86, sec. 42 (d)) defendant.

A. B., the above-named plaintiff, states as follows:—

1. He is one of the trustees under a deed of settlement bearing date on or about the day of made upon the marriage of the said

(c) County Court Forms in Equity, (d) Rule 6 of sect. 42 of 15 & 16
1868, No. 5. Vict. c. 86, provides that any "exc-

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E. F. and G. H., the father and mother of the defendant [or a deed of assignment of the estate and effects of E. F., for the benefit of C. D. the defendant, and other the creditors of E. F.].

2. The said A. B. has taken upon himself the burden of the said trust, and is seised of [or in possession of or of the proceeds of] the lands, tenement, and hereditaments [goods and chattels], conveyed [or assigned] by the before-mentioned deed.

3. The trust estate [or fund] does not exceed in amount [or value] the sum of £500.

4. The said C. D. claims to be entitled to a beneficial interest under the before-mentioned deed.

5. The plaintiff is desirous to account for all the rents and profits of the said lands, tenements and hereditaments [and the proceeds of the sale of the said or part of the said lands, tenements and hereditaments, or goods and chattels, or the proceeds of the sale of or part of the said goods and chattels, or the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the court will take the accounts of the said trust, and also that the whole of said trust estate may be administered in the court for the benefit of the said C. D. the defendant, and all other persons who may be interested in such administration, in the presence of the said C. D. and such other persons so interested as the court may direct, or that the said C. D. may show good cause to the contrary.

[N.B.—Where the suit is by a *cestui que trust*, the plaint may be modelled, *mutatis mutandis*, on the plaint by a legatee, and if breach of trust is alleged by way of wilful default or otherwise, the plaints shall shortly state the circumstances and pray for consequential relief.]

Plaint by cestui que trust (e).

The above-named plaintiff S. B., residing at _____, states as follows:—

1. That she was married to her present husband T. B., on or about the month of _____ 187 (f).

2. That in, on or about the month of _____, 187 _____, the said T. B. deserted the said S. B., and the said S. B. has not since the said month of _____ 187 _____, ever had any communication with the said T. B.

3. That the said S. B. being a married woman, and having accumulated the sum of £ _____ by her own savings paid the same into the Savings Bank, situate _____, in the joint names of herself and the above-named defendant, with a view to protect the same from all claims which might be urged by her husband.

4. That the defendant attended with the plaintiff on the _____ day of _____, when the said £ _____ was deposited in the joint names of S. B. and E. J., the defendant a trustee for her, with a view of protecting same from her husband.

ator, 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."

(e) MS. Form. See heading and conclusion, *ante*, p. 34.

(f) This plaint was instituted

before "The Married Women's Property Act, 1870" (33 & 34 Vict. c. 93), but that act would not, it seems, affect any claims arising under the circumstances alleged in this form. See the provisions of the statute, *ante*, Vol. I. pp. 509, 510.

5. That the said S. B. obtained the usual protection order which was granted to her by _____ esquire, magistrate of _____, on the _____ day of _____, 187____, which was duly registered at the _____ County Court on the _____ day of _____, 187____.

6. That the said defendant now claims some interest in the said sum of £ _____, which has increased to the sum of £ _____, which the plaintiff claims as her money, as being paid in and invested for her sole benefit.

7. That the said defendant has several times been applied to by the plaintiff to aid by his presence, and giving the necessary notice for the withdrawal of the sum of £ _____, the money of the said S. B., which the defendant has declined to do, but threatens and intends to deal with such sum as if the same were his own which plaintiff denies.

8. That the plaintiff submits that the defendant should do and perform all necessary acts and deeds to enable her to receive the said sum of £ _____ from the _____ Savings Bank, situate as aforesaid.

9. That it is submitted that the defendant should pay the costs of this application.

10. That the plaintiff should have such further or other relief as the circumstances of the case may require.

Foreclosure.—[Clause 3 of Section 1 of the Act] (g).

A. B., the above-named plaintiff, states as follows:—

1. By an indenture of mortgage bearing date on or about the day of _____ 187____, a freehold [copyhold or leasehold] cottage, with the garden and appurtenances, situated within the jurisdiction of this court, were conveyed [or assigned] by the defendant to him the plaintiff, his heirs, [or executors, administrators,] and assigns, for securing the principal sum of £ _____ together with interest thereon after the rate of £5 per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past.

2. There is now due from the defendant to the plaintiff the sum of £ _____ for principal and interest on the said mortgage.

3. The plaintiff prays that the court will order the defendant to pay him the said sum of £ _____ with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the court, and in default that the equity of redemption of the said mortgaged premises may be foreclosed, or that the said premises may be sold, and the proceeds applied in and towards the payment of the said principal, interest, and costs; and he prays that for that purpose all proper directions may be given and account taken by the court.

Redemption.

Transpose parties and also the facts in paragraph 1.

For paragraph 2 substitute—

2. There is now due from the plaintiff to the defendant, for principal and interest on the said mortgage, the sum of £ _____ which the plaintiff

(g) County Court Forms in Equity, 1868, No. 6. See heading and conclusion, *ante*, p. 34.

is ready and willing to pay to the defendant, of which the defendant before filing this plaint had notice.

For paragraph 3 substitute—

The defendant prays that he may redeem the said premises, and that the defendant may be ordered to re-convey [*or re-assign*] the same to him upon payment of the said sum of £ and interest, with such costs as the court may order (if any), upon a day to be named by the court, and that the court will give all proper directions for the preparation and execution of such re-conveyance [*or assignment*], and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

Foreclosure: another Form:—Assignment of Stock (h).

F. R., the above-named plaintiff, states as follows:—

1. By an indenture of mortgage dated the day of , 187 , and made between the defendant of the one part, and the plaintiff of the other part, in consideration of the sum of £ paid and advanced to the defendant by the plaintiff, the defendant assigned all that the part or share of him the defendant, whether already accrued or at any time thereafter to accrue to him by succession, devise, survivorship or bequest, or in any other mode whatsoever, of and in the sum of £ £3 per Centum Consolidated Bank Annuities, and of and in the sum of £ cash, and of and in all other sums of stock and cash then or thereafter to be standing in the name of the Accountant-General of the High Court of Chancery, in trust to the credit of a cause of v. , therein particularly mentioned, and of and in the dividends, interest and annual proceeds thereof, after the decease of G. M., therein mentioned, but subject to the several payments therein referred to, unto the plaintiff, his executors, administrators and assigns, for securing to him and them the said principal sum of £ , together with interest thereon after the rate of £ per centum per annum, subject to redemption upon payment by the defendant of the said principal and interest at a day long since passed.

2. The plaintiff on the day of , 187 , duly gave notice in writing to the trustees of the will by virtue whereof the said funds arose, and on the day of , 187 , obtained a stop order of the High Court of Chancery to restrain the share of the defendant therein.

3. There is now due from the defendant to the plaintiff the sum of £ for principal and interest on the said mortgage, and also some costs properly incurred in relation thereto, not exceeding £ .

4. The plaintiff prays that the court will order the defendant to pay him the said sum of £ , with such further interest as may accrue between the filing of the plaint and the day of payment, together with such costs as aforesaid; and also the costs of this suit on some day to be named by the court, and in default that the equity of redemption of the said mortgaged premises may be foreclosed; and he prays that for the purposes aforesaid all proper directions may be given and accounts taken by the court, or that he may have such further or other relief in the premises as the court may think fit.

Foreclosure: another Form:—On Mortgage by Deposit without express Agreement; Prayer for Injunction to restrain Actions to recover the deposited Deeds (i).

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The Brewery Company, Limited, the above-named plaintiff, states as follows:—

1. On the day of , 187 , the plaintiff company lent the defendant the sum of £ upon the security of his promissory notes for that amount, and interest thereon from the date thereof at the rate of £ per cent. per annum, and of an equitable mortgage by the defendant to the plaintiff company of certain leasehold premises known as "The Jolly Farmers" situate in the parish of , in the county of , held under a lease granted by indenture dated the day of , 187 , and made between M. F. of the first part, R. B. of the second part, and W. G. of the third part, and also certain leasehold premises in the rear of the said last-mentioned premises, held under a lease thereof by indenture dated the day of , 187 , and made between the said M. F. and S. N. of the one part, and the defendant of the other part.

2. The said equitable mortgage was effected by the deposit by the defendant with the plaintiff company of the said leases, and certain other documents relating to the said leasehold premises, but no memorandum of equitable mortgage was then or has since been signed or given by the defendant.

3. The said loan of £ is still owing with interest thereon from the day of , 187 .

4. At the time of the said loan the defendant had been supplied with goods by the plaintiff company, and the plaintiff company has subsequently supplied the defendant with goods, and there has been a running account between the defendant and the plaintiff company, and there is now owing from the defendant to the plaintiff company the sum of £ for goods sold and delivered.

5. The defendant has agreed with the plaintiff company that the amount which should become owing from the defendant to the plaintiff company for goods sold and delivered should be secured by way of mortgage of the said leasehold premises, and the said deed so deposited as aforesaid are held by the plaintiff company, and the said company is entitled thereto as a security as well for the said trade debt as the said sum of £ and interest thereof.

6. The plaintiff company after the said deposit of deeds supplied the defendant with goods upon the faith of the said deposit, and it is the custom of the trade as between brewers and their customers, that deeds when deposited by the latter should be a security for the amount which may become owing for goods sold and delivered, as well as any loan which may have been advanced by the brewers to the customer.

7. The plaintiff company has recently made several applications to the defendant for payment of what is due from him to the plaintiff company in respect of the said loan and trade debt, but the defendant refuses or neglects to make such payment.

8. The defendant alleges that he is entitled to redeem the leasehold premises upon payment to the plaintiff company of the said sum of and interest thereon, and pretends that the said trade debt is not a

(i) MS. Form settled by counsel. See form of heading and conclusion, *ante*, p. 34.

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charge on the said leasehold premises and threatens to bring an action against the plaintiff company for recovery of the said deeds.

The plaintiff prays that the court will order the defendant to pay the plaintiff the said sum of _____, and interest thereon from the _____ day of _____, 187____, to the day of payment, and also the said sum of £ _____, and further the costs of this suit, on some day to be named by the court, and in default that the equity of redemption of the said mortgaged premises may be foreclosed, or that the said premises may be sold and the proceeds applied in and towards the payment of the said principal, interest and costs, and prays that for that purpose all proper directions may be given and accounts taken by the court. And the plaintiff also prays that if necessary the defendant may be restrained by the order and injunction of this court from commencing and prosecuting any action for recovery of the said deeds.

Partnership (k).

[Clause 7 of Section 1 of the Act.]

A. B., the above-named plaintiff, states as follows:—

1. He and the said C. D. the defendant have been for the space of _____ years [or months] last past carrying on business together at _____ within the jurisdiction of this court, under certain articles of partnership in writing, signed by them respectively [or under a certain deed sealed and executed by them respectively, or under a verbal agreement between them, the said plaintiff and defendant].

2. Divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3. The whole of the property, stock and credits of such partnership do not exceed in value the sum of £ _____.

4. The plaintiff desires to have the said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles [deed or agreement].

5. The plaintiff prays the court to decree a dissolution of the said partnership, and that the accounts of the said partnership trading may be taken by the court, and the assets thereof realized, and that each party may be ordered to pay into court any balance due from him upon such partnership account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the cost of the suit may be paid out of the partnership assets, and that any balance remaining of such assets after such payment and discharge, and the payment of the said costs, may be divided between the plaintiff and the defendant, according to the terms of the said articles [deed or agreement], or that if the said assets shall prove insufficient, he the plaintiff and the said defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment of and discharge of such debts,

(k) County Court Forms in Equity, 1868, No. 11. See form of heading and conclusion, *ante*, p. 34.

liabilities and costs (*l*). And to give such other relief as the court shall think fit.

[*N.B.*—*In suits for winding-up of any partnership omit the prayer for dissolution; but instead thereof insert a paragraph stating the fact of the partnership having been dissolved.*]

Another Form of Plaintiff for Dissolution of Partnership (m).

E. P., the above-named plaintiff, states as follows:—

1. On or about the day of 187 , the plaintiff and the defendant entered into a verbal agreement with each other that they would take the Anchor Beerhouse, situate in street , in the county of (within the jurisdiction of this court), by purchasing the existing lease or tenancy, goodwill and stock thereof, and would carry on the business of beer-shop-keepers there in partnership, and as the sum of £ , or thereabouts, was required for the purchase of the said lease or tenancy and goodwill it was agreed between them that the plaintiff should advance and bring in the sum of £ towards such purchase, and that the like sum of £ should be borrowed from Messrs. and brewers, and that the defendant should furnish the remainder of the money required for the purpose aforesaid.

2. The plaintiff accordingly on the day of 187 , paid to the defendant the sum of £ out of her own monies, and the said defendant with that sum and the like sum of £ borrowed as aforesaid, and a further sum furnished by himself, completed the said purchase on behalf of himself and the plaintiff as such partners as aforesaid, and on the day of 187 , the plaintiff and defendant as such partners entered into the possession of the said beerhouse.

3. The plaintiff and defendant from the time of their so taking possession until the day of 187 , carried on the said business in partnership at the said beerhouse under the verbal agreement hereinbefore mentioned.

4. On the said day of 187 , the defendant by threats and violence compelled the plaintiff to leave the said premises against her will, and he refuses to allow her to return to the said premises.

5. Under the circumstances aforesaid it has become impossible to carry on the said business in partnership with advantage to the partners.

6. The whole of the property, stock and credits of the partnership do not exceed in value the sum of £ .

7. The plaintiff desires to have the said partnership dissolved, and she is ready and willing to bear her share of the debts and obligations of the partnership so far as under the circumstances hereinbefore mentioned she is justly liable for the same respectively.

8. The said defendant has since the said day of 187 , been and still is in sole possession of the said partnership premises,

(*l*) An injunction may be here prayed for to restrain the defendant from disposing of the partnership property, with or without the appointment of a receiver; thus [“and that the defendant may be restrained by the order and injunction of this court from selling, assigning and pledging or otherwise converting and disposing

of all or any of the partnership assets, estate and effects without the sanction of the court; and that a receiver may be appointed to collect and get in the debts due and owing to the said partnership.”]

(*m*) MS. Form. See form of heading and conclusion, *ante*, p. 34.

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stock and effects, and in sole receipt of the income and profits thereof, and he has since that time altogether and improperly excluded and still so excludes the plaintiff therefrom, and he threatens and intends to sell and dispose of the partnership interest in the said premises and the partnership stock and effects without the consent or concurrence of the plaintiff, and if he does so the plaintiff is in danger of losing her share of the proceeds thereof.

9. The plaintiff believes that the defendant caused the partnership term and interest so purchased as aforesaid to be assigned or transferred to himself alone; but if he did so it was without her concurrence or consent.

10. The plaintiff prays the court to decree a dissolution of the said partnership, and that the accounts of the said partnership business may be taken by the court and the assets thereof realized, and that each party may be ordered to pay into court the balance due from him or her respectively upon such partnership account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the balance of such assets (after such payment and discharge) may be divided between the plaintiff and defendant according to the terms of the said agreements, or that if the said assets shall prove insufficient the plaintiff and defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts and liabilities, and that the defendant may be restrained by the order of this court from selling or disposing of the said partnership property or any part thereof (unless with the concurrence and consent of the plaintiff or under the order of the court), and from receiving the income and profits of the said business, and that some proper person may be appointed to receive the same and to manage the said business until the same shall be sold under the order of the court, and that the defendant may be ordered to pay the costs of this suit. And that the court may give such other relief as to the court shall seem fit.

Specific Performance.—[Section 9 of 30 & 31 Vict. c. 142] (n).

A. B., the above-named plaintiff, states as follows:—

1. By an agreement dated the day of and signed by the above-named defendant C. D., he the said C. D. contracted to buy [or sell to] him certain property, therein described and referred to, for the sum of £ .

2. He has applied to the said C. D. specifically to perform the said agreement on his part, but that he has not done so.

3. The said A. B. has been and still is ready and willing specifically to perform the agreement on his part, of which the said C. D. has had notice.

4. The plaintiff prays that the court will order the said A. B. specifically to perform the said agreement, and to do all acts necessary to put the said A. B. in full possession of the said property [or to accept a conveyance and possession of the said property], and to pay the costs of the suit.

[N.B.—In suit for delivery up to be cancelled of any agreement omit paragraphs 2 and 3, and substitute a paragraph stating generally the

(n) County Court Forms in Equity, 1868, No. 7. See heading and con-

clusion, *ante*, p. 34. See sect. 9 of 30 & 31 Vict. c. 142, *ante*, p. 13.

grounds for requiring the agreement to be delivered up to be cancelled, such as that the plaintiff signed it by mistake, under distress, or by the fraud of the defendant, and alter the prayer according to the relief sought.]

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Another Form of Plaint for Specific Performance of Agreement for Sale of Real Estate (o).

T. J., the above-named plaintiff, states as follows :—

1. That C. P., the above-named defendant, had or pretended to be on and before the day of , 187 , seised of or well entitled to a freehold estate of inheritance, consisting of a messuage, dwelling-house and tenement with the appurtenances thereto belonging and appertaining, known as No. , Street, Bermondsey, in the county of Surrey; and that the said C. P. on or about the day and year aforesaid contracted and agreed with the said plaintiff to sell to him the said plaintiff the said messuage, tenements, and dwelling-house with the appurtenances thereunto belonging and appertaining, for the sum of £ sterling.

2. That thereupon the said plaintiff paid to the said defendant as an earnest to bind the said agreement, and in part payment of the said purchase-money the sum of £ , and received from the said defendant an acknowledgment in writing in the words and figures following :

“ , 187 .

“ Received, of Mr. J. the sum of £ , as deposit on the house
No. , Street .
C. P.”

and that the said acknowledgment was duly stamped with a receipt stamp.

3. That on or about the day of 187 , the said defendant furnished to the plaintiff a document purporting to be the abstract of the defendant's title to the said messuage, tenement, and dwelling-house with the appurtenances which was manifestly insufficient and uncertain, and did not show a good and sufficient title in the said defendant to the said estate which he the said defendant has or pretends that he has in the said messuage, tenement and dwelling-house, with the appurtenances; and thereupon the said plaintiff has from time to time objected to the defendant's title as so shown, and made the usual requisitions for the production of further information and evidence thereof, but the said defendant has hitherto wholly neglected and refused to furnish or show the same.

4. That from the month of last thence hitherto the plaintiff has always been willing and ready to complete the performance of his part of the said agreement, and has for that purpose kept and retained the sum of £ sterling unemployed, and the same has remained unproductive so as to be ready at any time to be paid over to the said defendant on the completion of the said purchase of which the defendant has often had notice.

5. That the said defendant from the month of hitherto has been in the possession of the said messuage, tenement and dwelling-house with the appurtenances, and in the enjoyment of all the rents, profits, benefits and advantages thereof.

(o) MS. Form. See heading and conclusion, *ante*, p. 34.

6. That the plaintiff has done all things on his part to be done to entitle him to the specific performance of the said agreement, and he is ready and willing and hereby offers to do anything on his part still remaining to be done.

7. The plaintiff submits that he is entitled to the relief hereinafter prayed.

The plaintiff prays as follows :—

1. That the defendant may be decreed specifically to perform the said agreement so made in the month of _____, 187____, as aforesaid if the said defendant can make a good title to the messuage, tenement and dwelling-house with the appurtenances, and that the said defendant may be decreed to make and execute, and to procure to be made and executed, a proper conveyance of the said messuage, tenements and dwelling-house with the appurtenances to the plaintiff.
2. That in case the said defendant shall not be able to make a good title to the said messuage, tenement and dwelling-house with the appurtenances, account may be taken of what is due to the plaintiff for loss of interest on the said sums of £ _____ and £ _____, and that the sum of £ _____ may be returned to him.
3. That an account may be taken of the rents and profits and benefits derived by the said defendant from the said messuage, tenement and dwelling-house with the appurtenances from the day and year when the said purchase ought to have been completed, and that the defendant may be decreed to pay the amount thereof to the plaintiff.
4. That damages may be awarded to the plaintiff in addition to, or if specific performance be impossible, in substitution for, specific performance.
5. That the defendant may pay the costs of this suit.
6. That the plaintiff may have such further or other relief as the nature of the case may require.

Another Form of Plaint for Specific Performance on Agreement to execute Mortgage (p).

T. J. and W. J., the above-named plaintiffs, state as follows :—

1. By an indenture of lease bearing date the _____ day of _____, 187____, and made between and duly executed by W. B. of the one part and C. E. of the other part, all that messuage, or tenement and hereditaments situated and being No. _____, Street in the county of _____, then in the occupation of the said C. E., together with the rights of way or passage, and the right to use the quay or wharf in the same indenture respectively mentioned were demised to the said C. E., his executors, administrators and assigns for the term of twenty-one years from the day of _____, 187____, at the yearly rent of £ _____ and under and subject to the covenants, conditions and agreements in the same indenture contained and on the lessee's part thenceforth to be paid, observed and performed as by the same indenture and other the documents herein stated or referred to, to which the plaintiffs crave leave to refer when produced, will appear.

(p) MS. Form settled by counsel. See heading and conclusion, *ante*, p. 34.

2. By divers mesne assignments and acts in the law and ultimately by an indenture bearing date the day of , 187 , and made between E. R. of the one part and the defendant of the other part, the premises comprised in and demised by the indenture of lease hereinbefore stated became and were thenceforth and down to and at the time of signing the memorandum of deposit and agreement of the day of , 187 , hereinafter stated, vested in the defendant for the residue of the said term of twenty-one years granted by the said indenture of lease.

3. On the said day of , 187 , the plaintiffs lent and advanced to the defendant the sum of £ upon the security of the leasehold premises comprised in and demised by the said indenture of lease, and of the title deeds relating to the same, and at the time of such advance the defendant deposited with the plaintiffs the said title deeds, and duly signed and delivered to the plaintiffs a memorandum of deposit and agreement of that date, which, omitting the schedule describing the said title deeds, was in the words and figures or to the purport and effect following, that is to say:—

“To Mr. T. J. and Mr. W. J.

“In consideration of £ this day lent and advanced by you to me, and collaterally secured by my note of hand to you on demand, I hereby deposit with you the under-mentioned deeds as security for the repayment of the said sum of £ with interest thereon at the rate of £ per cent. per annum. And I hereby charge and make liable the same deeds, and the property to which they refer, with and to the repayment of the said sum of £ and interest. And I undertake when called upon to execute unto you a good and valid mortgage with a power of sale, subject to one month’s notice for the repayment of the said sum of £ and interest, and the expense of and incidental to the preparation of such mortgage. Dated this day of , 187 .

“ (Signed) G. O.”

4. On or about the day of 187 the defendant executed a deed of composition for the benefit of his creditors, and in consequence thereof, the plaintiffs, through Messrs. and , their solicitors, caused a draft of a deed of mortgage to be prepared of the said leasehold premises, in accordance with and in pursuance of the terms of the said memorandum or agreement of the day of , 187 , and sent the same to the defendant for approval. The defendant, however, refused to peruse the said draft, and he also refused, and he still refuses, to execute a legal mortgage of the said leasehold premises, or otherwise to carry his said agreement into effect, and he returned the said draft to the said Messrs. and , accompanied by a letter dated the day of 187 , and which, omitting the merely formal parts, was in the words and figures, or to the purport and effect following, that is to say:—“Considering the fearful amount you have run my bill to, and likely to be turned out of my house in a month, I am advised not to sign the paper. I may add I have stated all particulars to my solicitor, Mr. of Street.”

5. The whole of the said sum of £ , with interest for the same from the time when the same was advanced and a small sum for costs, are still due and owing to the plaintiffs on the security hereinbefore mentioned. The allegation contained in the letter of the defendant

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CHAP. III.

hereinbefore stated, to the effect that the plaintiffs' said solicitors had charged the defendant an excessive sum for costs, is wholly untrue.

6. The defendant is and has been for some time past in the actual occupation of the said leasehold premises, and the same are but a scanty security for the monies so due and owing to the plaintiffs as aforesaid.

7. The plaintiffs are advised and submit that the defendant ought to be ordered and decreed specifically to perform his undertaking contained in the said memorandum or agreement of the day of , 187 , for the execution of a good and valid mortgage, in accordance with the terms of such undertaking, and that the plaintiffs are entitled to such other relief as is hereinafter prayed.

Prayer.

The plaintiffs therefore pray as follows:—

1. That the defendant may be ordered and decreed specifically to perform and carry into effect his undertaking contained in the said memorandum or agreement of the day of , 187 , to execute unto the plaintiffs a good and valid mortgage, with power of sale, subject to one month's notice, for securing to the plaintiffs the repayment of the said sum of £ , and interest after the rate of £ per cent. per annum, and of the expense of and incidental to the preparation of such mortgage, and that such mortgage may be settled by the judge or such conveyancing counsel as he may direct, in case the parties differ, the plaintiffs being ready and willing, and hereby offering to perform and do all necessary acts (if any) which ought to be performed by them for the purpose of carrying such agreement into effect.
2. That if necessary an account may be taken by and under the order and direction of this court of what is due for principal and interest in respect of the advance of £ , so made to the defendant by the plaintiffs as hereinbefore stated, and of the costs and charges incurred by the plaintiffs in the preparation of the said draft mortgage, or in any way incidental thereto; and that the defendant may be ordered and decreed to pay to the plaintiffs what, upon taking such account, shall be found due to them, together with the costs of this suit, by a short day to be appointed for that purpose by this court, and that in default of such payment, the defendant, and all persons claiming under him, may be absolutely barred and foreclosed of all right and equity of redemption in and to the said leasehold premises, and every of them, and every part thereof.
3. Or, that if necessary, and in case of such default in payment on the part of the defendant as aforesaid, the said leasehold premises may be ordered to be sold, and that the monies to arise upon such sale may be applied in payment of what shall appear to be due to the plaintiffs for principal and interest and costs, charges and expenses as aforesaid.
4. That all necessary orders and directions may be made and given for effectuating the purposes aforesaid, or any of them.
5. That the defendant may be ordered to pay the costs of this suit.
6. That the plaintiffs may have such further or other relief as the nature of the case may require.

Plaint to secure Transfer to and Registration by Defendant of Shares bought by him (q).

A. B., the above-named plaintiff, states as follows:—

1. On the day of , 187 , the plaintiff applied for shares in the Company, Limited, and on or about the day of the same month shares in that company, numbered from to , were allotted to him, and his name was entered in the register of shareholders of the company as the owner or proprietor of those shares.

2. In the same month of the plaintiff instructed F. W., one of the licensed brokers of the Stock Exchange, London, to sell the said shares, and on the day of the same month, J. S. of the Stock Exchange contracted to purchase of the said shares for £ and on the day of the same month the said J. S. contracted to purchase the remaining shares for £ .

3. The contract aforesaid was made between the said F. W., as broker for the plaintiff, and the said J. S.

4. On the day of , 187 , the said J. S. contracted to sell of the said shares to M. A., and they were eventually bought by the defendant for the price of £ .

5. According to the practice of the Stock Exchange the said J. S. on the day of , 187 (appointed as a special settling day in the said shares), sent a notice or ticket to the office of the said F. W., requiring the said F. W. to transfer or cause to be transferred of the said shares into the name of the defendant, and on the day of , 187 , the plaintiff executed a deed of transfer of of the said shares, numbered from to both inclusive, to the defendant.

6. On or about the day of , 187 , the certificate or certificates of the said shares were placed in the possession or power of the defendant; and the said sum of £ , and for the transfer stamp, was paid by the defendant to the said J. S.

7. The plaintiff has requested the defendant to register his name as a proprietor in the books of the company, but the defendant has neglected and refuses so to do, and the plaintiff has received divers letters and notices from the said company, requiring payment in respect of a call of £ per share, payable in the months of and 187 , on the said shares, Nos. to , and threatening legal proceedings in case the same were not paid, and the plaintiff has duly apprized the defendant of such letters and notices.

8. On the day of , 187 , a writ was issued out of her Majesty's Court of Common Pleas against the plaintiff at the suit of the said company, demanding £ for debt in respect of the said calls and interest, and £ for costs in the said action, and on the day of , 187 , the plaintiff paid in satisfaction of the action £ .

9. The plaintiff prays that the defendant may be ordered to procure the shares, Nos. to , to be duly and effectually transferred into and registered in the name of the defendant in the register book of shareholders in the said company, and that he may be ordered to execute, if he has not already executed, the deed of transfer and to deliver the same so duly executed to the secretary of the company in order that a memorial may be entered in the book called "The Register

of Transfers," and that he may be ordered to take all proper steps for effectually transferring and registering the shares, and that he may be ordered to repay the plaintiff the said sum of £ with interest, and indemnify the plaintiff against all losses and costs already incurred or to be incurred by reason of the defendant not having procured the shares to be registered, or by reason of the non-payment of the calls on the said shares, and to pay all costs of this suit, and that this court will grant such further or other relief as the court may think fit.

Summons on Plaint (r).

No. of plaint in equity.

In the county court of holden at .
(Seal.)

A. B. [*address, description*] plaintiff,
and

C. D. [*address, description*] defendant.

You are hereby summoned to appear at the county court, to be holden at on the day of at the hour of in the noon, to show cause why the relief prayed for in the plaint hereunto annexed should not be granted.

Dated this day of 187 .

Registrar.

To C. D. defendant [*or one of the defendants*].

N.B.—If you do not attend either in person or by your attorney at the time and place above mentioned, such decree or order will be made and proceedings taken as the judge may think just and expedient.

[*Endorsement on Summons.*]

If you desire to lessen the amount of costs which you may be put to, you should follow such of these directions as may apply.

If you desire to admit the truth of the allegations in the plaint, and to submit to the judgment of the court, you may, at any time before the return day of the original summons, appear before the registrar, and in his presence sign an admission of the truth of the plaint, and a consent to abide by and perform any decree or order the court may make.

If you desire to disclaim any interest in the subject-matter of the suit, or if you intend at the hearing to deny any of the statements in the plaint, or raise any question of law upon such statement without admitting the truth thereof, you may deliver to the registrar, within eight days after the service of the summons upon you, a statement signed by you to that effect.

If you intend to rely on a set-off, infancy, coverture, a statute of limitations, or a discharge under a bankrupt or an insolvent act, as a defence, you must give notice of such special defence to the registrar five days before the day of hearing, and such notice must contain the particulars required by "The County Court Rules;" and you must deliver to the registrar as many copies of such notice as there are plaintiffs, and an additional copy for the use of the court. If your defence be a set-off, you must, with each notice thereof, deliver to the registrar a statement of the particulars thereof.

Summonses for witnesses and for the production of documents will be issued upon application at the office of the registrar of the court upon payment of the proper fee.

PART IV.
CHAP. III.

§ 3. — PROCEEDINGS BY PETITION.

Proceedings under the Trustees Relief Acts, or under the Trustee Acts (s), and proceedings relating to the advancement of infants, are instituted by petition.

The following Rules relate to such proceedings (t):—

“All proceedings under the 5th and 6th clauses of the first section of the act, shall be by petition, and such petition need not show title except so far as is provided by the rules in this order” (u).

Order XI.
Rule 1.
Petition.

“Where a trustee petitions under the said 5th clause (x) for an order in any matter relating to the trust, he shall file his petition at the office of the registrar, and leave thereat as many copies thereof as there are persons beneficially interested in the due execution of the trust, and he shall state in such petition his own name, address, and description, and also the names, addresses, and descriptions of the persons beneficially interested, so far as he is able, and the nature of the trust, and how created, the property or money to which the same relates, and the substance of the order which he seeks to obtain” (y).

Rule 2.
Petitions by trustees.

“Where any guardian or trustee of any infant petitions for an order relating to the maintenance or advancement of such infant, he shall file his petition at the office of the registrar, and where any person, as next friend of an infant, petitions on behalf of such infant for an order upon or against the guardian or trustee of such infant, he shall file his petition at the office of the registrar, and leave thereat as many copies thereof as there are guardians or trustees. And in such petition shall be stated the names, addresses, and descriptions of the petitioner, and of all the persons to whom such order is intended to relate, and shall also state the nature of the guardianship or trust, and how created, of the property to which the trust relates, and the substance of the order which the petitioner seeks to obtain” (z).

Rule 3.
Petitions by guardian or trustee of infant or next friend.

“Under this order petitions shall be filed and notices shall be delivered (a) at the office of the registrar seven days before the sitting of the court at which the petition is to be heard or application made (b).

Rule 20.
Time of filing petitions and giving notices.

(s) See *ante*, p. 18.

(t) Order XI. which relates to “proceedings under the 5th, 6th and 8th clauses of the 1st section of the act, and section 24 of 30 & 31 Vict. c. 142,” provides that, “the preceding orders relating to suits shall, in all cases where they are applicable, be construed as extending to proceedings under this order.”

(u) County Court Orders and Rules in Equity, 1868, Order XI. Rule 1.

(x) See *ante*, p. 3.

(y) County Court Orders and

Rules in Equity, 1868, Order XI. Rule 2.

(z) *Id.* Rule 3. See as to undertaking for costs, by next friend, Order XXIII. Rule 19, *ante*, p. 33.

(a) This rule, so far as relates to the delivery of notices, refers to notices of applications for injunctions under the next section (§ 4). See Order XXIII. Rule 18, *post*, Chap. V. § 3, as to enlarging and abridging time.

(b) County Court Orders and Rules in Equity, 1868, Order XI. Rule 20.

General Form of Heading and Conclusion for Petitions (b).

Proceeding in equity.

In the county court of holden at

In the matter of

The petition of A. B., of, etc. [*address and description*].

This petition was filed by

of

attorney for the plaintiff,

[or by].

Under Trustee Relief Act.—[Clause 5 of Section 1 of the Act] (c).

Showeth,

1. That by a deed of settlement bearing date the day of made upon the marriage of C. D. with E. F. certain freehold property in the settlement mentioned was conveyed to [or that C. D., deceased, by his will bearing date the day of and proved on the day of by your petitioner and G. H. in the Prerogative Court of the Archbishop of Canterbury, certain freehold property in the will mentioned was devised to] the petitioner, together with G. H., upon certain trusts, inter alia [*here set out the clause or portion of the trust deed or will upon which the order of the court is required*].

2. That the said G. H. died on or about the day of leaving the petitioner surviving trustee.

3. That disputes and doubts have arisen under the clause before set out, as to whether [*here set out the specific question upon which the opinion, advice, or direction of the court is required*].

4. That the trust estate [or fund] to which this proceeding relates does not exceed in value the sum of £500.

5. That the persons interested in this application are I. J. of, etc. [*address and description*], K. L. of, etc.

6. Your petitioner prays the court to declare its opinion, advice, or direction whether [*here state specific question which the court is asked to determine*].

N.B.—By stat. 23 & 24 Vict. c. 38, s. 9, this must be signed by counsel.

Under Trustee Acts (d).

Showeth,

1. That C. D., deceased, by his will bearing date the day of and proved on the day of by your petitioner and G. H. in the Prerogative Court of the Archbishop of Canterbury, certain freehold property in the will mentioned was devised to [or that by deed of settlement bearing date the day of made upon the marriage of C. D. with E. F. certain freehold property in the settlement mentioned was conveyed to] the petitioner, together with G. H. upon certain trusts.

2. That the said G. H. died on or about the day of leaving the petitioner surviving trustee.

(b) County Court Forms in Equity, conclusion, *supra*.
1868. (d) *Id.* No. 9. See heading and

(c) *Id.* No. 8. See heading and conclusion, *supra*.

3. That the said trusts are still unexecuted, and that the petitioner is unable by reason of having left the neighbourhood [or his bodily infirmity, or any cause for relinquishing trust] further to execute the said trusts; that it is for the advantage of the parties beneficially interested in the due execution of the trust that new trustees be appointed by the court in the place of the petitioner.

4. That and of, etc. [address and description] are proper persons to appoint as such trustees.

5. That I. J. of, etc. [address and description], and L. M. of, etc. [address and description], are the persons beneficially interested in the said trust.

6. Your petitioner prays that the said and or some other persons to be named by the court, be appointed trustees in his place and stead, and that the cost of the proceeding be ordered to be paid out of the trust fund, and to give such directions as may be necessary for executing such order.

Maintenance and Advancement of Infants (e).

[Clause 6 of Section 1 of the Act.]

Showeth,

1. That he is guardian [or trustee] of C. D., an infant, and that by the will of E. F. a sum of £ was bequeathed to the petitioner, upon trust to apply the income thereof to the maintenance and education of the said C. D. during his minority, and to pay the said principal sum of £ to the said C. D. upon his attaining the age of twenty-one years.

2. That the said C. D. is now of the age of fourteen years or thereabouts, and is now resident within the jurisdiction of this court, and the petitioner has heretofore spent the whole of the accruing interest upon his maintenance and education.

3. That in the opinion of your petitioner it would be greatly to the interest and advancement of the said C. D. if a sum of £ , part of the said principal money of £ , was now expended by the petitioner in payment to G. H. of saddler, as a premium to the said G. H. to take and receive the said C. D. as his indoor apprentice.

4. The petitioner prays that he may be directed to use and appropriate the said sum of £ , part of the said principal trust money or sum of £ for the apprenticeship of the said infant accordingly.

§ 4.—PROCEEDINGS FOR ORDERS IN THE NATURE OF INJUNCTIONS.

Applications for orders in the nature of injunctions are, in general, founded upon a notice delivered to the registrar with copies for service on the persons against whom the order is sought.

(e) County Court Forms in Equity, 1868, No. 10. See heading and conclusion, *ante*, p. 50.

PART IV.
CHAP. III.Order XI.
Rule 4.
Application
for injunc-
tion.

The following Rule relates to these proceedings:—

“Where any person intends to apply under the 8th clause of the first section of the act (*f*), for an order in the nature of an injunction (except as is provided in Order XII. for urgent cases (*g*)), he shall deliver at the office of the registrar a notice of his intention to apply for the same, together with as many copies thereof as there are persons upon or against whom such order is intended to be obtained, and he shall state in such notice his own name, address, and description, and so far as he can, the names, addresses, and descriptions of all such persons, and also the substance of the order which the petitioner seeks to obtain” (*h*).

Notices must be delivered at the office of the registrar seven days before the sitting of the court at which the application is to be made (*i*).

In urgent cases, however, an order in the nature of an injunction may be applied for *ex parte* to the judge in or out of court, upon affidavits setting forth the facts, rendering such order immediately necessary, and upon such application the judge may either make an order absolute in the first instance, or make an order to be absolute at any time to be ordered by him unless cause be shown to the contrary (*k*).

It is to be observed, that although applications for injunctions may be made after notice, independently of any plaint or other proceeding against the same person, an injunction may and, in general, does form part of the prayer in an equitable plaint; as for example, in a suit for dissolution of partnership, the plaintiff may pray for an injunction to restrain the defendant from disposing of any of the partnership property (*l*).

General Form of Heading for Notices, Admissions, Statements, Orders, Certificates and Warrants (m).

Proceeding in equity.

In the county court of holden at .
In the suit of A. B. v. C. D.

Notice of Application for Order in the Nature of Injunction (n).

[Clause 8 of Section 1 of the Act.]

Take notice that I, A. B., intend to apply at the sitting of the court as aforesaid on the day of [or to Mr. Judge at his sittings or at on the day of as the case may be] for an order in the nature of an injunction to restrain C. D. from further prosecuting an action which he has commenced against me in

(*f*) See *ante*, p. 3.

(*g*) See *post*, Chap. V. § 4.

(*h*) County Court Orders and Rules in Equity, 1868, Order XI. Rule 4.

(*i*) *Id.* Rule 20, *ante*, p. 49.

(*k*) County Court Orders and Rules

in Equity, 1868, Order XII. Rule 1. See this order more fully, *post*, Chap. V. § 4.

(*l*) See *ante*, p. 41, note.

(*m*) County Court Forms in Equity, 1868.

(*n*) *Id.* No. 12.

the exchequer of pleas to recover damages for the breach of the contract for the specific performance of which this suit was commenced [or to restrain him from receiving and giving discharges for any of the debts due to the partnership in the matter of the partnership between us for the winding-up of which the suit was commenced, or from digging the turf from the land which was agreed to be sold by him to me by the agreement the specific performance of which this suit is commenced to enforce, or as the case may be].

Dated this day of 187 .

A. B.

To C. D.

[N.B.—Where the order in the nature of an injunction is to be applied for against a party whose name and address does not appear upon any proceeding already filed in this suit, it must be stated in full to enable the high bailiff to serve the notice.]

§ 5.—PROCEEDINGS BY TRUSTEES AND EXECUTORS ON PAYMENT INTO COURT UNDER SECT. 24 OF “THE COUNTY COURTS ACT, 1867.”

The power given to persons by “The County Courts Act, 1867” (30 & 31 Vict. c. 142), s. 24, to pay into county courts moneys, annuities, stocks, or securities vested in them as trustees, executors, administrators or otherwise, upon trusts within the meaning of the act 10 & 11 Vict. c. 96, has been already noticed (*o*).

The mode of doing this is not by plaint or petition, but by filing an affidavit (*p*).

The following Rules relate to these proceedings :—

“Any person desiring to pay money, transfer stock, or deposit security in trust to attend the orders of any county court, under sect. 24 of 30 & 31 Vict. c. 142 (*q*), shall file with the registrar of the county court having jurisdiction in the matter an affidavit, entitled in the matter of the last act, and of the particular trust, and setting forth :—

Order XI.
Rule 6.
30 & 31 Vict.
c. 142, s. 24.

1. His own name, address, and description :
2. The place where he is to be served with any petition or summons, or any notice of any proceeding or order of the court relating to the trust fund :
3. The amount of money, stock, or security which he proposes to pay, transfer, or deposit in trust to attend the orders of the court :
4. A short description of the trust or of the instrument creating it :
5. The names, addresses, and descriptions of the persons interested in or entitled to, or claiming to be 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 or stock paid in or transferred or security deposited as the court may think proper to make or direct” (*r*).

(*o*) See *ante*, p. 19.

(*p*) 30 & 31 Vict. c. 142, s. 24,
ante, p. 19.

(*r*) County Court Orders and
Rules in Equity, 1868, Order XI.
Rule 6.

(*q*) See *ante*, p. 19.

PART IV.
CHAP. III.Rule 7.
Form of affidavit.Rule 8.
Endowment on affidavit.Rule 9.
Certificate of registrar.Rule 10.
Payment of money.Rule 11.
Transfer of stock.Rule 12.
Deposit of security.Rule 13.
Notice of to treasurer of deposit.Rule 14.
Where no treasurer.

"The affidavit may be in the form set out in the schedule to these orders, with such variations as each particular case may require" (s).

"Immediately on the receipt by the registrar of the affidavit, he shall indorse thereon a memorandum of the day on which the same was received by him, and when such affidavit shall be so indorsed, it shall be taken for all purposes to have been duly filed on the date so indorsed thereon" (t).

"The persons filing the affidavit, or any of them, may apply to the registrar to give to them a certificate entitled in the matter of the act 30 & 31 Vict. c. 142, and of the particular trust, and under the seal of the court, certifying that the affidavit has been filed, and such certificate may be in the form set out in the schedule to these orders, with such variation as each particular case may require" (u).

"In the case of money, the persons filing the affidavit, or any of them, may, upon the receipt of the before-mentioned certificate, pay the money into a post office savings bank, under sect. 24 of 30 & 31 Vict. c. 142 (x), and obtain from the officer of the bank a receipt for the same, and shall forthwith leave the said receipt with the registrar, and the registrar shall accordingly indorse thereupon a memorandum of the day on which the same was received by him, and when such receipt shall be so indorsed it shall be taken for all purposes to have been duly recorded on the date so indorsed thereon" (y).

"In the case of stocks, the persons filing the affidavit or any of them may, upon the receipt of the before-mentioned certificate, transfer the stocks into the names of the treasurer and registrar of the county court mentioned in the said certificate, in trust to attend the orders of the court, and shall forthwith leave the transfer ticket with the registrar, and the registrar shall immediately indorse thereon a memorandum of the day on which the same was received by him, and when such transfer ticket shall be so endorsed, it shall be taken for all purposes to have been duly recorded on the day so indorsed thereon" (z).

"In the case of security, the person filing the affidavit may forthwith deposit the security with the registrar in the name of the treasurer and registrar, in trust to attend the orders of the court, and the registrar shall immediately indorse on the affidavit a memorandum of the day on which the security was deposited with him" (a).

"The registrar shall, within twenty-four hours after the deposit of the security, send notice thereof by post to the treasurer of the court, stating therein the particulars of the deposit, which notice may be in the form in the schedule, with such variations as each particular case may require" (b).

"Where there is a county court in which there is not a treasurer, the transfer or deposit shall be made into the name of the registrar and of

(s) County Court Orders and Rules in Equity, 1868, Order XI. Rule 7.

(t) *Id.* Rule 8.

(u) *Id.* Rule 9.

(x) See *ante*, p. 19.

(y) County Court Orders and Rules in Equity, 1868, Order XI. Rule 10.

(z) *Id.* Rule 11.

(a) *Id.* Rule 12. Order XX. Rule 9, directs, that "The registrar shall comply with all regulations which may from time to time be made by the Commissioners of her Majesty's Treasury for the safe custody of any securities deposited with them under section 24 of 30 & 31 Vict. c. 142."

(b) *Id.* Order XI. Rule 13.

the superintendent of the county court department of the treasury for the time being" (c).

"Immediately after the recording of the receipt or transfer ticket, or the deposit of the security, the registrar shall give to the persons paying in the said money, or transferring the said stocks or depositing the security, an acknowledgment or certificate of such payment or transfer or deposit, and such acknowledgment or certificate may be in the form set out in the schedule to these rules, with such variations as each particular case may require" (d).

"Immediately after the recording of the receipt or transfer ticket, or giving a certificate of deposit of security, the registrar shall cause the necessary entry to be made in 'The Suits and Proceedings in Equity Book,' including the *title of the particular trust*, and the *amount of money or stock paid or transferred, or security deposited*, and the names and addresses of the *person or persons making such payment, transfer or deposit*, and the names of every person stated in the affidavit to be, or to claim to be, interested in or entitled to such money or stock, and their addresses and descriptions, as given in the affidavit; and the registrar shall forthwith, by post, send to each of such last-mentioned persons, to the addresses given in the affidavit, a notice of the said payment, transfer or deposit, which notice shall be under the seal of the court, and may be in the form set out in the schedule to these rules, with such variations as each particular case may require" (e).

"Any person interested in or entitled to the fund, or (if need be, but not otherwise) the trustee, may apply by petition, respecting the investment, paying out or distribution of the fund or income thereof, and the petition shall be filed at the office of the registrar; and the petitioner shall leave thereat, where the petition relates to the income only of the fund, as many copies thereof as there are trustees and persons, other than the petitioner, interested in the due execution of the trust, so far as regards the income only, and in all other cases as many copies thereof as there are trustees and persons, other than the petitioner, interested in the due execution of the trust, and he shall state in such petition his own name, address and description, and a place where he may be served with any petition, or notice of any proceeding or order of the court, relating to the said fund, and also the names, addresses and description of the other persons interested, so far as he is able, the nature of the trust and how executed, the trust property, and the substance of the order which he seeks to obtain" (f).

"Unless the judge shall otherwise direct, the trustee shall be served with notice of every application made to the court respecting the fund or the income, by any person beneficially entitled thereto" (g).

"Where a trustee shall have availed himself of the provisions of sect. 24 of 30 & 31 Vict. c. 142 (h), without sufficient reason, the judge may direct such trustee to bear his own costs, and pay the costs of any other parties, or to bear and pay any part of such respective costs, as the judge shall think fit" (i).

PART IV.
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Rule 15.
Acknowledgment of payment.

Rule 16.
Entries in books, etc.

Rule 17.
Who may petition for order as to fund.

Rule 18.
Notice to trustees.

Rule 19.
When trustee to pay costs.

(c) County Court Orders and Rules in Equity, 1868, Order XI. Rule 14.

(d) *Id.* Rule 15.
(e) *Id.* Rule 16.
(f) *Id.* Rule 17.

(g) *Id.* Rule 18.

(h) See *ante*, p. 19.

(i) County Court Orders and Rules in Equity, 1868, Order XI. Rule 19.

PART IV.
CHAP. III.

In general the costs of all parties of a petition for payment to the tenant for life of the income of a fund paid into court under the Trustee Act are payable out of the income, and not out of the *corpus* of the fund (*k*).

Affidavit, under 30 & 31 Vict. c. 142, s. 24 (l).

In the County Court of _____ holden at _____
In the matter of "The County Courts Act, 1867," and of [add the title of the particular trust, as "the trusts of a certain indenture of mortgage, dated the _____ day of _____, and made between A. B. and C. D."]

I, C. D., of [address and description], make oath and say as follows—
1. *State place of service, as*—My house, being _____, is the place where I am to be served with any notice or application relating to the trust fund hereinafter mentioned.

2. *State the amount of money or stock proposed to be paid or transferred or security deposited, in trust to attend the orders of the court, as under the provisions of the said act, I desire to pay into the Post Office Savings Bank, the sum of _____ hereinafter mentioned.*

3. *Set out a short description of the trust and of the instrument creating it, as, By the indenture before mentioned a certain messuage situate at _____ with the appurtenances, was mortgaged by the said A. B. to me, my heirs and assigns, for securing to me the repayment on the day of _____, 187 _____, of the sum of £ _____, with interest for the same at the rate of £ _____ per cent. per annum, and the said indenture contained a power of sale in case of default in payment, and it was by the said indenture declared, that the moneys to arise from any such sale should, after retaining thereout the expenses of executing the said power and the said principal money and interest, be paid to the said A. B., his heirs or assigns.*

The said A. B. died on or about the _____ day of _____, and by his will, dated the _____ day of _____, appointed E. F. of^e, executor thereof, and devised the said hereditaments, subject to the said mortgage, unto G. H. of^e and J. K. of^e, in trust for the said E. F., for his life, and after his death upon certain trusts for sale, and for the division of the proceeds amongst the following persons, namely, the testator's son M. N. of^e, and his children or child, and the testator's daughter O., the wife of P. Q. of^e, and her children or child.

The said E. F. proved the said will in [state in what court], and is still living.

The said G. H. never acted in the trusts of the said will, etc.

On or about the _____ day of _____, I sold the said hereditaments by public auction to X. Y., of [address and description] at the price of £ _____

After retaining out of the said £ _____ the costs of sale, and the sum of £ _____, being the total amount of principal moneys and interest due upon the said mortgage, and the sum of £ _____, being the costs of paying the fund into court, a balance of £ _____ now remains in my hands, and the sum of £ _____, which I desire to pay into the Post Office Savings Bank, in trust to attend the orders of this court, is the said balance of £ _____

(*k*) *Re Manton's Trusts*, 39 L. J. (N. S.) Ch. 764; reversing *Re Gordon's Trust*, Law Rep., 6 Eq. 335; 37

L. J. (N. S.) Ch. 408.

(*l*) County Court Forms in Equity, 1868, No. 48.

* Here insert present address and description. If the address of any person interested be unknown to the trustee, this fact must be set forth in the affidavit.

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CHAP. III.

in the case of money, or the transfer ticket in the case of stock.] has this day delivered to me, the registrar of the court, a receipt dated [name of officer of the Post Office Savings Bank], for the sum of £ , stating that [state receipt], [or, a transfer ticket of the Governor and Company of the Bank of England, stating that [state as in ticket].

Registrar of the court.

Certificate of Deposit or Security (p).

In the County Court of holden at
In the matter of "The County Courts Act, 1867,"
and

In the matter of this
(Seal.)

I hereby certify that [state the name, address, and description of the party depositing with the registrar the security], has this day deposited with me, the registrar of this court, in the name of myself and the treasurer [here state the nature of the security deposited].

Registrar of the court.

Notice of Payment into Post Office Savings Bank or of Transfer of Stock or Deposit of Security (q).

No.

In the County Court of holden at
(Seal.)
In the matter of "The County Courts Act, 1867,"
and

In the matter of this

Take notice, that on the day of [state name, address, and description of party who has paid in the money] under the said act paid into the Post Office Savings Bank at , in the name of me, the registrar of this court, the sum of £ , and in his affidavit filed in this court on the day of shortly described the instrument creating the trust, and stated the names of the persons interested in or entitled to the fund, to the best of his knowledge and belief, as follows, that is to say [state from the affidavit the paragraph containing the names of the persons interested or entitled] [or, "transferred into the names of of , and of me, the registrar of this court, in the books of the Governor and Company of the Bank of England, the sum of £ Bank £3 per Cent. Consolidated Annuities, in trust to attend the orders of this court, or deposited with me in the names of of , and of me the registrar of this court in trust to attend the orders of this court [here describe security"].

And further, take notice, that any person interested in, or entitled to, the said fund, may apply to this court respecting the investment, payment out, or distribution of the fund, or of the income thereof, according to the practice of the court.

Registrar of the court.

(p) County Court Forms in Equity, 1868, No. 52.

(q) *Id.* No. 53.

*Notice to Treasurer (r).*PART IV.
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In the County Court of holden at .
(Seal.)

In the matter of "The County Courts Act, 1867,"
and

In the matter of this

Take notice, that on the day of [state name, address, and
description of party who has deposited the security] under the said act
deposited with the registrar of this court, in the names of yourself and
myself, in trust to attend the orders of this court (here describe security).

Registrar of the court.

To E. E., Treasurer,
(or as the case may be.)

Letter to Commissioners of Treasury as to Drawing out Money (s).

County Court Office,

(Seal.)

My Lords,

I have the honor to request that an authority may be addressed to the
postmaster-general to allow me to draw out of the Post Office Savings
Bank the sum of £ [here insert the sum desired to be drawn out,
adding, where the sum is not to pay interest], being the sum I am directed
to draw out by order of court dated the day of 187 .

I am, my Lords,

Your obedient servant,

Registrar of the County Court
of holden at .

§ 6.—SERVICE OF PROCESS.

The Order and Rules provide that—

"The high bailiff shall serve all documents issued to him by the
registrar for service, and execute all warrants" (t).

"Every document the mode of serving which is not specially defined
by these orders, may be served, and the service thereof may be proved
in conformity with the practice that has heretofore prevailed in the
county courts as to the service of summonses, excepting so far as the
same relates to the time of service" (u).

"Where by reason of the absence of any party, or from any other
sufficient cause, the service of any summons, notice, proceeding or
document cannot be made, or ought in the opinion of the judge to be
dispensed with, the judge may wholly dispense with such service, or
may, at his discretion, order any substituted service or notice by adver-
tisement or otherwise in lieu of such service" (x).

"The fee for service of process shall be taken in respect of each

Order XXI.
Rule 2.
Services and
executions.

Order XXIII.
Rule 3.
Service.

Rule 14.
Substituted
service.

Order XXIII.
Rule 28.

(r) County Court Forms in Equity, Rules in Equity, 1868, Order XXI.
1868, No. 54. Rule 2.

(s) *Id.* No. 55.

(u) *Id.* Order XXIII. Rule 3.

(t) County Court Orders and

(x) *Id.* Rule 14.

PART IV.
CHAP. III.Order 1.
Rule 9.
Service of
summons.Rule 10.
Service when
defendant is
out of juris-
diction of
county courts.

defendant to be served, and where the process is to be served in a foreign district, a fee for each affidavit of service" (y).

Service of Summons in Proceedings by Plaintiff and Summons under Sect. 2.—“The summons, with a copy of the plaint annexed thereto, shall be issued by the registrar to the bailiff forthwith, who shall serve the same within seven days, and the service thereof shall be proved, in conformity with the present practice of the county courts; provided always, that the court may, upon facts duly verified by affidavit, allow substituted service where justice requires it” (z).

“Where a defendant shall be out of England, the judge, or in his absence the registrar, may, upon an affidavit of the fact, direct the service of the plaint and summons to be effected within such time and in such manner as the judge or registrar may think fit” (a).

Affidavit in support of Application for substituted Service (b).

I, J. S., of [address and description], make oath and say as follows:—

State facts showing that defendant has been within the jurisdiction of the county courts at some time not more than two years before the plaint was filed, and that he is beyond the seas. Or, that upon inquiry at his usual place of abode (if he had any), or at any other place or places where prior to the time when the plaint was filed he might probably have been met with, he could not be found so as to be served, and that in either case there is just ground to believe that he has gone but of the realm or otherwise absconded to avoid being served, and that service on J. N. will be effective to reach C. D.

Then state deponent's means of knowledge of the facts deposed to. Sworn, etc.

Order for substituted Service (c).

It appearing to me, upon the affidavit of that it is desirable for the purposes of this suit that service of the plaint be made upon at , and that such service be deemed good service on the defendant C. D., I do order that service of the plaint and summons in this suit be deemed good service upon the said defendant C. D.

Dated this day of . J. S., Judge.

Order XI.
Rule 21.
Registrar to
issue notices.

Service of Petition or Notice in Proceedings under Sects. 3 & 4.—“The registrar, upon receiving any such petition or notice and the copies thereof, shall issue the copies under the seal of the court to the bailiff for service upon the respective persons to whom they are addressed, together with a notice, signed by himself and under the seal of the court, informing them of the day and hour on which the petition or application will be heard, and that if they do not attend, either in person or by their attorneys, such order will be made and proceedings taken as the judge may think just and expedient” (d).

“The bailiff of the court shall, four days at least before the hearing, serve all copies of such petitions and notices” (e).

As to service in general, see *ante*, Vol. I., pp. 160, 298, 444.

(y) This is an additional rule given by “The County Court Rules, 1870.”

(z) County Court Orders and Rules in Equity, 1868, Order I. Rule 9.

(a) *Id.* Rule 10.

(b) County Court Forms in Equity,

1868, No. 2. See form of heading of affidavit, *post*, Chap. V. § 5.

(c) *Id.* No. 3.

(d) County Court Orders and Rules in Equity, 1868, Order XI. Rule 21.

(e) *Id.* Rule 22.

CHAPTER IV.

THE DEFENDANT'S PROCEEDINGS IN A SUIT.

§ 1.—ADMISSION.

§ 2.—DISCLAIMER OR ANSWER.

§ 3.—STAYING PROCEEDINGS.



§ 1.—ADMISSION.

“ Where any defendant desires to admit the truth of the allegations in the plaint, and to submit to the judgment of the court, he may, at any time before the return-day of the original summons, in the presence of a registrar of a county court, or in the presence of one of his clerks, or of an attorney of one of the superior courts, sign an admission in the form contained in the schedule to these orders; and the signature of the defendant thereto shall be verified by affidavit, unless signed in the presence of the registrar of the court in which the suit is, or of one of his clerks” (a).

Order II.
Rule 1.
Admission.

“ The admission shall be delivered to the registrar, together with a copy thereof for each of the plaintiffs, or, where the plaint is filed by an attorney, with a copy for such attorney only; and the registrar shall forthwith file the same, and transmit a copy by post to each plaintiff, or the attorney, as the case may be, and after the receipt of such copy the plaintiff shall be entitled to the costs then already incurred, and to the further costs of attending the court and obtaining the decree or order to be made upon such admission, but to no other costs” (b).

Rule 2.
Notice of
admission.

Defendant's Admission (c).

I, the undersigned defendant, admit the truth of the allegations in the plaint, and hereby submit to the judgment of the court thereon.

(Signed) C. D., defendant.

Signed in the presence of

[*This paper marked (A.) is the paper referred to in the annexed affidavit.*]

Affidavit of Signature to Defendant's Admission (d).

I, of , gentleman, an attorney of her Majesty's Court of at Westminster, make oath and say, that I was present on the day of one thousand eight hundred and sixty , and

(a) County Court Orders and Rules in Equity, 1868, Order XI. Rule 1.

(c) County Court Forms in Equity, 1868, No. 17. See form of heading, ante, p. 52.

(b) *Id.* Rule 2.

(d) *Id.* No. 18.

did see the above-named C. D., the defendant, sign the statement hereunto annexed, marked with the letter A., and that the name set to the said statement is in the handwriting of the defendant, and that the name set to the said statement as the witness attesting the same is in my handwriting.

§ 2.—DISCLAIMER OR ANSWER.

It seems doubtful whether a defendant in any suit in equity in the county court is compelled under any circumstances to give notice of a special defence, as in the case of actions (*e*). "The County Courts Act, 1846" (9 & 10 Vict. c. 96), sect. 76, provides, that "no defendant shall be allowed to set off any debt or demand claimed or recoverable by him from the plaintiff, or to set up by way of defence and to claim and have the benefit of infancy, coverture or any statute of limitations, or of his discharge under any statute relating to bankrupts, or any act for relief of insolvent debtors, without the consent of the plaintiff, unless such notice thereof as shall be directed by the rules made for regulating the practice of the court shall have been given" (*f*). "The County Courts Act, 1865" (28 & 29 Vict. c. 99), giving the equitable jurisdiction to county courts, requires the above (and other) acts to be read and construed as one act. The question is, therefore, whether the County Court Rules direct notice of the above defences to be given in equitable suits. The County Court Rules relating to special defences are the "Common Law Rules," as distinguished from the "Orders and Rules in Equity;" the latter orders and rules, however, expressly provide that "the rules and forms and practice in actions in the county courts shall, subject to these orders, be adopted with reference to suits and proceedings in equity, so far as they shall be respectively applicable" (*g*). Are the Common Law Rules, then, relating to special defences applicable to suits in equity? A difficulty in answering in the affirmative arises from the fact, that the rules relating to defences require notice to be given, not only in the cases mentioned in "The County Courts Act, 1846," but also where a defendant relies on "an equitable or statutory defence" (*h*). An "equitable defence," then, clearly means an equitable defence to an *action*; and it is clearly impossible to contend that notice is required, if the rule is applicable to suits in equity. The safest course seems to be, to treat the rules relating to any special defence mentioned in "The County Courts Act, 1846," as applicable to suits in equity, and

(*e*) See *ante*, Vol. I., pp. 188—192.

(*f*) See the section, *ante*, Vol. I., p. 189.

(*g*) County Court Rules and Orders

in Equity, 1868, Order XXIII. Rule 27. See the rule, *ante*, p. 3, note.

(*h*) County Court (Common Law) Rules, 1868, Rule 88. See *ante*, Vol. I., p. 189.

accordingly to give the required notice in any case within its scope. It is only in very exceptional cases that such a defence arises in equity.

Although, however, notice of an answer or defence to an equitable claim is not *necessary*, it will be often very *expedient* for a defendant in reference to costs to inform the plaintiff of the nature of his defence.

The Rules of Practice in Equity provide for the defendant doing this.

“The defendant may, within eight days after the service of the summons, by a statement in writing signed by him, disclaim any interest in the subject-matter of the suit, or admit or deny any of the statements in the plaint, or raise any question of law on such statements without admitting the truth thereof; or he may state concisely any new fact or document upon which he intends to rely as a defence at the hearing, or which he thinks advisable to bring to the notice of the court: Provided always, that in exercising his discretion as to costs, the judge shall consider the fact of a defendant having or not having availed himself of the powers given by this rule” (*i*).

Order II.
Rule 3.
Statement in the nature of a disclaimer or answer may be filed by defendant.

“The statement under the last foregoing rule shall be delivered to the registrar, together with a copy thereof for each of the plaintiffs, or where the plaint is filed by an attorney, with a copy for such attorney only; and the registrar shall forthwith file the same, and transmit a copy by post to each plaintiff or the attorney, as the case may be” (*k*).

Rule 4.
Statement to be filed.

“Where the statement is filed by an attorney he shall indorse thereon his name or firm and place of business, and that the defendant defends by him; and where it is not filed by an attorney, the defendant who actually files the same shall indorse thereon his name and address” (*l*).

Rule 5.
Statement filed by attorney.

Defendant's Statements (m).

I the undersigned defendant [*or one of the defendants*] disclaim all interest under the will of the said E. F., in the plaint named [*or as heir-at-law of, or as next of kin, or one of the next of kin of E. F., deceased, in the said plaint named*].

Or, I the undersigned defendant state that I admit [*or deny*] [*here repeat in the language of the plaint the statements admitted or denied*].

Or, I the undersigned defendant submit that upon the facts stated in the plaint it does not appear that there is any agreement which can be legally enforced [*or that it appears upon the said plaint that I am jointly liable with one E. F., who is not a party to the suit, and not severally liable as by the plaint appears, or that it appears by the said plaint that G. H. should have been a joint plaintiff with the said A. B. in the said suit, or as the case may be*].

Or that the plaintiff has conveyed [*or assigned*] his interest in the said mortgage [*or equity of redemption*] to one I. J., *or* that I have conveyed or assigned to H. L. by way of further charge for securing the sum of £ , the equity of redemption in the property sought by the suit to be foreclosed].

(*i*) County Court Orders and Rules in Equity, 1868, Order II, Rule 3.

(*k*) *Id.* Rule 4.

(*l*) *Id.* Rule 5.

(*m*) County Court Forms in Equity, 1868, No. 19. See heading and conclusion, *ante*, p. 52.

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Or that since the dissolution of the partnership the plaintiff has executed a deed under seal, whereby the plaintiff covenants to discharge all debts and liabilities of the partnership, and generally to release me from all claims and liabilities either by or to himself and others in respect of the said partnership trading [*or as the case may be*].

(Signed) C. D., defendant.

Where filed by attorney add—

This statement was filed by
of
attorney for the defendant.

§ 3.—STAYING PROCEEDINGS.

Apart from the proceedings on a simple admission under sect. 1, a defendant may in certain cases obtain a stay of proceedings on payment of costs or even without payment of costs.

Frivolous or
vexatious
suits.

“There are cases in which an application may be made by a defendant to stay proceedings without costs. Suppose a party, without any dispute having been raised by a defendant, files a bill. Then the defendant may well say, ‘I never disputed your right. Why did you not apply to me before you filed a bill? You have filed a bill merely to make costs.’ In such a case the court, without going into the merits, would stop the suit without costs; on the ground, extrinsic to the merits, that the plaintiff ought never to have filed a bill at all” (*n*).

Staying pro-
ceedings until
acts of former
suit are
paid.

So, where a plaintiff has made default in payment of the costs of a former suit against the same defendant or the person whom he represents, for the same purpose, the defendant may obtain an order on motion, with notice to the plaintiff, staying all further proceedings until the plaintiff has paid such costs (*o*).

(*n*) *Kindersley*, V.-C., in *Wallis* v. *Wallis*, 4 Drew. 458, 463; 28 L. J. (N. S.) Ch. 441; acted upon in *Rudd* v. *Rowe*, 39 L. J. (N. S.) Ch. 846.

(*o*) Daniell's Chancery Practice, 5th edit., p. 696, and cases there cited.

CHAPTER V.

VARIOUS PROCEEDINGS BEFORE THE HEARING.

- § 1.—PROCEEDINGS BY ATTORNEY.
- § 2.—CONDUCT OF THE SUIT OR PROCEEDING.
- § 3.—ENLARGING OR ABRIDGING TIME FOR TAKING STEPS, &C.
- § 4.—EX PARTE APPLICATIONS.
- § 5.—AFFIDAVITS.
- § 6.—FILING OF DOCUMENTS.
- § 7.—APPLICATION FOR COPIES OF DOCUMENTS.
- § 8.—INSPECTION AND ADMISSION OF DOCUMENTS.
- § 9.—SUMMONING WITNESSES.
- § 10.—EXAMINATION OF WITNESSES BEFORE HEARING.
- § 11.—NOTICE OF INTENTION TO USE AFFIDAVITS AT THE HEARING.
- § 12.—DISMISSAL OF THE SUIT AT THE PLAINTIFF'S INSTANCE BEFORE THE RETURN DAY.



§ 1.—PROCEEDINGS BY ATTORNEY.

IN treating, in this chapter, of various steps that may be taken in a suit or proceeding subsequent to its commencement and before the hearing (a), it will be convenient in the first place to give the following rules relating to the power of an attorney in acting on behalf of a client (b) :—

“ Where by these orders any act is to be, or may be done, by any party to a suit or proceeding, such act may be done either in person or by his attorney” (c).

“ Where a party acts by attorney, service of any proceeding or document upon such attorney, or delivery of the same at his office, or sending the same to him by post, shall be good service upon the party for whom

Order XXIII
Rule 11.
Acts may be done by counsel or attorney.

Rule 12.
Service on attorney

(a) As to the transfer of suits and proceedings, see *post*, Chap. IX.

(b) The Orders and Rules in Equity do not preserve the distinction in name between attorneys in common

law matters, and solicitors in Chancery.

(c) County Court Orders and Rules in Equity, 1868, Order XXIII. Rule 11.

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CHAP. V.

sufficient
except where
personal
service is
required.

Rule 13.
Service may,
by leave of
the registrar,
be effected by
the attorney.

Order XXIII.
Rule 4.
Change of
attorney.

such attorney acts, as upon the day when the same is so served or delivered, or upon which in the ordinary course of post it would be delivered, except in cases where by these orders personal service upon a party is required" (*d*).

"Any proceeding or document may, by leave of the registrar, be served by the attorney of the party requiring to effect such service; but the costs of such service, and proof thereof, shall not be allowed, except by order of the judge" (*e*).

"Where any party to a suit or proceeding changes his attorney, he shall give notice in writing of such change to the registrar, stating the name or firm and place of business of the new attorney, and the registrar shall file the notice" (*f*).

Notice of Change of Attorney (g).

To the registrar of the court.

Take notice that I, A. B. [*or C. D.*], have hitherto employed as my attorney G. H. of _____ in the above-mentioned cause, but that I have ceased to employ him, and that my present attorney is I. K. of _____
A. B. [*or C. D.*]

§ 2.—CONDUCT OF THE SUIT OR PROCEEDING.

Order XXIII.
Rule 17.
Conduct of
suit.

"The judge may order what party shall have the conduct of any suit or proceeding, or any part thereof, and may rescind or alter such order or make new orders in that behalf, from time to time as he shall think fit" (*h*).

§ 3. ENLARGING OR ABRIDGING TIME FOR TAKING STEPS, &C.

Order XXIII.
Rule 18.
Court may
enlarge or
abridge
periods men-
tioned in
these orders.

"The judge may, if he think fit, enlarge or abridge any of the times fixed by these orders for taking any step, or filing any document, or giving any notice in any suit or proceeding" (*i*).

§ 4.—EX PARTE APPLICATIONS.

Order XII.
Rule 1.
Peremptory
motions.

"Wherever in any suit or proceeding it shall become necessary to secure the possession of any property, or to obtain security from any person for any moneys in his possession, or to enforce the deposit or the payment into court thereof pending litigation, or the immediate sale of any goods or chattels, and the deposit or payment into court of the purchase-money thereof, or to obtain an order in the nature of an injunction, any party may apply *ex parte* to the judge, either in or out of court, upon affidavits setting forth the facts, rendering such order immediately necessary, and upon such application the judge may either make an

(*d*) County Court Orders and
Rules in Equity, 1868, Order XXIII.
Rule 12.

(*e*) *Id.* Rule 13.

(*f*) *Id.* Rule 4.

(*g*) County Court Forms in Equity,

1868, No. 37.

(*h*) County Court Orders and
Rules in Equity, 1868, Order XXIII.
Rule 17.

(*i*) *Id.* Rule 18.

order absolute in the first instance, or make an order to be absolute at any time to be ordered by him, unless cause be shown to the contrary, or may make such other order or give such directions in the matter as the judge may think fit, and may order immediate execution" (*k*).

"The draft of all orders under the foregoing rule shall be prepared beforehand by the registrar of the court in which such suit or proceeding is pending, and shall be presented by the party when he makes such application to the judge to settle and sign" (*l*).

"The draft so signed shall be transmitted by the applicant to the registrar of the court in which the suit or proceeding is pending, who shall draw up the order in conformity therewith, and seal and file the same, and issue a copy thereof under the seal of the court to the bailiff for service, and execution shall be issued thereon, as by the order is directed" (*m*).

See Forms of Order under these Rules, Forms No. 21 and 22, *post*, p. 96.

PART IV.
CHAP. V.Rule 2.
Orders, how
drawn.Rule 3.
Orders, how
drawn and
executed.

§ 5—AFFIDAVITS.

"All affidavits shall be expressed in the first person of the deponent" (*n*).

"All affidavits shall state the deponent's age, occupation, quality, and place of residence, and also what facts or circumstances deposed to are within deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to, or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are" (*o*).

"The costs of affidavit not in conformity with the last two preceding rules shall be disallowed on taxation, unless the court shall otherwise direct" (*p*).

"Before any affidavit is used it shall be filed in the office of the registrar" (*q*).

"No affidavit in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, nor any affidavit in which there is any interlineation, unless the person before whom the same is sworn shall have duly authenticated such interlineation with his initials in such manner as to show that such interlineation was made before it was sworn, shall be filed or used in any suit or proceeding" (*r*).

"Where a registrar rejects an affidavit under Order XIV. he shall give notice, by post or otherwise, to the party offering the same for filing, and of the reasons for such rejection; and where any other document is so imperfect upon the face thereof, or by reason of having blanks therein, that it cannot be easily read or understood, the registrar may

Order XIV.

Rule 1.
Affidavits to
be expressed
in the first
person.Rule 2.
Sources of
knowledge to
be stated.Rule 3.
Costs of
affidavits
when dis-
allowed.Rule 4.
Filing of
affidavits.Rule 5.
Erasure,
blotting,
interlinea-
tion, etc. in
affidavits.

Order XX.

Rule 3.
Duty of re-
gistrar when
he rejects
affidavits, or
where docu-

(*k*) County Court Orders and Rules in Equity, 1868, Order XII. Rule 1.

(*l*) *Id.* Rule 2.

(*m*) *Id.* Rule 3.

(*n*) *Id.* Order XIV. Rule 1.

(*o*) *Id.* Rule 2.

(*p*) *Id.* Rule 3.

(*q*) *Id.* Rule 4.

(*r*) *Id.* Rule 5.

ing, give notice to such other party that he or his attorney desires to inspect the same at any place to be appointed by such other party; and if such other party shall not appoint a convenient place, or allow the party giving such notice or his attorney, to inspect such document within three days after receiving such notice, the judge may adjourn the hearing, and make such order as to costs as he shall think fit" (z).

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possession or
control of an
opposite
party.

Sect. 18 of 15 & 16 Vict. c. 86 (amending the practice and course of proceeding in the High Court of Chancery), referred to in the margin of the above rule, enacts that "it shall be lawful for the court, upon the application of the plaintiff in any suit in the said court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just."

15 & 16 Vict.
c. 86, s. 18.

For the practice of the Court of Chancery, see Daniell's Chancery Practice, 5th edit., p. 1673. See also the County Court Practice as to Inspection and Recovery of Documents in Actions in the County Courts, *ante*, Vol. I. p. 225. And see Rule 27 of Order XXIII. of the County Court Orders and Rules in Equity, 1868, *ante*, p. 3 (a).

The mere fact that documents are the property of the party jointly with another (not a party to the suit), is not an answer to an application for inspection. The nature of the joint ownership ought to be shown, so that the court may be able to draw any necessary inferences as to the rights of parties (b).

Notice to Admit and Inspect (c).

Take notice that the plaintiff [*or* defendant *or* petitioner] proposes to adduce in evidence on the trial in this cause [*or* matter] the several documents hereunder specified, and that the same may be inspected by the defendant [*or* plaintiff, *or* petitioner], his attorney or agent, at _____ on _____, between the hours of _____; and the defendant [*or* plaintiff *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 speci-

(z) County Court Orders and Rules in Equity, 1868, Order III. Rule 3.

(a) As to the right of an agent to inspect on behalf of his principal, see *Attorney-General v. Whitwood Local Board* and *Attorney-General v. Castleford Local Board*, 40 L. J. (N. S.) Ch. 592.

(b) *Bovill v. Cowan*, 39 L. J. (N. S.) Ch. 768. Defendants may in some cases have an order for inspection against co-defendants; see *Kennedy v. Wakefield*, 39 L. J. (N. S.) Ch. 827.

(c) County Court Forms in Equity, 1868, No. 14. See form of heading, *ante*, p. 52.

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fied 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 the day of .

G. H., attorney for

To E. F., attorney for

ORIGINALS.

Description of the Documents.	Date.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

§ 9.—SUMMONING WITNESSES.

Order III.
Rule 4.
Summons to
witness.

“Where a party requires the attendance of any other party, or of any witness, either to give evidence, or to produce documents, he shall apply to the registrar to issue a summons requiring such other party or witness to attend the court or the registrar, as the case may be, or to attend and produce documents; and such summonses shall respectively be drawn up by the registrar, and be issued by him to the bailiff, who shall serve the same; and in every summons to produce documents the registrar shall insert a description of the documents required” (d).

Rule 5.
Compulsory
production of
documents by
parties to
suit.

15 & 16 Vict.
c. 86, ss. 18 &
20.

“Where a party served with a summons under the last rule shall not at the hearing produce the documents required, the court may upon admission or proof of the service of such summons within a reasonable time, and that such documents are in the possession of the party so served, and that they relate to the matter then pending before the court, make an order for their production by him, and the court may deal with them, when so produced, and with all costs occasioned by their non-production, as may appear just. Provided that nothing herein shall prevent the court from receiving secondary evidence of any document of which notice to produce has been given” (e).

(d) County Court Orders and Rules in Equity, 1868, Order III. Rule 4.

(e) *Id.* Rule 5. Sects. 18 and 20 of 15 & 16 Vict. c. 86, referred to in

the margin of the rule, are the corresponding provisions regulating the practice of the High Court of Chancery.

Application for Summons to Produce (f).

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To the registrar of the above court.

I, A. B. [or C. D.], hereby apply for a summons to issue, calling upon
of to attend the court upon the day of , and
then and there to produce the following documents.

A. B. [or C. D.]

ORIGINALS.

Description of the Documents.	Date.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.

Summons to Witness (g).

In the county court of holden at No. of plaint in equity.
In the suit of A. B. v. C. D.

You are hereby required to attend at [court house in] on
the day of , 187 , at the hour of in the
noon, to give evidence in the above cause on behalf of the [plain-
tiff or defendant, as the case may be], and then and there to have and
produce [the several documents hereunto specified], and all other books,
papers, writings and other documents relating to the said action, which
may be in your custody possession or power. In default of your attend-
ance you will be liable to a penalty of 10*l*.

Dated this day of , 187 .

Registrar.

To
[Here insert list of documents mentioned in the application for the
Summons.]

§ 10.—EXAMINATION OF WITNESSES BEFORE HEARING.

“When it shall be necessary to examine a witness *de bene esse*, appli-
cation upon affidavit shall be made to the judge to appoint an examiner
for that purpose” (h).

Order III.
Rule 8.
Examination
de bene esse.

(f) County Court Forms in Equity,
1868, No. 15. See form of heading,
ante, p. 52.

(g) *Id.* No. 16.
(h) County Court Orders and
Rules in Equity, 1868, Order III.

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CHAP. V.Rule 9.
Special
examiner.Rule 10.
How exami-
nation con-
ducted.

“ Upon the application of a party desirous to examine a witness residing out of the jurisdiction of the court, the judge may, if he thinks fit, appoint the registrar of the court within the district of which such witness resides, to take the examination of such witness” (*i*).

“ Where any witness is examined by a registrar, he shall be examined on oath, and the registrar shall transcribe the answers of such witness, and the deposition shall be subscribed by the witness and the registrar who shall have so examined him, and shall then be transmitted by post to the registrar of the court in which the suit or proceeding is pending” (*h*).

◆

§ 11.—NOTICE OF INTENTION TO USE AFFIDAVITS AT THE HEARING.

Order III.
Rule 7.
Affidavit.

“ Where a party desires to use at the hearing an affidavit by any particular witness, or an affidavit as to particular facts, he may, ten days before the hearing, give a notice, with a copy of such affidavit annexed, to the party against whom such affidavit is to be used; and unless such last-mentioned party shall within five days give notice to the other party that he objects to the use of such affidavit, he shall be taken to have consented to the use thereof” (*l*).

◆

§ 12.—DISMISSAL OF THE SUIT AT THE PLAINTIFF'S INSTANCE BEFORE THE RETURN-DAY.

Order II.
Rule 6.
Dismissal of
suit.

“ The plaintiff may, at any time before the return-day of the summons, by notice in writing delivered at the office of the registrar, require the plaint to be dismissed as against all or any of the defendants, with costs, without prejudice to further proceedings or suits, and such notice shall operate as an order to dismiss accordingly; and the registrar shall forthwith file such notice, and forward a copy thereof by post or otherwise to each of the defendants” (*m*).

Rule 8. “ The examination of a witness *de bene esse* ordinarily takes place where there is danger of losing the testimony of an important witness from death, by reason of age (as where the witness is seventy years old and upwards); or dangerous illness; or where he is about to go abroad; or where he is the only witness to an important fact. In such cases the court, to prevent the party from being deprived of the benefit of his evidence, will permit his depositions to be taken before the cause is at issue in order

that, if the witness die, or be not forthcoming to be examined after issue joined, the depositions so taken may be used at the hearing. This examination of a witness *de bene esse* may be incidental to every suit.” Daniell's Chancery Practice, 5th ed. p. 814.

(*i*) County Court Orders and Rules in Equity, 1868, Order III. Rule 9.

(*h*) *Id.* Rule 10.

(*l*) *Id.* Rule 7.

(*m*) *Id.* Order II. Rule 6.

CHAPTER VI.

THE HEARING.

- § 1.—HOW PARTIES TO COME PREPARED.
- § 2.—EVIDENCE.
- § 3.—AMENDMENTS.
- § 4.—TRIAL BY JURY.
- § 5.—DECREES AND DECRETAL ORDERS.
- § 6.—FINAL DECREE.
- § 7.—REHEARING.
- § 8.—REGISTRATION OF DECREES.



§ 1.—HOW PARTIES TO COME PREPARED.

It has been already stated that the times of the sitting of a county court in matters of equity are those appointed for the general business of the court, unless the judge orders otherwise and appoints a special day or days (a).

“ Upon the day on which the summons is returnable, all parties shall come to the court prepared, so far as the nature of the case will admit, with evidence to enable the judge to try the whole matter of the suit upon the merits, and then to determine the same by a final decree or to make such decretal order, or give such directions for adding parties to the suit, for making inquiries, taking accounts, realizing assets, or doing any act which the judge may consider necessary to enable him to make a final decree upon a day to which the hearing may be adjourned” (b).

Order IV.
Rule 1.
How parties
to come pre-
pared.

“ A suit in equity shall be heard in open court as plaints in the county court are now tried” (c).

Rule 2.
Hearing.



§ 2.—EVIDENCE.

“ Except where otherwise provided by these Orders, the evidence of witnesses shall be taken vivâ voce on oath, according to the present practice on the hearing of plaints” (d).

Order III.
Rule 1.
Evidence to
be taken vivâ
voce.

(a) See Order XXIII. Rule 6, Rule 1.
ante, p. 33.

(b) County Court Orders and Rules in Equity, 1868, Order IV.

(c) *Id.* Rule 2.

(d) *Id.* Order III. Rule 1.

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Order III.
Rule 6.
Documents
unobjected to
received
without
formal proof.

Rule 3.
Affidavits.

Order XI.
Rule 23.
Facts may be
supported by
affidavit.

"Where any documents are produced to the court from proper custody, they will be read without further proof, if they appear genuine, and if no objection be taken thereto; and if the admission of any document so produced be objected to, the judge may adjourn the hearing for the production of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the judge shall otherwise order" (*e*).

"Affidavits and depositions used at the hearing shall be read as the evidence of the person by whom they are used" (*f*).

In the case of proceedings under the Trustee Acts, &c., or applications for injunctions, the facts are proved by affidavit.

"Upon the hearing of any petition or application under this order, unless the judge shall otherwise direct, the facts relied upon in support of or in opposition to such petition or application shall be proved by affidavit" (*g*).

§ 3.—AMENDMENTS.

Order XIII.
Rule 1.
Amendments.
15 & 16 Vict.
c. 86, ss. 49
and 53.

"The judge may at or during the hearing, and before a final decree or order be made in any suit or proceeding under the act, exercise all powers of amendment mentioned in sect. 57 of the 19 & 20 Vict. c. 108 (*h*), so far as the same may be applicable to suits and proceedings in equity, and also all the powers and authorities of a judge of the High Court of Chancery; and the rules relating to amendment in actions (*i*) shall apply, so far as they are applicable, to all suits and proceedings in equity" (*k*).

§ 4.—TRIAL BY JURY.

"The County Courts Act, 1865" (28 & 29 Vict. c. 99), enacts, that—

Provisions of
County Court
Acts as to
juries,
suits and
witnesses
extended to
suits and
witnesses
under this
act.

Sect. 7. "Whenever it is required that a jury should be summoned for the trial of any matter arising out of the jurisdiction given to the county courts by this act, it shall be summoned from the list of jurors in the possession of the registrar of the county court in which the suit or matter has been brought; and all the enactments relating to the summoning, impannelling and swearing of a jury in a county court, and to the number of the jury and the unanimity of their verdict, shall apply to every jury summoned under this act; and the duties and obligations of and upon all jurors, suitors and witnesses, and their liability to penalty and punishment, shall, in any proceeding under this act, be the same as those created, authorized and imposed by the several statutes now in force relating to county courts."

(*e*) County Court Orders and Rules in Equity, 1868, Order III. Rule 6. See *ante*, Vol. I. p. 464.

(*f*) *Id.* Order IV. Rule 3.

(*g*) *Id.* Order XI. Rule 23.

(*h*) See *ante*, Vol. I. p. 266.

(*i*) *Id.* See *ante*, Vol. I. p. 266.

(*k*) County Court Orders and Rules in Equity, 1868, Order XIII. Sects 49 and 53 of 15 & 16 Vict. c. 86, referred to in the margin, are the corresponding provisions regulating the practice of the High Court of Chancery.

In what Cases a Jury may be summoned.—“In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same 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” (“The Chancery Amendment Act, 1858,” 21 & 22 Vict. c. 27, s. 2); and see the note to sub-section 8 of sect. 1 of 28 & 29 Vict. c. 99, *ante*, p. 23, as to the application of this provision to county courts.

“It shall be lawful for the Court of Chancery, 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; . . . and generally for all purposes of or auxiliary to the assessment of damages or the trial of questions of fact by a jury before the court itself, and in respect of new trials, the Court of Chancery shall have the same jurisdiction, powers and authority in all respects as belong to any superior court of common law, or to any judge thereof for the like purposes” (21 & 22 Vict. c. 27, s. 3).

“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 a true verdict to give thereon according to the evidence; and upon every such trial the Court of Chancery shall have the same powers, jurisdiction and authority as belong to any judge of any of the said superior courts sitting at nisi prius” (*Id.* s. 4).

The same act further provides that damages may be assessed or questions of fact tried before the court itself without a jury (*Id.* s. 5), or the court may cause the amount of damages to be assessed by a jury before a judge of one of the superior courts of common law or before the sheriff (*Id.* s. 6).

A subsequent act, “The Chancery Regulation Act, 1862” (25 & 26 Vict. c. 42), after reciting that the High Court of Chancery has power in certain cases to refuse or postpone the application of remedies within its jurisdiction, until questions of law and fact on which the title to such remedies depends have been determined or ascertained in one of her Majesty’s courts of common law; and that it is expedient that the said power should no longer exist, and that in all cases every question of law and of fact, cognizable in a court of common law, arising in the said Court of Chancery, on which the right of any party to any equitable relief or remedy depends, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, should be deter-

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CHAP. VI.

mined by or before the said court itself: enacts, that in all cases in which any relief or remedy within the jurisdiction of the Courts of Chancery is or shall be sought in any cause or matter instituted or pending in the court, 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.

Where, however, questions of fact may be more conveniently tried at assizes or nisi prius, the court may direct an issue to be so tried (Id. s. 2); and all the provisions of "The Chancery Amendment Act, 1858" (21 & 22 Vict. c. 27), with reference to the trial of questions of fact before the Court of Chancery, are applied to this act (Id. s. 3): "Provided also, that in all cases in which the object of any suit in equity shall be to recover or to defend the possession of land under a legal title, or under a title which would have been legal but for the existence of some outstanding term, lease or mortgage (and whether mesne profits or damages shall or shall not also be sought in such suit), such relief only shall be given in equity as would have been proper according to the rules and practice of the court if this act had not passed; and nothing in this act shall make it necessary for a court of equity to grant relief in any suit concerning any matter as to which a court of common law has concurrent jurisdiction, if it shall appear to the court that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law" (Id. s. 4).

It has been thought desirable to set out thus fully the various cases in which a jury may be required in equity, although some of the above provisions will be rarely applied to the equitable jurisdiction of the county courts.

Order IV.
Rule 5.
Jury.
Sect. 7 of the
Act.

"Where the court shall order any question of fact, or any question as to the amount of damages, to be tried by a jury, the court shall adjourn the hearing, and appoint a day for the trial of such question by a jury; and thereupon the practice shall be in all respects the same as in actions where either party has required a jury, including the power to direct a new trial when necessary" (l).

Rule 6.
Record for
trial.

"Where the court shall order any question of fact, or any question as to the amount of damages, to be tried by a jury, the judge shall reduce the question into writing, and the same shall be called the 'Record for Trial' " (m).

(l) County Court Orders and Rule 5.
Rules in Equity, 1868, Order IV. (m) *Id.* Rule 6.

§ 5.—DECREES AND DECRETAL ORDERS.

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It has been already seen that “The County Courts Act, 1865,” gives the judge of a county court in all suits or matters within the equitable jurisdiction of his courts, all the powers and authorities of a judge of the High Court of Chancery (*n*).

The Rules provide that—

“Upon the hearing the court may dismiss the suit, or grant the relief asked by the plaint, or any part thereof, or may grant any other relief consistent with the case made by the plaint, or make any order giving directions for, or with respect to, the prosecution of the suit, as the circumstances of the case may require, and also make such order as to costs as the court may think fit” (*o*).

Order IV.
Rule 4.
Decree or decretal order.

Principles on which the Judge acts.—“It has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the circumstances of every particular case: whereas the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart” (*p*). “There are certain principles, on which courts of equity act, which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases, as they arise, by the principle on which former cases have been decided; and may thus illustrate or enlarge the operation of those principles. But the principles are as fixed and certain as the principles on which the courts of common law proceed” (*q*). “Again: neither a court of equity nor of law can vary men’s wills or agreements, or (in other words) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One court ought not to extend, nor the other abridge, a lawful provision deliberately settled by the parties contrary to its just intent. A court of equity, no more than a court of law, can relieve against a penalty in the nature of stated damages; as a rent of 5*l.* an acre for ploughing up ancient meadow (*r*); nor against a lapse of time, where the time is material to the contract; as in covenants for the renewal of leases. Both courts will equitably construe, but neither pretend to control or change, a lawful stipulation or engagement” (*s*).

If the result of conferring equitable powers on the county courts were to enable a judge to put aside the law of the land which, by his oath of office, he has sworn to follow, and to do that which is

(*n*) See sect. 2, *ante*, p. 3.

(*o*) County Court Orders and Rules in Equity, 1868, Order IV. Rule 4.

(*p*) 3 Blackst. Comm. 432.

(*q*) Lord Redesdale, *Bond v.*

Hopkins, 1 Sch. & Lefr. R. 428; cited with approbation by Story, *Equity Juris.* § 20.

(*r*) 2 Atk. 239.

(*s*) 3 Blackst. Comm. 435.

right in the sight of his own eyes, and call it "equity," the power would be a curse instead of a blessing to the community. "If a court of equity," says Blackstone, "floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in any particular case, the inconvenience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible" (*t*). It is a popular error, however, to imagine that equity consists in setting law at defiance. So far from being true, it is a maxim that equity follows the law, and the rules of property and rules of interpretation in both courts are, and should be, exactly the same (*u*); and even where equity differs in doctrine from law, equity has its own precise rules and limits which no judge can, will or dare infringe or exceed.

As to costs, see *post*, Chap. XI., § 2.

General Form of Heading for and Conclusion for Decretal Order or Decree or Orders of Committal (*x*).

	No. of plaint or proceeding.
In the county court of	holden at
day of	on the
	, 187 .
	In the suit of A. B. v. C. D.
	[or in the matter of the petition of].
Upon the hearing this day of Mr.	for the plaintiffs, and upon
the hearing of Mr.	for the defendants [or if some of the defen-
dants do not appear, then for the defendants C. D., &c., and no one	appearing for the defendants E. and F.]; it is ordered
	* * *
Given under the seal of the court this	day of
	, 187 .
	By the court.
	E. F., registrar.

Take notice, that unless you obey the directions contained in this order, obedience thereto will be enforced in such manner as the law provides.

Decretal Order.—Administration Suit (*y*).

It is ordered that the following accounts and inquiries be taken and made; that is to say,
In Creditor's Suit.

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In Suits by Legatees.

An account be taken of the legacies given by the testator's will.

In Suits by Next of Kin.

An inquiry be made and account taken of what, or of what share, if

(*t*) 3 Blackst. Comm. 440.

(*u*) *Id.* 434. Blackstone says the rules of evidence are also the same. See some important infringements of the general rules of evidence in respect to proof of documents, in Order

III. Rule 6, *ante*, p. 74.

(*x*) County Court Forms in Equity, 1868.

(*y*) County Court Orders in Equity, No. 20. See heading and conclusion, *supra*.

any, the plaintiff is entitled to as next of kin [*or, one of the next of kin*] of the intestate.

[After the first paragraph, the decretal order will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, devisees, heirs-at-law and next of kin. In suits by claimants other than creditors, after the first paragraph in all cases, an order to inquire and take an account of creditors will follow the first paragraph, and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

3. An account of the funeral and testamentary expenses.

4. An account of the personal estate of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

5. An inquiry what part (if any) of the personal estate of the deceased are outstanding and undisposed of.

6. And it is further ordered, that the defendant do, on or before the day of next, pay into court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or to his use.

7. And that if the registrar shall find it necessary for carrying out the objects of the suit to sell any part of the personal estate of the deceased, that the same be sold accordingly.

8. And that Mr. be receiver in the suit [*or proceeding*], and receive and get in all outstanding debts and outstanding personal estate of the deceased, and pay the same into the hands of the registrar [and shall give security by bond for the due performance of his duties to the amount of £].

9. And it is further ordered, that if the personal estate of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made and accounts taken, that is to say,—

10. That an inquiry be made what real estate the deceased was seised of or entitled to at the time of his death.

11. What are the incumbrances (if any) affecting the real estate of the deceased, or any part thereof.

12. An account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

13. And that the real estate of the deceased, or so much thereof as shall be necessary to make up the fund in court sufficient to carry out the object of the suit, be sold, with the approbation of the judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

14. And it is ordered, that shall have the conduct of the sale of the real estate, and shall prepare the conditions and contracts of sale, and the abstract of title, subject to the approval of the registrar, and that in case any doubt or difficulty shall arise the papers shall, with the like approval, be submitted to , Esquire, to settle.

15. And it is further ordered, that, for the purpose of the inquiries hereinbefore directed, the registrar shall advertise in the newspapers, according to the practice of the court, or shall make such inquiries in any other way which shall appear to the registrar to give the most useful publicity to such inquiries.

16. And it is ordered, that the above inquiries and accounts be made

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and taken, and that all other acts ordered to be done be completed, before the day of , and that the registrar do certify the result of the inquiries and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

17. And lastly it is ordered, that this suit [or matter] stand adjourned for making a final decree to the day of .

[Such part only of this decretal order is to be used as is applicable to the particular case.]

Decretal Order for Reference in Foreclosure Suit by legal Mortgagee (z).

It is ordered that it be referred to the registrar to take an account of what is due to the plaintiff for principal and interest on the mortgage mentioned in the plaint (making allowance on one side or the other for any rents or profits received by the plaintiff, and for any sums of money lawfully expended by the plaintiff about the mortgaged premises) and to tax the plaintiff's costs of this suit, and that the registrar do certify to the court on the day of what he shall find to be due for principal and interest as aforesaid and for costs: And upon the defendant paying into court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months after the registrar shall have presented his certificate, it is ordered that the plaintiff do reconvey the said mortgaged premises, free and clear from all incumbrances done by him, or any claiming by, from or under him, and do deliver up to the registrar all deeds and writings in his custody or power relating thereto, and that upon such reconveyance being made, and deeds and writings being delivered up, the registrar shall pay out to the plaintiff the said sum so paid in as aforesaid for principal, interest and costs; but in default of the defendant paying into court such principal, interest and costs as aforesaid by the time aforesaid, then it is ordered, that the defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said premises, and the registrar is to settle the conveyance if the parties differ about the same; and it is further ordered, that after the expiration of the said six months, the plaintiff shall be at liberty to apply to the court for a final decree for the foreclosure of the said mortgage.

[N. B.—Where the state of the account is ascertained at the first hearing, instead of the order of reference to the registrar, begin—It is declared that the sum of £ is now due to the plaintiff for principal and interest on the mortgage mentioned in the plaint, and it is ordered that the registrar do tax the plaintiff's costs of this suit, and that]

Decretal Order of Sale in a Suit by a legal or equitable Mortgagee or Person entitled to a Lien (a).

It is ordered that it be referred to the registrar to take an account of what is due to the plaintiff for principal and interest on the mortgage [or equitable mortgage or lien] mentioned in the plaint, and to tax the plaintiff's costs of this suit, and that the registrar do certify to the court

(z) County Court Forms in Equity, 1868, No. 23. See heading and conclusion, *ante*, p. 78.

(a) *Id.* No. 24. See heading and conclusion, *ante*, p. 78.

on the day of , what he shall find to be due for principal and interest as aforesaid, and for costs: And upon the defendant paying into court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months after the registrar shall have presented his certificate, it is ordered that the plaintiff [do reconvey the said mortgaged premises free and clear from all incumbrances done by him, or any claiming by, from or under him, and] do deliver up to the registrar all deeds and writings in his custody or power relating thereto, and that upon such reconveyance being made, and deeds and writings being delivered up, the registrar shall pay out to the plaintiff the said sum so paid in as aforesaid for principal, interest and costs; but in default of the defendant paying into court such principal, interest and costs as aforesaid by the time aforesaid, then it is ordered that the said mortgaged premises [*or* the premises subject to the said equitable mortgage or lien] be sold with the approbation of the registrar; and it is ordered that the money to arise by such sale be paid into court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest and costs as aforesaid, and that the balance (if any) shall be paid to the defendant.

Decretal Order—Dissolution of Partnership (b).

It is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the London Gazette, etc.

And it is ordered that be the receiver of the partnership estate and effects in this suit, and do get in all the outstanding book debts and claims of the partnership.

And it is ordered that the following accounts be taken:—

1. An account of the credits, property, and effects now belonging to the said partnership.

2. An account of the debts and liabilities of the said partnership.

3. An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties are to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the registrar do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of .

And lastly it is ordered that this suit stand adjourned for making a final decree to the day of .

(b) County Court Forms in Equity, 1868, No. 25. See heading and conclusion, *ante*, p. 78.

Order in the Nature of an Injunction (c).

The plaintiff undertaking [by his counsel *or* attorney] to abide by any order this court may make as to damages, in case this court shall hereafter be of opinion that the defendant shall have sustained any, by reason of this order, which the plaintiff ought to pay: Now, therefore, C. D., the defendant in this cause, his servants, agents, and workmen are hereby strictly enjoined and restrained from pulling down or suffering to be pulled down the house being Number 16, Blank Street, Islington, in the county of Middlesex, and from selling the materials whereof the said house is composed [*or* from entering into any contract or contracts, and from accepting, drawing, indorsing, or negotiating any bills or bill of exchange, notes or note, or written securities or security, in the name of the partnership firm of _____, and from contracting any debts or debt, and buying and selling any goods, and from making or entering into any verbal or written promise, agreement, or undertaking, and from doing or causing to be done any acts or act in the name or on the credit of the said partnership firm, or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sums or sum of money, or for the performance of any contract, promise, or undertaking [*or, as the case may be*], until the day after the day upon which the cause shall be heard, or until further order [*or until the _____ day of _____, upon which day this court will consider whether this order shall be further continued*].

Dated this _____ day of _____ .

J. S., judge.

If you the said C. D. [your servants, agents, or workmen] act in disobedience to this order, you the said C. D. will be liable to be committed by this court, and also be liable to have your estate sequestered.

§ 6.—FINAL DECREE.

Order IX.
Rule 1.
Final decree.

“When the court has determined all the questions raised between the parties, the registrar shall, as soon thereafter as conveniently may be, draw up a final decree in accordance with the judgment of the court, and seal and file the same” (*d*).

Final Decree—Partnership (e).

It is ordered that the fund now in court, amounting to the sum of £ _____, be applied as follows:—

1. In payment of the debts due by the partnership set forth in the registrar’s certificate, amounting in the whole to £ _____.

2. In payment of the costs of all parties in this suit, amounting to £ _____ [*These costs must be ascertained before the decree is drawn up*].

3. In payment of the sum of _____ to the plaintiff as his share of the partnership assets, and of the sum of £ _____, being the residue

(*c*) County Court Orders in Equity, 1868, No. 41. See heading and conclusion, *ante*, p. 78.

(*d*) County Court Orders and

Rules in Equity, 1868, Order IX.

(*e*) County Court Forms in Equity, 1868, No. 27. See heading and conclusion, *ante*, p. 78.

of the said sum of £ now in court to the defendant as his share of the partnership assets.

[Or, And that the remainder of the said sum of £ be paid to the said plaintiff [or defendant] in part payment of the sum of £ certified to be due to him in respect of the partnership accounts.

And that the defendant [or plaintiff] do, on or before the day of pay to the plaintiff [or defendant] the sum of £ , being the balance of the said sum of £ due to him, which will then remain due.]

Final Decree for Foreclosure (f).

Whereas it appears to the court that the defendant has not paid into court the sum which was on the day of last certified by the registrar to be due to the plaintiff for principal and interest upon the mortgage in the plaint mentioned, and for costs, pursuant to the decretal order made in this suit on the day of last, and that the period of six months has elapsed since the said day of .

It is ordered that the defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgage premises.

Another Form of Final Decree for Foreclosure, reciting proceedings (g).

Upon motion this day by Mr. , solicitor for the plaintiff, who alleged that by the decretal order in this suit dated the day of , 187 , it was ordered that an account be taken of what was due to the plaintiff for principal and interest on his mortgage, in the plaint mentioned, and for his costs, and that the registrar do certify to the court on the day of , 187 , what he should find to be due for principal, interest and costs as aforesaid and for costs not being costs of this suit, and upon the defendant paying into court what should be certified to be due to the plaintiff for principal, interest and costs as aforesaid, and for costs not being costs of this suit, within six months after the registrar should have presented his certificate, it was ordered that the plaintiff do re-assign the premises comprised in the said mortgage, in the plaint mentioned, and in default thereof that the defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said premises, and further, that after the expiration of the said six months the plaintiff should be at liberty to apply to the court for a final decree for the foreclosure of the said mortgage; that in pursuance of the said decretal order the registrar made his certificate dated the day of , 187 , and thereby certified that there would be due to the plaintiff for principal and interest on his said mortgage and for his costs, on the day of , 187 , the sum of £ , which the defendant was thereby appointed to pay to the registrar of this court on the said day of , 187 , at the county court of , situate at in the said county of , between the hours of ten in the forenoon and four in the afternoon: And no one appearing for the defendant; and it appearing to the court that the said sum hath not nor hath any part thereof been paid into court but that the whole thereof still remains due and owing, and that the period

(f) County Court Forms in Equity, clusion, *ante*, p. 78.
1868, No. 26. See heading and con-

(g) MS. Form.

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of six months has elapsed since the said day of last, and upon reading the said decretal order and certificate ; This court doth order that the defendant do stand absolutely debarred and foreclosed of and from all equity of redemption of, in and to the said mortgaged premises.

§ 7.—REHEARING.

Order XV.
Rule 1.
Rehearing to
be allowed
on special
grounds only.

“No decree or order once made shall be reheard unless in any case in which the judge, on special grounds, shall think such rehearing necessary, and then only on such terms as the judge may think just” (*h*).

§ 8.—REGISTRATION OF DECREES.

“The County Courts Act, 1865” (28 & 29 Vict. c. 99), enacts that—

As to registry
of judgments
in London.

Sect. 15. “Such of the judgments and decrees as may be directed by any rule or order shall be registered with the registrar of county court judgments in London in such manner as may be therein directed.”

The County Court Orders in Equity provide that—

Order XXIII.
Rule 24.
Decrees to
be registered.
Sect. 15 of
the act.

“A note of every decretal order or final decree made in any suit or of an order made on a petition shall be transmitted to the registrar of county court judgments in London, who shall register the same under the direction of the commissioners of her majesty’s treasury” (*i*).

(*h*) County Court Orders and (*i*) *Ib.* Order XXIII. Rule 24.
Rules in Equity, 1868, Order XV.

CHAPTER VII.

PROCEEDINGS IN CARRYING OUT DECRETAL ORDERS.

- § 1.—DRAWING UP DECRETAL ORDERS.
- § 2.—ADDING PARTIES.
- § 3.—APPOINTMENT OF RECEIVER.
- § 4.—ORDER FOR SALE OF PROPERTY.
- § 5.—ORDER FOR PREPARATION AND EXECUTION OF DEEDS.
- § 6.—REFERENCE TO THE REGISTRAR.
- § 7.—APPLICATION TO JUDGE FOR FURTHER DIRECTIONS.
- § 8.—ADVERTISEMENTS.
- § 9.—PAYMENT OF MONEY INTO AND OUT OF COURT.
- § 10.—PAYMENT OF LEGACY OR MONEY TO WHICH AN INFANT OR PERSON BEYOND SEAS IS ENTITLED.
- § 11.—POWERS AND DUTIES OF THE REGISTRAR IN RESPECT OF FUNDS IN COURT.
- § 12.—INTEREST ON DEBTS AND LEGACIES.
- § 13.—AUDITING REGISTRAR'S ACCOUNTS.
- § 14.—PROCEEDINGS ON ABATEMENT OF SUIT BY DEATH, MARRIAGE OR OTHERWISE.

§ 1.—DRAWING UP DECRETAL ORDERS.

“Where the court makes any decretal order the registrar shall, as soon thereafter as conveniently may be, draw up, seal and file such order” (a).

Order V.
Rule 1.
Registrar to
draw order.

(a) County Court Orders and Rules in Equity, 1868, Order IV. Rule 1. There is a similar rule with respect to petitions under the Trustee Acts and applications for Injunctions (see *ante*, pp. 49, 51), viz. :—

“Where the judge makes an order upon such petition or application, the registrar shall, as soon thereafter

as conveniently may be, draw up, seal and file such order.” (Order XI. Rule 24.)

“All judicial or official documents in any suit or proceeding, and all copies thereof respectively issued by the court, shall be stamped by the registrar with the seal of the court.” (Order XXIII. Rule 2.)

§ 2.—ADDING PARTIES.

The rules provide, as has been already seen, for adding parties to the suit when the judge considers it necessary (*b*).

Notice of Decretal Order to Absent Party (c).

Take notice that on the day of the decree of which a copy is hereunto annexed was made in this cause, and that from the service of this notice you will be bound by the proceedings in the above cause in the same manner as if you had been originally made a party to the suit, and that you may attend the proceedings under the said decretal order, and that you may apply to the court to add to the decretal order.

Dated this day of 187 .

Registrar.

To

§ 3.—APPOINTMENT OF RECEIVER.

Order V.
Rule 3.
Receiver.

“Where upon the hearing it appears to the court expedient that a receiver be appointed, such appointment shall be made by the decretal order, whether the same be asked as part of the relief in the plaint or not” (*d*).

The following rules relate to the duties of receivers :—

Order XXII.
Rule 1.
Receiver to give security.

“Every receiver appointed by the court other than the high bailiff, shall give such security by bond to the registrar for the faithful discharge of his duties, and the payment over of money, as the court shall direct” (*e*).

Rule 2.
His accounts to be audited by registrar and when.

“The receiver shall submit to the registrar, and the registrar shall audit, the accounts of the receiver, which need not be in any particular form, as soon as conveniently may be, after the receipt or realization of the assets, and immediately after such audit shall pay over to the registrar the balance found thereby to be in his hands” (*f*).

Rule 3.
To produce voucher and if required verify on oath.

“The registrar may require any receiver to produce any receipt, accounts, and vouchers necessary for verifying the accounts, and may disallow any item not proved to his satisfaction, and may, if he shall think fit, require any receiver to verify such accounts and vouchers upon oath” (*g*).

Rule 4.
To produce account for audit upon notice.

“The receiver shall, at any time before the complete realization of the assets, produce his accounts to be audited in manner provided by this order, upon receiving seven days’ notice in writing from the registrar so to do, and such notice may be sent by post or otherwise to the address of the receiver” (*h*).

(*b*) See Order IV. Rule 1, *ante*, p. 73.

(*c*) County Court Forms in Equity, 1868, No. 28. See heading, *ante*, p. 52.

(*d*) County Court Orders and

Rules in Equity, 1868, Order V. Rule 3.

(*e*) *Id.* Order XXII. Rule 1.

(*f*) *Id.* Rule 2.

(*g*) *Id.* Rule 3.

(*h*) *Id.* Rule 4.

“Where the duties of the receiver are continuous, no longer period than one year shall in any case be allowed to intervene between each audit” (i).

“In no case shall it be necessary for any party to attend at the audit of the receiver's account; but where a party is dissatisfied with a receiver's account he may apply to the court or registrar for a revision of the registrar's allowances” (k).

“The court may order the receiver to pay over, at such time or from time to time as it shall see fit, to the party entitled to the beneficial interest therein, or to the guardian of any infant, any yearly or other accruing rents or interest instead of paying the same into court, and to take credit for such payments in his accounts when audited” (l).

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Rule 5.
Audit once a year.

Rule 6.
Parties need not attend audit.

Rule 7.
Court may order income to be paid direct to parties.

Bond to be given by a Receiver (m).

Know all men by these presents, that we, A. B. of, etc., and C. D. of, etc., and E. F. of etc., are jointly and severally held and firmly bound to G. H., registrar of the county court of holden at , in £ to be paid to the said G. H., or his certain attorney, executors, administrators or assigns. For which payment to be made we bind ourselves, and each and every of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of one thousand eight hundred and

And whereas a plaint in equity has been filed in this court by A. B. against C. D. for the purpose of [*here insert object of suit*].

And whereas the said A. B. has been appointed, by order of the above-mentioned court, to receive the rents and profits of the real [*or freehold or copyhold or leasehold*] estate [*or estates*] [and to get in the outstanding personal estate] of C. D., the testator in the said plaint named.

Now the condition of this obligation is such, that if the above-bounden A. B. do and shall duly account for all and every the sum and sums of money which he shall so receive on accounts of the rents and profits of the real estates, and in respect of the personal estate, of the said C. D. [*or as may be*] at such periods as the said court shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him as the said court hath directed or shall hereafter direct, then this obligation shall be void and of none effect, otherwise shall remain in full force and virtue.

A. B. (L.S.)

C. D. (L.S.)

Signed, sealed, and delivered by the above-bounden
in the presence of

NOTE.—*If deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.*

(i) Connty Court Orders and Rules in Equity, 1868, Order XXII.
Rule 5.

(l) *Id.* Rule 7.

(m) County Court Forms in Equity, 1868, No. 33.

(k) *Id.* Rule 6.



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§ 4.—ORDER FOR SALE OF PROPERTY.

Order V.
Rule 4.
Sale of real
property.

“Where real property is ordered to be sold, the decretal order shall direct who shall have the conduct of the sale, and by whom the conditions and contracts of sale, and the abstract of title, shall be prepared. And where any conditions or contracts are ordered to be settled by a conveyancing counsel, it shall name the counsel to whom they are to be submitted” (*n*).

Rule 5.
Sale of personal
property.

“Where a decretal order directs any personal property to be sold, the same shall be sold under the superintendence of the high bailiff, by public auction, unless the court shall otherwise order” (*o*).

Order XXI.
Rule 1.
As to sale of
personal
property.

“Where any personal property is directed to be sold by auction, the high bailiff shall superintend the sale; and where the property is to be sold by private contract, he shall carry out the directions of the court in respect of such sale” (*p*).

§ 5.—ORDER FOR PREPARATION AND EXECUTION OF DEEDS.

Order V.
Rule 2.
Preparation
of a deed.

“Where a decretal order directs any deed to be prepared and executed, it shall state by what party the said deed shall be prepared, and to whom it shall be submitted for approval” (*q*).

Order VI.
Rule 1.
Deed how
settled.

“Where a deed is ordered to be prepared, and the parties cannot agree upon the form thereof, the judge may, upon the application of either party, settle the same himself, or name a conveyancing counsel by whom the same shall be settled, subject to the final approval of the judge” (*r*).

§ 6.—REFERENCE TO THE REGISTRAR.

*Absent Parties.]—*Order VII.
Rule 1.
Inquiry as to
parties.

“Where any matter is referred to the registrar by a decretal order, he shall, as soon as conveniently may be, ascertain if there are any parties who, if the decretal order had been made in a suit pending in the Court of Chancery, ought, under the 42nd section of the 15 & 16 Vict. c. 86, to be served with a notice under Rule 8 of such section” (*s*).

Rule 2.
Notice to
parties.

Where it shall be necessary to serve any parties with the notice mentioned in the foregoing rule, the same shall be prepared by the registrar, and issued by him to the bailiff, who shall serve the same, and upon such notice the party served therewith may attend the proceedings under the decretal order (*t*).

Rule 3.
Application
to vary or
add to de-
cretal order.

Any party who shall be served with a notice under the last foregoing rule, may apply to the court at the next sitting, or by leave of the judge at any subsequent sitting, to vary or add to the decretal order (*u*).

The 42nd section of the 15 & 16 Vict. c. 86, amending the practice and course of proceeding in the High Court of Chancery,

(*n*) County Court Orders and
Rules in Equity, 1868, Order V.
Rule 4.

(*o*) *Id.* Rule 5.

(*p*) *Id.* Order XXI. Rule 1.

(*q*) *Id.* Order V. Rule 2.

(*r*) *Id.* Order VI. Rule 1.

(*s*) *Id.* Order VII. Rule 1.

(*t*) *Id.* Rule 2.

(*u*) *Id.* Rule 3.

enacts that it shall not be competent to any defendant to take any objection for want of parties in any case to which the rules thereafter set forth extend. The rules apply to administration suits by any residuary legatee and devisees and heirs or next of kin, or any legatee interested in a legacy charged on real estate, and to suits by any one of several *cestui que trusts* under any deed or instrument for the execution of its trusts, and suits for the protection of property pending litigation, and in all cases in the nature of waste; and Rule 8 of the section then provides that "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 lord chancellor, apply to the court to add to the decree."

Reference to the Registrar to take Accounts or to make Inquiries.—

"Where any decretal order directs any accounts or inquiries to be taken or made, or any acts to be done, by the registrar, high bailiff, receiver, or parties, it shall name a day within which all such acts shall be done, and accounts and inquiries completed, and shall also name a day, not less than fourteen days after that day, on which the registrar shall certify the result of the accounts and inquiries, and what has been done under such decretal order, and on which the cause will be further heard, and if practicable, a final decree made" (x).

Order V.
Rule 6.
Accounts or
inquiries.

"Where a decretal order directs that any account be taken or inquiry made, such account shall be taken and inquiry made by the registrar, and he shall for that purpose have all the powers and discharge all the duties of a chief clerk of the master of the rolls or a vice-chancellor in the Court of Chancery; and all parties prosecuting any accounts or inquiries shall have the same power of summoning witnesses, including as witnesses any parties in the cause, and of examining them on such accounts or inquiries, and of compelling the production of documents, as they had on the original hearing; and all rules as to the summoning, swearing, and examining of witnesses, and the production of documents at the hearing, shall be applicable (as far as may be) to such summoning, swearing, examining, and production on taking any such accounts, or prosecuting any such inquiries" (y).

Order VI.
Rule 2.
In taking
accounts, &c.,
registrar to
be chief clerk.
15 & 16 Vict.
c. 80, ss. 30,
31.

"Where a decretal order directs accounts to be taken, any books of account in which the accounts required to be taken, or any of them, have been kept, shall, unless the judge shall otherwise direct, be taken as *primâ facie* evidence of the truth of the matters therein contained, with

Rule 3.
In taking ac-
counts, ac-
count books
to be primâ
facie evi-

(x) County Court Orders and Rules in Equity, 1868, Order V. Rule 6.

(y) *Id.* Order VI. Rule 2. Sects. 30 & 31 of the 15 & 16 Vict. c. 86,

referred to in the margin of the note, direct the mode of conducting the oral examination of witnesses in the High Court of Chancery.

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dence of the matters therein contained.

Rule 13.
Allowances.

Order XX.
Rule 5.
Registrar to appoint time and place for inquiries and taking accounts.

Rule 6.
Hearing before registrar.

Rule 7.
Further time for certificate.

Order VI.
Rule 4.
Advertisement for creditors, etc.

Rule 5.
Creditors need not attend without notice.

Rule 6.
Securities, deeds, and documents, to be produced to registrar.

Rule 7.
Pedigree or proof to be produced to registrar.

liberty to the parties interested to take such objections thereto as they may be advised" (z).

"In taking any account directed by any decretal order, all just allowances shall be made without any directions for that purpose in such order" (a).

"Where the registrar is required by any decretal order to make inquiries or to take accounts, he shall appoint some day, being not less than twenty-one days from the date of such order, to sit in his office or at the court to hear and determine all matters relating to such inquiry and accounts, and he shall forthwith prepare and insert advertisements in conformity with such order, stating the time, place, and purpose of such sitting, and shall insert the same fourteen days previous to such sitting" (b).

"Upon the day so appointed, the registrar shall sit at the time and place appointed, and shall hear all parties interested, their counsel or attorneys" (c).

"Where a registrar is not prepared to certify to the court on the day mentioned in the order, he shall apply to the judge for an extension of time, and state the reason for making the application, and he shall give notice, by post or otherwise, to the parties of the enlargement of the time and of the day on which he is to certify" (d).

Proof of Claims.—

"Every advertisement for creditors or other persons having any claim upon or interest in the distribution of any assets to be administered by the court, which shall be issued pursuant to any decretal order, shall direct every such creditor or other person, by a time, to be thereby limited, to send to the registrar his name and address, and the full particulars of his claim or interest, and a statement of his account, and the nature of the security (if any) held by him, and at the time of directing such advertisement a time shall be fixed for adjudicating on the claims" (e).

"No such creditor or other person need make any affidavit, or attend in support of his claim, unless he is served with a notice requiring him to do so, as hereinafter provided" (f).

"Every creditor shall produce or transmit to the registrar any security held by him, at such time as shall be specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor shall, if required, by notice in writing to be given by the registrar, produce or transmit to the registrar all other deeds and documents necessary to substantiate his claim before the registrar at his office at such time as shall be specified in such notice" (g).

"Every person claiming as heir-at-law, devisee, next of kin, or legatee, shall, if required, by notice in writing to be given by the registrar, produce or transmit to the registrar any pedigree or proof mentioned in such notice within such time as shall be therein specified" (h).

(z) County Court Orders and Rules in Equity, 1868, Order VI. Rule 3.

(a) *Id.* Rule 13.

(b) *Id.* Order XX. Rule 5.

(c) *Id.* Rule 6.

(d) *Id.* Rule 7.

(e) *Id.* Order VI. Rule 4.

(f) *Id.* Rule 5.

(g) *Id.* Rule 6.

(h) *Id.* Rule 7.

“In case any creditor or other person shall neglect or refuse to comply with the two last preceding rules, he shall not be allowed any costs of proving his claim unless the registrar shall otherwise direct” (i).

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Rule 8.
Costs when not allowed.

“At the time appointed for adjudication upon the debts or claims, the registrar shall take the evidence of the executor, administrator, or other accounting party upon such debts or claims, and may thereupon, in his discretion, allow any of such debts or claims without further proof, and may direct such investigation of all or any of the debts or claims not allowed, and require such further particulars, information, or evidence relating thereto as he may think fit, and may, if he so think fit, require any creditor or other person to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed shall be adjourned to a time to be then fixed” (k).

Rule 9.
Proof of debts or claims.

“Notice of allowance shall be given by the registrar to every creditor or other person whose claim, or any part thereof, has been allowed, and notice shall also be given by him to every such creditor or other person as he shall think fit, to attend and prove his claim or such part thereof as is not allowed, by a time to be named in such notice, not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon shall have been adjourned; and in case any such creditor or other person shall not comply with such notice, his claim, or such part thereof as aforesaid, shall be disallowed” (l).

Rule 10.
Notice of allowance.

“Any such creditor or other person who has not before sent in the particulars of his claim pursuant to the advertisement, may do so two days previous to any day to which the adjudication is adjourned” (m).

Rule 11.
Claims not before made.

“If any claim be sent in after the time fixed by the advertisement (except as before provided in case of an adjournment) the registrar may, upon special application, entertain the same, upon such terms and conditions as to costs and otherwise as he thinks fit” (n).

Rule 12.
Claims too late.

Notice to Creditor to Prove his Claim (o).

You are hereby required to prove the claim sent in by you against the estate of A. B., deceased, by filing such affidavit as you may be advised in support thereof, and by giving notice thereof to me, on or before the day of next, and by attending at my office on the day of 187 , at o'clock in the noon, being the time appointed for adjudicating on the claim.

Dated this day of 187 .

Registrar.

To

Notice to Creditor of Allowance of Claim (p).

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of , with interest thereon at per cent. per annum, from the day of 187 , and for costs.

[If part only allowed, add, If you claim to have a larger sum allowed, you are hereby required to prove such further claim, by filing such affi-

(i) County Court Orders and Rules in Equity, 1868, Order VI. Rule 8.

(n) *Id.* Rule 12.

(k) *Id.* Rule 9.

(o) County Court Forms in Equity, 1868, No. 29. See form of heading, ante, p. 52.

(l) *Id.* Rule 10.

(p) *Id.* No. 30.

(m) *Id.* Rule 11.

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davit as you may be advised in support thereof, and by giving notice thereof to me on or before the day of next, and by attending at my office on the day of 187 , at o'clock in the
noon.

Dated this day of 187 .

Registrar.

Registrar's Certificate.—

“Where a registrar has been ordered to certify to the court upon any matter, he shall present to the court a certificate in writing signed by him” (*q*).

“The registrar shall prepare his certificate seven days before the day appointed for presenting the same, and shall give notice by post to all parties to the suit that the same lies in his office for the inspection of any parties interested therein or affected thereby; and he shall deliver a copy thereof to any person requiring the same, upon payment of the costs of such copy” (*r*).

“Where any party interested in, or affected by, the registrar's certificate desires to have the same varied, he shall apply by himself, his counsel or attorney, at the court on the day appointed for presenting the same, and the judge shall thereupon hear and determine such application, and shall confirm or vary the certificate, and make such further order thereupon as he may think fit” (*s*).

“If no application shall be made to vary the certificate, it shall be taken as confirmed, unless the judge shall otherwise order” (*t*).

Form of Registrar's Certificate (u).

In obedience to the decretal order of this court made in the above suit, I hereby certify that the result of the accounts and inquiries [*or of the sale and apportionment*] which have been taken and made in pursuance of the made in this dated the day of 187 , is as follows.

The plaintiffs and defendants have attended by themselves or by their respective attorneys.

Notice of Decretal Order.

Notice of the said decretal order of the day of 187 , has been served upon .

The persons so served include all the now living, and the personal representatives of such of them as are dead, except such as are parties to this suit, and except hereinafter named .

Service of notice of the said decretal order upon the said was dispensed with.

Personal Estate Account.

The defendant the executor [*or administrator*] of the testator [*or intestate*] named in the said have received personal estate to the amount of £ , and they have paid or are entitled to be allowed on account thereof sums to the amount of £ , leaving a balance due from [*or to*] them of £ on that account.

(*q*) County Court Orders and Rules in Equity, 1868, Order VIII, Rule 1.

(*r*) *Id.* Rule 2.

(*s*) *Id.* Rule 3.

(*t*) *Id.* Rule 4.

(*u*) County Court Forms in Equity, 1868, No. 31. See form of heading, *ante*, p. 52.

Order VIII.
Rule 1.
Registrar's certificate.

Rule 2.
Registrar's certificate to lie in office.

Rule 3.
Variation of registrar's certificate.

Rule 4.
Confirmation of certificate.

References to Account.

The particulars of the above receipts and payments appear in the account marked A., verified by the affidavit of the said defendant filed the day of and the account marked B., verified by the affidavit of filed the day of and which accounts are to be filed with this certificate.

PART IV.
CHAP. VII.*Variations from Accounts.*

Except that in addition to the sums appearing in such account to have been received, the said defendant [*or plaintiff*] is [*or are*] charged with the following sums; (that is to say) £ , and except that of the items of disbursement in the said account, I have disallowed those numbered , and I have deducted from the item numbered the sum of £ , and from the item numbered the sum of £ , and in addition to the disbursements appearing in such account the said defendant ha paid and been allowed the sum of £ .

Special Allowances in Accounts.

The payments allowed to the said defendant [*or plaintiff*] in the said account include the sum of £ paid into court to the credit of this cause, on the day of 187 .

Reference to Transcript of Account.

The before-mentioned account marked A. has been altered, and the account marked A. B., and which is also to be filed with the certificate, is a transcript of the said account marked A. as altered and passed.

No Personal Estate received.

The defendant the executor [*or administrator*] of the testator [*or intestate*] named in the said have not, nor hath any or either of them, or any person or persons by their or any or either of their order, or for their or any or either of their use, received any part of the personal estate of the said testator [*or intestate*].

Funeral Expenses.

The funeral expenses of the testator [*or intestate*], amounting to the sum of £ have been paid and are allowed the defendant [*or plaintiff*] the executor [*or administrator*] of the said testator [*or intestate*] in the said account of personal estate hereinafter mentioned].

Debts.

The debts of the testator [*or intestate*, including the plaintiff's] which have been allowed are set forth in the schedule hereto, and with the interest thereon and costs mentioned in the said schedule are due to the plaintiff and the other persons named therein, and amount altogether to . No other person has been allowed, or come in and proved, any debt against the estate of the said testator [*or intestate*], and the time fixed by advertisement for that purpose has expired.

Such of the said debts as are specialty are set forth in the first part of the said schedule, and amount to ; such as are simple contract are set forth in the second part of the said schedule, and amount to £ .

Interest on Debts.

The interest on such debts is computed down to the date of this certificate, and after the rate of £4 per centum per annum, from the day of 187 , the date of the said decretal order, unless otherwise specified in the said schedule.

PART IV.
CHAP. VII.

Legacies and Annuities.

The legacies given by the testator, other than annuities, are set forth in the first part of the schedule hereto, and with the interest therein mentioned, remain due to the persons therein named, and amount altogether to £ .

The annuities given by the testator, with the arrears due thereon, are set forth in the second part of the said schedule. Such arrears amount to £ .

Interest on Legacies.

The interest on such legacies is computed down to the date of this certificate, and after the rate of £4 per centum per annum, from the day of 187 , the end of one year after the testator's death, unless otherwise specified in the said schedule.

The arrears of the annuities are computed to the date of this certificate, and from the testator's death, unless otherwise specified in the said schedule.

Outstanding Estate.

The personal estate of the said testator [*or* intestate] [not specifically bequeathed] outstanding or undisposed of consists of the particulars set forth in the schedule hereto.

Real Estate.

The real estate which the said testator [*or* intestate] was seized of or entitled to consist of the particulars set forth in the schedule hereto.

Incumbrances on Real Estate.

The incumbrances affecting the said testator's [*or* intestate's] real estate are specified in the schedule hereto.

Rents and Profits Account.

The defendants [*or* plaintiff] the trustee named in the said decretal order have received rents and profits of the testator's real estate to the amount of £ and they have paid or are entitled to be allowed on account thereof sums to the amount of £ , leaving a balance due from [*or* to] them of £ on that account.

No Rents and Profits received.

The defendants [*or* plaintiff] the trustees named in the said decretal order have not, nor hath any or either of them or any person or persons by their or any or either of their order, or for their or any or either of their use, received any sum or sums of money on account of the rents and profits of the testator's [*or* intestate's] real estate.

Next of Kin.

The next of kin, according to the statutes for the distribution of the effects of intestates, of the intestate named in the said living at the time of his death were of whom the said have since died.

The legal personal representative of the said

The legal personal representative of the said

The legal personal representative of the said

Dated this day of .

Registrar.

Notice that Registrar's Certificate may be inspected (x).

PART IV.
CHAP. VII.

Take notice that the certificate of the result of the inquiries made and accounts taken by me under the decretal order of this court made on the day of _____ in this cause lies in my office and can be inspected by you up to and inclusive of the _____ day of _____ [here insert the day before the cause is to be further heard].

Registrar.

To

Registrar's Certificate of Amount of Principal and Interest due on Mortgage in Suit for Foreclosure (y).

In obedience to the decretal order of this court made in the above suit I hereby certify that the result of the accounts and inquiries which have been taken and made in pursuance of the decretal order made in this suit, dated the _____ day of _____, 187____, is as follows:—

1. The plaintiff and defendant have respectively attended in person.
2. There is due to the plaintiff the sum of £ _____ for principal, and the sum of £ _____ for interest, calculated to the date of this certificate on his mortgage security in the plaint mentioned, making together the sum of £ _____.
3. There is also due to the plaintiff for costs charges and expenses properly incurred by him in respect of his mortgage security, not being costs of this suit, the sum of £ _____, and the said several sums of £ _____ and £ _____ being added to the sum of £ _____ the amount of the plaintiff's taxed costs of this suit, they amount together to the sum of £ _____.
4. The evidence produced hereon was the affidavit of the plaintiff filed the _____ day of _____, 187____, and the exhibits A therein referred to.
5. There will be due to the plaintiff on the _____ day of _____ next, being six months after the date of this certificate the sum of £ _____ for further interest at the rate of _____ per cent. per annum on the said principal sum of £ _____, they amount together to the sum of £ _____.
6. The said _____ day of _____ next, between the hours of ten in the forenoon and four in the afternoon at the _____ county court of _____, situate at _____ in the said county of _____, are named as the time and place at which the defendant T. M. is to pay the said sum of £ _____ to the registrar of this court. Dated this _____ day of _____, 187____.

Registrar.

§ 7.—APPLICATION TO JUDGE FOR FURTHER DIRECTIONS.

“Where the registrar, high bailiff, receiver, or any party has by any decretal order been directed to do any act for doing which it may be found necessary to have further directions or an order of the court, the registrar shall apply to the judge for such direction or order, and upon such application the judge may give such direction or make such order

Order VI.
Rule 14.
Application to judge for further directions *mero motu*.

(x) County Court Forms in Equity, 1868, No. 32. See heading, *ante*, p. 52. (y) MS. Form. See form of heading, *ante*, p. 52.

PART IV.
CHAP. VII.

as he may think fit, or may appoint a time to hear all parties upon the application so made by the registrar; and if the judge shall make such appointment for hearing, the same shall operate as a stay of proceedings in the suit until the day so appointed, if he shall so direct" (z).

Form of Order under Order VI. Rule 14, or under Order XII. (a).

It appearing to me that it will be for the benefit of the estate that the remaining outstanding debts be sold, I do order that the debts now due to the estate of E. F., the testator [or intestate] in the plaint in this suit mentioned, be sold as soon as conveniently may be by [the receiver] by private contract [or public auction] for the highest price that can be obtained for the same.

Dated this day of .

J. S., judge.

Form of Order under Order VI. Rule 14, or under Order XII. (b).

It appearing to me that it is necessary for carrying out the objects of this suit that the real estate [or part of the real estate] of the deceased be sold. I do order that all that freehold [copyhold or leasehold] messuage or tenement, etc. [setting out parcels, as in last conveyance] being the real [or part of the real] estate of E. F., late of in the county of deceased, the testator [or intestate in the plaint in the suit mentioned], be offered for sale by public auction at the Hotel at by Mr. auctioneer, and be then and there sold [provided the sum bid for the same be not less than £ or] to the highest bidder without reserve.

Dated this day of .

J. S., judge.

◆
§ 8.—ADVERTISEMENTS.

Order XXIII.
Rule 15.
Judge to order in what newspapers advertisements to be inserted and costs thereof to be prepaid.

"The judge shall order in what newspaper any advertisements which may from time to time be ordered in any suit or proceeding shall be inserted; and when there is no fund in court, the expense of such advertisement shall be paid to the registrar by the party requiring the same before they are inserted" (c).

Rule 16.
Advertisements in London Gazette.

"All advertisements to be inserted in the London 'Gazette' shall be transmitted to the registrar of county court judgments in London, who shall cause them to be classified and inserted in lists under the direction of the commissioners of her majesty's treasury" (d).

◆
§ 9.—PAYMENT OF MONEY INTO AND OUT OF COURT.

Order XVII.
Rule 2.
Payment into court.

"Where a party is directed to pay money into court, he shall attend and pay the same into the office of the registrar, and obtain a receipt for the amount; and the registrar shall, unless otherwise ordered by the

(z) County Court Orders and Rules, 1868, Order VI. Rule 14.

(a) County Court Forms in Equity, 1868, No. 21. See Order XII. ante, pp. 66, 67. See form of heading, ante, p. 52.

(b) *Ib.* No. 22. See Order XII., ante, pp. 66, 67.

(c) County Court Orders and Rules in Equity, 1868, Order XXIII. Rule 15.

(d) *Id.* Rule 16.

judge, pay the same into a post-office savings bank, in accordance with the provisions of section 26 of 30 & 31 Vict. c. 142" (e).

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CHAP. VII.

The section referred to (30 & 31 Vict. c. 142, s. 26) enacts that,—

"Any money paid into a county court in equitable proceedings shall, unless otherwise ordered by the court, be invested by the registrar of the court, in his name as registrar, within forty-eight hours of its payment into court, in a post-office savings bank established in the town in which the court is held, without restriction as to amount, and without the declaration required of a depositor in a savings bank; and no part of any money invested in a post-office savings bank under this act shall be paid out to any registrar except upon an authority addressed to the postmaster-general by the commissioners of her majesty's treasury."

Monies paid into a county court in equitable proceedings may be invested in a post office savings bank.

The rules provide that,—

"The registrar shall enter in the 'cash book' and 'ledger for equitable proceedings' all sums so paid to the account of the suit or matter, in which it is paid, and where the interest of any fund, paid into a post-office savings bank, has been directed to be paid to any person, the registrar shall pay the same half-yearly out of any general moneys in his hands" (f).

Order XVII.
Rule 3.
Entry of payment into court and payment of interest.

In the Case of Married Women.—

"Where any married woman is interested in any principal money, stocks, shares, or securities exceeding in value 200*l.*, or 10*l.* in annual payments, she shall be examined by the judge apart from her husband, to ascertain whether the same shall be paid to him or made the subject-matter of a settlement, but if she be under age the court shall order a proper settlement to be made" (g).

Rule 9.
Married women.



§ 10.—PAYMENT OF LEGACY OR MONEY TO WHICH AN INFANT OR PERSON BEYOND SEAS IS ENTITLED.

"The County Courts Act, 1865" (28 & 29 Vict. c. 99), enacts that—

Sect. 5. "Any legacy or sum of money to which any person who is an infant or absent beyond seas may be found or declared entitled by any county court in any suit or matter under this act may be ordered by the court to be paid to the accountant-general of the Court of Chancery, in accordance with the provisions of section thirty-two of an act passed in the session of parliament held in the thirty-sixth year of the reign of his majesty king George the third, chapter fifty-two; and the person ordered to pay the same shall, within such time as the court shall direct, produce to the registrar of the court the certificate of the accountant-general of the payment of such money; and if default be made in such payment the judge may direct a warrant of execution to

Power to judge of a county court to order any legacy, &c. to which an infant or person beyond the seas may be entitled to be paid into the Bank of England, in accordance

(e) County Court Orders and Rules in Equity, 1868, Order XVII. Rule 2.

(f) *Id.* Rule 3.
(g) *Id.* Rule 9.

PART IV.
CHAP. VII.with pro-
visions of
s. 32 of 36
Geo. 3, c. 52.

issue to the high bailiff of the court, who by such warrant shall be empowered to levy or cause to be levied by distress and sale of the goods and chattels of such person a sum of money equal in amount to the sum which he was ordered to pay to the said accountant-general and to the costs incurred by reason of such default, and the sum so levied shall be paid to and be receivable by the said accountant-general under the direction of the court; and all amounts so paid or transferred into the Court of Chancery, with any dividends thereon, shall be paid or transferred to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application by summons to one of the vice-chancellors while sitting at chambers."

By the statute referred to, 36 Geo. 3, c. 52, s. 32, the person having or taking the burthen of any will or testamentary instrument, or the administration of any personal estate in the case of infancy or absence beyond the seas, of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with the legacy duty, is enabled to pay such legacy or residue, after deducting the duty chargeable thereon, into the bank in the name of the accountant-general to the account of the person for whose benefit the same is payable; and such money is directed to be laid out by the accountant-general, without any formal request for that purpose, in the purchase of three per cent. consolidated annuities.

Order of Payment of Legacy into Court of Chancery (h).

Whereas it has been found by this court by its decree of the day of in this suit [*or matter*] that K. L. of is entitled to the sum of ; and whereas the said K. L. is an infant [*or absent beyond seas*], and it appearing to the court that it is desirable that, under the power given to it by the fifth section of the act of parliament passed in the twenty-eighth and twenty-ninth years of her majesty's reign, chapter ninety-nine, C. D., the defendant in this suit [*or matter, as the case may be*], should be ordered to pay such sum of money to the accountant-general of the Court of Chancery, in accordance with the provisions of section thirty-two of an act passed in the session of parliament held in the thirty-sixth year of the reign of his majesty King George the Third, chapter fifty-two, it is ordered that the said [] do pay the same accordingly, and do within days produce to the registrar of this court the certificate of the said accountant-general of the payment to him of such money.

By the court,
Registrar.

[*Endorsement on last Order.*]

N.B.—Your attention is drawn to the following provisions of the Act 36 Geo. 3, c. 52, and to the rule of this court.

Any legacy or sum of money to which any person who is an infant or absent beyond seas may be found and declared entitled by any county

(*h*) County Court Forms in Equity, 1868, No. 39. See form of heading, *ante*, p. 52.

court in any suit or matter under this act may be ordered by the court to be paid to the accountant-general of the Court of Chancery, in accordance with the provisions of section thirty-two of an act passed in the session of parliament held in the thirty-sixth year of the reign of his Majesty King George the Third, chapter fifty-two; and the person ordered to pay the same shall, within such time as the court shall direct, produce to the registrar of the court the certificate of the accountant-general of the payment of such money; and if default be made in such payment the judge may direct a warrant of execution to issue to the high bailiff of the court, who by such warrant shall be empowered to levy or cause to be levied by distress and sale of the goods and chattels of such person a sum of money equal in amount to the sum which he was ordered to pay to the said accountant-general and to the costs incurred by reason of such default, and the sum so levied shall be paid to and be receivable by the said accountant-general under the direction of the court.

Rule of Court.—Where default shall be made in the production of the certificate of the accountant-general the registrar shall give notice in writing to the judge of the fact of such default, and the judge may thereupon direct a warrant of execution to issue in accordance with section 5 of the act.

The County Court Orders and Rules provide that—

“Where any order has been made upon any person to pay to the accountant-general in chancery any sum of money under sect. 5 of the act, such order shall be drawn up by the registrar and issued to the bailiff of the court, by whom the same shall be served personally upon the person ordered to make the payment” (*i*).

Order XVII.
Rule 7.
Service of order under s. 5 of the act.

“Where default shall be made in the production of the certificate of the accountant-general the registrar shall give notice in writing to the judge of the fact of such default, and the judge may thereupon direct a warrant of execution to issue in accordance with sect. 5 of the act” (*k*).

Rule 8.
Where default made in payment to accountant-general of the Court of Chancery.



§ 11.—POWERS AND DUTIES OF THE REGISTRAR IN RESPECT OF FUNDS IN COURT.

“In the first week of January in each year the registrar shall transmit to the postmaster-general his bank book, and upon its return he shall send a letter, in the form in the schedule, to the commissioners of the treasury, requesting them to authorize the postmaster-general to allow him to draw out a sum equal to the interest which he may have paid to persons during the then past year, and shall apportion the same and carry the proportion to the account of each fund on which he has paid interest as aforesaid” (*l*).

Order XVII.
Rule 4.
Registrar to transmit bank book to postmaster-general.

“The registrar wherever he shall be directed by the court to draw out of a post-office savings bank the fund or part of the fund in any suit or

Rule 5.
Drawing out of money from savings bank.

(*i*) County Court Orders and Rules in Equity, 1868, Order XVII. Rule 7.

(*k*) *Id.* Rule 8.
(*l*) *Id.* Rule 4.

PART IV.
CHAP. VII.Rule 6.
Interest on
investments.

matter, he shall send a letter to the commissioners of the treasury in the form in the schedule" (*m*).

"Where money has before the 1st January, 1868, been invested in stock, and the investment is in the names of the treasurer and registrar alone, the registrar shall from time to time receive the dividends of all the funds so standing in their names, and shall re-invest the dividends in the same names, except where and so far as the court shall otherwise direct, and shall apportion the amount so re-invested in his books to the right accounts" (*n*).

Payment of Legacy and Succession Duty.—Order XX.
Rule 10.
Where legacy
or succession
duty payable,
it must be
paid before
execution of
decree.

"Before executing any decree or order directing the payment or transfer of any fund, or part of any fund, in respect of which any duty shall be payable to the revenue under the acts relating to legacy or succession duty, the registrar shall, before making the payment, require a certificate from the proper officer of the payment of the duty chargeable in respect of such fund, or any part thereof respectively" (*o*).



§ 12.—INTEREST ON DEBTS AND LEGACIES.

Order XXIII.
Rule 22.
Interest on
debts.

"Creditors are to be entitled to interest in respect of debts as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of 4*l.* per cent. per annum, from the date of the decretal order, and to costs of successfully proving such debts according to the scale of costs in that behalf" (*p*).

Rule 23.
Interest on
legacies.

"Interest is to be computed on legacies after the rate of 4*l.* per cent. per annum, from the end of one year from the date of the testator's death, unless otherwise ordered or a different rate is directed by the will" (*q*).



§ 13.—AUDITING REGISTRAR'S ACCOUNTS.

Order XVII.
Rule 1.
Registrar's
accounts to
be audited.

"The accounts of a registrar in equitable proceedings shall be examined and audited by the treasurer in the same manner as his accounts in other proceedings are now or shall be examined and audited" (*r*).

§ 14.—PROCEEDINGS ON ABATEMENT OF SUIT BY DEATH,
MARRIAGE OR OTHERWISE.*Revivor and Supplement.*—Order X.
Rule 1.
Order under

"Upon any suit becoming abated by death, marriage, or otherwise, or defective in consequence of any change or transmission of interest or

(*m*) County Court Orders and Rules in Equity, 1868, Order XVII. Rule 5.

(*n*) *Id.* Rule 6.
(*o*) County Court Rules, 1870, by which this Rule is made Rule 10 of Order XX.

(*p*) County Court Orders and Rules in Equity, 1868, Order XXIII. Rule 22.

(*q*) *Id.* Rule 23.
(*r*) County Court Orders and Rules in Equity, 1868, Order XVII. Rule 1.

liability, the judge shall, on application of any person having a right so to apply, make an order reviving the said suit, or such supplementary decree or order as may have become necessary in consequence of any such matters as aforesaid" (s).

"An order under the foregoing rule shall be drawn up by the registrar and sealed with the seal of the court, and issued to the bailiff, who shall serve the same upon such person or persons as the court shall direct" (t).

"After service of such order, the suit shall, as between the party by whom the order has been obtained and the party on whom it has been served, be in the same plight and condition as it was in before it had become abated or defective as aforesaid; provided that the person so served may move the court at the next sitting, or by leave of the judge at any subsequent sitting, to discharge such order, and such motion shall be made upon affidavit of the facts relied upon to support the same" (u).

Order of Revivor (x).

Upon application of [*here state by whom the application is made and the events which have happened rendering it necessary to apply*], I do order that this suit stand revived and be in the same plight and condition as the same was in at the time of the said abatement.

Dated this day of .

J. S., judge.

(s) County Court Orders and Rules in Equity, 1868, Order X. Rule 1. Sect. 52 of 15 & 16 Vict. c. 86, referred to in the margin of Rules 1 and 3 of this order provides for orders instead of bills of revivor in the case of abatement of suits.

(t) *Id.* Rule 2.

(u) *Id.* Rule 3. As to revivorship for costs see 33 & 34 Vict. c. 28, s. 19, and *Doggett v. Eastern Counties Railway Company*, 40 L. J. (N. S.) Ch. 292.

(x) County Court Forms in Equity, 1868, No. 38. See form of heading, *ante*, p. 52.

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CHAP. VII.

15 & 16 Vict.
c. 86, s. 52.

Rule 2.
Order to be served.

Rule 3.
Person served to be bound thereby, and may appeal, 15 & 16 Vict. c. 86, s. 52.

CHAPTER VIII.

ENFORCEMENT OF DECREES AND ORDERS.

- § 1.—MODE OF ENFORCING DECREES AND ORDERS IN GENERAL.
- § 2.—EXECUTION TO ENFORCE PAYMENT OF MONEY.
- § 3.—EXECUTION TO ENFORCE DELIVERY OF LANDS OR GOODS.
- § 4.—COMMITTAL FOR CONTEMPT FOR NEGLECT TO OBEY DECREE OR ORDER.
- § 5.—ORDER OF COMMITMENT ON A JUDGMENT-SUMMONS.



§ 1.—MODE OF ENFORCING DECREES AND ORDERS IN GENERAL.

“The County Courts Act, 1865,” enacts that—

Power to enforce judgments of county courts in equity.

Sect. 8. “For the due execution of any judgment, decree or order made under the authority of this act, or of the rules and orders to be framed as hereinafter provided, the court shall have power to order, and the registrar upon such order shall have authority to seal and issue, and the high bailiff to execute, any writ or warrant of possession, writ or warrant of execution, or other process of execution for carrying into effect any judgment, decree or order of the said court; and such writs, warrants and processes shall be in the form and executed at the time and in the manner to be set forth in the rules and orders to be framed as hereinafter provided.”

Order XVI. Rule 1. Service of decree or order.

“On the application of the party entitled to the benefit of the decree or order, the registrar shall issue to the bailiff a copy of such decree or order under the seal of the court with a notice to the party to be bound indorsed thereon, and the bailiff shall forthwith serve the same upon the party to whom such notice is addressed” (a).

Rule 2. When execution may issue.

“No process shall issue to enforce any decree or order, unless by leave of the judge, until three days after a copy thereof under the seal of the court shall have been served upon the party to be bound thereby” (b).

Service of Order in the Nature of an Injunction.—

Order XVI. Rule 5. Service of orders in the nature of an injunction.

“Where an order in the nature of an injunction has been made, whether made *ex parte* or not, the registrar shall, if the party by whom it was obtained desires to have the same served by his attorney, issue for service a copy of such order, under the seal of the court, to such party” (c).

(a) County Court Orders and Rules in Equity, 1868, Order XVI. p. 5, note (m).

Rule 1. (c) County Court Orders and Rules in Equity, 1868, Order XVI. Rule 5.

(b) *Id.* Rule 2. As to enforcing

decrees of stannaries courts, see *ante*, p. 5, note (m).

(c) County Court Orders and Rules in Equity, 1868, Order XVI. Rule 5.

Payment over of Money.]—

PART IV.
CHAP. VIII.

“All moneys coming into the hands of the high bailiff shall be paid over by him to the registrar to the credit of the suit or proceeding in which the same was so received by him within twenty-four hours after he shall have received the same” (d).

Order XXI.
Rule 4.
Payment
over of
money.



§ 2.—EXECUTION TO ENFORCE PAYMENT OF MONEY.

“Where any decree or order is made for the payment of money into court or by one party to another, the registrar shall, after the expiration of the time, if any, appointed by the decree or order for the payment thereof, and after the expiration of the time limited by this order, upon application by the person having the conduct of the suit, or by the payee, issue to the bailiff of the court a writ of *fiery facias* as a warrant of execution, as provided by sect. 94 (e) of 9 & 10 Vict. c. 95” (f).

Order XVI.
Rule 3.
Warrant of
fi. fa.

Warrant of Execution on a Decree or Order of the Court for the Payment of Money (g).

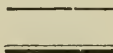
Whereas on the day of 187 , this court did, in the matter of this suit, decree [*or order*] that A. B. [*or C. D.*] should pay to C. D. [*or A. B.*] [*or should pay into court*] the sum of : And whereas a copy of such decree [*or order*] was duly served upon A. B. [*or C. D., as the case may be.*] And whereas the said A. B. [*or C. D.*] has not paid the said sum of money according to the said decree [*or order*]: These are, therefore, to require and order you forthwith to make a levy, by distress and sale of the goods and chattels of the said A. B. [*or C. D.*] wheresoever they may be found within the district of this court (excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount directed to be paid by the said decree [*or order*], including the costs of this execution, and also to seize and take any money or bank notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, of A. B. [*or C. D.*] which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court, this day of 187 .
By the court, Registrar.

To the high bailiff of the said court,
and others the bailiffs thereof.

Amount ordered to be paid
Costs

Total amount to be levied .



(d) County Court Orders and Rules in Equity, 1868, Order XXI. Rule 4.

Rules in Equity, 1868, Order XVI. Rule 3.

(e) See *ante*, Vol. I. p. 74.

(g) County Court Forms in Equity, 1868, No. 34. See form of heading, *ante*, p. 52.

(f) County Court Orders and

PART IV.
CHAP. VIII.Order XVI.
Rule 4.
Warrant of
possession or
assistance.Order XXI.
Rule 3.
Possession.

§ 3.—EXECUTION TO ENFORCE DELIVERY OF LANDS OR GOODS.

“Where a decree or order made in any suit or proceeding for the delivery up to any person of lands or tenements, goods or chattels, either as owner thereof, or to be sold, or to be held in possession until an order is made as to the disposition thereof, the registrar shall, upon the application of the person entitled to such possession, issue to the bailiff either a warrant of possession, or warrant of assistance, as the case may require” (*h*).

“Where a warrant shall direct the high bailiff to take possession of, without selling or delivering to a party, any goods or chattels, he shall make or cause to be made an inventory or appraisalment of the goods or chattels which he may take into his possession, and may, upon receiving as a deposit the amount of such appraisalment or sufficient security, to be approved by the registrar, for the safe custody, and for the delivery up of possession upon request, of such goods and chattels, relinquish the possession thereof, on condition that the same shall be re-delivered to him or held to abide the order of the court” (*i*).

Warrant of Assistance (k).

Whereas, according to the tenor and true meaning of a decree [*or an order*] bearing date the day of 187 , made in the matter of this suit, the said defendant C. D. was ordered to deliver up possession to A. B. in the said order named of all that, &c. [*as in order*]: And whereas a copy of such decree [*or order*] was duly served upon the said C. D., yet nevertheless he the said C. D., and other ill-disposed persons, his accomplices, have refused to pay obedience thereto, and detain and keep the possession of the said house [*or tenement and premises*]: These are, therefore, to authorize and require you to forthwith enter into and upon the said messuage [*or tenement and premises*], and that you do remove, eject and expel the said C. D., his tenants, servants and accomplices, each and every of them, out of and from the said messuage [*or tenement and premises*], and every part and parcel thereof, and that you do place and put the said A. B. and his assigns into the full, peaceable and quiet possession thereof, and defend and keep him and his said assigns in such peaceable and quiet possession when and as often as any interruption may or shall from time to time be given or offered to them or any of them, according to the true intent and meaning of the said order; and herein you are not in any wise to fail.

Given under the seal of the court, this day of 187 .

By the court,
Registrar.

To the high bailiff of the said court,
and others the bailiffs thereof.

Warrant of Possession (l).

Whereas on the day of 187 , this court did in the matter of this suit, decree [*or order*] that you the high bailiff of this court,

(*h*) County Court Orders and Rules in Equity, 1868, Order XVI. p. 52.

Rule 4. (*l*) County Court Forms in Equity,

(*i*) *Id.* Order XXI. Rule 9. 1868, No. 36. See heading, *ante*,

(*k*) County Court Forms in Equity, p. 52.

should [or that A. B. should] take possession of the goods and chattels of E. F. deceased, in the said suit mentioned, and which at the date of the said order were in the possession of the defendant [and sell and convert the same into money or keep and hold the same to abide the further order of the court, *as the case may be*].

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These are therefore by virtue of the said decree [or order] and the statute in such case made and provided to will and require, authorize and empower, you and every one of you to whom this warrant is directed forthwith to enter into and upon the house and houses of the said C. D. and also in all other place or places belonging to the said C. D. where any of the goods or chattels, part of the estate of the said E. F., deceased, are suspected to be; and there to seize all the goods and chattels whatsoever belonging to the estate of the said E. F., deceased.

And in case of resistance, or of not having the key or keys of any door, or lock of any premises belonging to the said C. D., where any of the goods or chattels, part of the estate of the said E. F. are suspected to be, you shall break open or cause the same to be broken open, for the better execution of this warrant.

Given under the seal of the court this day of 187 .
By the court,
Registrar.

To the high bailiff of the said court,
and others the bailiffs thereof.

§ 4.—COMMITTAL FOR CONTEMPT FOR NEGLECT TO OBEY DECREE OR ORDER.

"Where any breach of an order in the nature of an injunction shall have been made, the registrar shall, upon the application by the person having the conduct of the suit, issue to the high bailiff or to such person for service by his attorney, a notice under the seal of the court, requiring the person who shall have been guilty of the breach of the said order to appear at a court, to be held on a day to be named therein, to show cause why he should not be committed for contempt for having disobeyed the said order" (m).

Order XVI.
Rule 6.
Where a person makes breach of an order in the nature of an injunction, notice to be served upon him to show cause why he should not be committed.

"Where any person is required by any decree or order to pay money or do an act within a certain number of days after service of the copy of the decree or order, and such person shall not have paid such money or done such act within the time mentioned therein, the registrar shall, upon application by the person having the conduct of the suit, issue to the high bailiff, or to such person for service by his attorney, a notice under the seal of the court, requiring the person who shall have neglected to obey the decree or order to appear at a court to be held on a day to be named therein, to show cause why he should not be committed for contempt in having neglected to obey such decree or order. Provided always, a party shall not by proceeding under this rule be precluded from enforcing the order by warrant of execution or any other process of the court" (n).

Rule 7.
Where a person neglects to obey a decree or order, notice to be served on him to show cause why he should not be committed.

(m) County Court Orders and Rules in Equity, 1868, Order XVI. Rule 6.
(n) *Id.* Rule 7.

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 Order XXIII.
 Rule 25.

"Any person who may be in custody may apply to the registrar for his discharge therefrom, upon giving to the party at whose suit he was committed notice of his intention so to apply two days previous to his applying" (o).

See § 5, *post*, pp. 107, 108, as to orders of commitment under "The Debtors Act, 1869."

Notice of Application for Committal (p).

Take notice that the plaintiff A. B. will on the _____ day of 187____, apply to this court for an order for your committal to prison for having disobeyed the order of this court made on the _____ day of 187____, enjoining and restraining you [*or for having neglected to obey the decree or order made on the _____ day of 187____, requiring you*] (*here set out the mandatory part of the decree or order*); and further take notice that you are hereby required to attend the court on the first-mentioned day to show cause why an order for your committal should not be made.

Dated this _____ day of _____ 187____.

E. F., registrar.

To C. D. the defendant.

Order of Committal for Breach of an Order in the Nature of an Injunction (q).

Whereas by an order of this court, dated the _____ day of 187____ [*here recite the order*]: Now, upon the application of the plaintiff, and upon hearing the defendant [*or, if the defendant does not appear, reading the affidavit of X. Y., or, where service has been by bailiff, of L. M., a bailiff of this court, or the County Court of _____ holden at _____, showing, or being satisfied on oath, that a copy of the said order and notice of this application have been severally served upon the defendant C. D.*], and upon reading the affidavit of, etc. [*enter evidence*], the court being of opinion, upon consideration of the facts disclosed by the said affidavit [*or affidavits*], that the said defendant C. D. has been guilty of a contempt of this court by a breach of the said order, doth order that the said defendant C. D. do stand committed to [*here insert prison used by the court*] for the said contempt.

Order for Committal for Neglect to obey Decree or Order (r).

Whereas by a decree [*or order*] of this court dated the _____ day of _____ 187____ [*here recite the decree or order*]: Now, upon the application of the plaintiff, and upon hearing the defendant [*or, if the defendant does not appear, reading the affidavit of X. Y., or, where service has been by bailiff, of L. M., a bailiff of this court, or the County Court of _____ holden at _____, showing, or being satisfied on oath, that a copy of the said decree [*or order*] and notice of this application have been severally served upon the defendant C. D.*], and upon reading the affidavit of, etc. [*enter evidence*], the court being of opinion, upon consideration of the

(o) County Court Orders and Rules in Equity, 1868, Order XXIII. Rule 25.

(p) County Court Forms in Equity,

1868, No. 42. See heading, *ante*, p. 52.

(q) *Id.* No. 43.

(r) *Id.* No. 44.

facts disclosed by the said affidavit [*or affidavits*], that the said defendant C. D. has been guilty of a contempt of this court by neglecting to obey the said decree [*or order*], doth order that the said defendant C. D. do stand committed to [*here insert prison used by the court*] for the said contempt.

Warrant of Committal (s).

To the high bailiff and others the bailiffs of the said court and all peace officers within the jurisdiction of the said court, and to the governor or keeper of the [*here insert prison used by the court*].

Whereas by an order bearing date the day of it was ordered that the defendant C. D. should stand committed to prison for contempt of this court:

These are therefore to require you forthwith to arrest and apprehend the defendant C. D., and him safely convey and deliver to the governor or keeper of the [*prison used by this court*], and you, the said governor or keeper, to receive the defendant C. D. until further orders of this court.

Dated this day of 187 .

E. F., registrar of the court.

Notice of Application for Discharge from Custody (t).

Take notice that I intend on the day of 187 to apply to this court [*or the registrar of this court*] to discharge me from custody, I being desirous of clearing my contempt.

Dated this day of 187 .

C. D., defendant.

To A. B., plaintiff.

Order of Discharge from Custody (u).

Upon application made this day of by for the defendant who was committed to prison for contempt by order of this court, dated the day of 187 , and upon reading the affidavit of the defendant filed the day of 187 , showing that he is desirous of clearing his contempt, and upon hearing the plaintiff [*or, if no one appears for plaintiff, then, upon being satisfied that notice of this application has been duly served upon the plaintiff*], this court [*or I, the undersigned registrar of this court*], do hereby order that the said defendant be discharged out of the custody of the governor [*or keeper*] of [*here insert name of prison*] as to the said contempt, but not as to the costs of the said contempt.

Dated this day of 187 .

E. F., registrar of the court.

§ 5.—ORDER OF COMMITMENT ON A JUDGMENT-SUMMONS.

“The Debtors Act, 1869” (32 & 33 Vict. c. 62), enacts that, with certain exceptions, no person shall be arrested or imprisoned

(s) County Court Forms in Equity, 1868, No. 46. See heading, *ante*, 1868, No. 44. See heading, *ante*, p. 52.

(u) *Id.* No. 47.

(t) County Court Forms in Equity,

for making default in payment of a sum of money. Among the exceptions from the operation of the above enactment are—

Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum in his possession or under his control; and

Default in payment of sums in respect of which orders are in that act authorized to be made.

By the act any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court, where it is proved that the person making default either has or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made defaults, and has refused or neglected, or refuses or neglects to pay the same.

Moreover, even in the cases excepted from the act, no person can be imprisoned for a longer period than one year (*x*).

It will be observed that the abolition of imprisonment is for making default "in payment of a sum of money," and, on the other hand, that the power to make orders of imprisonment under the act is confined to cases of default "in payment of any debt or instalment of any debt." Questions may arise as to the effect of the act on certain orders of the county court under the equitable jurisdiction (*y*). It seems clear, however, that the power to imprison for contempt in disobeying orders of the court, not being orders for payment of a sum of money, are not affected by "The Debtors Act, 1869" (*z*).

An order on a defendant trustee (made in a suit) to pay the plaintiff a specified sum, being the balance of the proceeds of the sale of stock, trust property sold by the defendant, may be enforced by imprisonment, although he may have parted with the actual possession of or control over the money prior to the order for payment; but interest due in respect of such trust money is not money in the trustee's possession or under his control, and, therefore, cannot be so enforced (*a*).

(*x*) See the whole Law and Practice on an Order of Commitment on a Judgment-Summons, *ante*, Vol. I. p. 335.

(*y*) As to committals under the act in the High Court of Chancery, see Daniell's Chancery Practice, 5th edit.

p. 928, also sect. 8 of the act.

(*z*) See General Order of the Court of Chancery made under the act, dated 7th January, 1870.

(*a*) *Middleton v. Chichester*, 40 L. J. (N. S.) Ch. 237.

CHAPTER IX.

TRANSFER OF PROCEEDINGS.

§ 1.—TRANSFER TO THE COURT OF CHANCERY ON APPLICATION OF THE PARTIES.

§ 2.—TRANSFER TO THE COURT OF CHANCERY WHERE THE SUBJECT-MATTER EXCEEDS THE JURISDICTION OF THE COUNTY COURT.

§ 3.—TRANSFER FROM THE COURT OF CHANCERY TO THE COUNTY COURT.

§ 4.—TRANSFER FROM ONE COUNTY COURT TO ANOTHER.



§ 1.—TRANSFER TO THE COURT OF CHANCERY ON APPLICATION OF THE PARTIES.

“The County Courts Act, 1865” (28 & 29 Vict. c. 99), enacts that—

Sect. 3. “Any one of the vice-chancellors, on the application at chambers of any party to any suit or matter pending under this act, shall have power, then and there, or, if he shall think fit, after hearing a summons served upon the other party or parties, to transfer the same to the Court of Chancery, upon such terms, if any, as to security for costs or otherwise, as he may think fit.”

Power to a vice-chancellor to order transfer of suits from county court to Court of Chancery.



§ 2.—TRANSFER TO THE COURT OF CHANCERY WHERE THE SUBJECT-MATTER EXCEEDS THE JURISDICTION OF THE COUNTY COURT.

“The County Courts Act, 1865” (28 & 29 Vict. c. 99), enacts that—

Sect. 9. “If during the progress of any suit or matter it shall be made to appear to the court that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the county courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the court to direct the said suit or matter to be transferred to the Court of Chancery, and thereupon the said suit or matter shall proceed in such one of the vice-chancellor’s courts as the lord chancellor may by general order direct; and such vice-chancellor shall have power to regulate the whole of the procedure

Where amount of subject-matter of suit exceeds limit of the jurisdiction of county court, suit may be remitted to Court of Chancery, &c.

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in the said suit or matter when so transferred: provided always, that it shall be lawful for any party to apply to such vice-chancellor at chambers for an order authorizing and directing the suit or matter to be carried on and prosecuted in the county court, notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the county courts; and the vice-chancellor, if he shall deem it right to summon the other parties or any of them to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order."

In respect to the transfer of proceedings under this section, where the excess of jurisdiction is discovered in the progress of an inquiry before the master under order of the court, the orders provide that—

Order XVIII.
Rule 1.
Transfer to
Court of
Chancery
where sub-
ject-matter
exceeds the
amount to
which juris-
diction is
given by act.

"If during the progress of any inquiry under order of the court it shall be made to appear that the subject-matter of the suit or proceeding exceeds the amount to which the jurisdiction of the court is limited, the registrar may proceed with the particular account or inquiry which is then before him, unless he thinks it inexpedient so to do, but he shall at the next sitting of the court present a certificate of the state of the suit and proceedings, and if the judge shall be of opinion that such excess exists, he shall make an order for the transfer of the suit or matter to the Court of Chancery; and the registrar shall make and file with the record a copy of such certificate and order, and shall transmit the original, together with the order of the judge thereupon, under the seal of the court, by post or otherwise, to the office of the clerk of records and writs in chancery, or to such other office or officer as the lord chancellor may by general order direct, and shall also send notice, by post or otherwise, of the fact, to all parties and persons entitled to be served with a copy of the decree" (a).

Order of Transfer of Suit or Matter to Court of Chancery (b).

Whereas it appearing that the subject-matter of this suit exceeds in amount the sum of 500*l.*, it is ordered that this suit [*or matter*] be transferred to the High Court of Chancery, together with the annexed certificate of the registrar of this court, showing the state of the suit [*or matter*] and the proceedings that have been had therein in this court.

By the court,
Registrar.

§ 3.—TRANSFER FROM THE COURT OF CHANCERY TO THE COUNTY COURT.

"The County Courts Act, 1867" (30 & 31 Vict. c. 142), enacts that—

Proceedings
in equity may
be transferred

Sect. 8. "Where any suit or proceeding shall be pending in the High Court of Chancery, which suit or proceeding might have been com-

(a) County Court Orders and Rules in Equity, 1868, Order XVIII. Rule 1.

(b) County Court Forms in Equity, 1868, No. 40. See form of heading, *ante*, p. 52.

menced in a county court, it shall be lawful for any of the parties thereto to apply at chambers to the judge to whose court the said suit or proceeding shall be attached to have the same transferred to the county court or one of the county courts in which the same might have been commenced (c), and such judge shall have power upon such application, or without such application, if he shall see fit, to make an order for such transfer, and thereupon such suit or proceeding shall be carried on in the county court to which the same shall be ordered to be transferred, and the parties thereto shall have the same right of appeal that they would have had had the suit or proceeding been commenced in the county court."

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to county courts, which might have commenced therein.

The following Rules relate to transfers under the above section:—

"Where any suit or proceeding is transferred under section 8 of the 30 & 31 Vict. c. 142, to a county court, the plaintiff shall lodge with the registrar thereof the order of transfer, together with all original documents in the suit or proceeding in his possession, and also a statement of the names and addresses of the several parties to the suit, and their attorneys, and the defendant shall lodge all original documents in the suit or proceeding in his possession, and either party shall from time to time lodge office copies of any further documents the judge or registrar may require" (d).

Order XVIII.
Rule 2.
Transfer from Court of Chancery under section 8 of 30 & 31 Vict. c. 142.

"The registrar shall forthwith indorse on the order of transfer the date on which the same was lodged" (e).

Rule 3.
Indorsement.

"When the order of transfer is lodged, the registrar shall forthwith apply to the judge for directions as to the further steps in the suit or proceeding, and thereupon the judge may give such directions for carrying on the suit or proceeding as he may think fit, or he may appoint a time to hear and determine any matters in such suit or proceeding, and direct the registrar to summon all parties to appear on the day so appointed. And the judge shall also, if he think fit, order the registrar to give notice to the parties to the suit or proceeding, or any of them, that the order of transfer has been lodged" (f).

Rule 4.
Registrar to apply to judge for instructions.

§ 4.—TRANSFER FROM ONE COUNTY COURT TO ANOTHER.

"The County Courts Act, 1865" (28 & 29 Vict. c. 99), enacts that—

Sect. 11. "If during the progress of a suit or matter it shall be made to appear to the court that the same could be more conveniently prosecuted in some other county court, it shall be competent for the court to transfer the same to such other county court, and thereupon the suit or matter shall proceed in such other county court."

As to transfer of suit from one county court to another.

(c) If an officer of a county court is a defendant, the suit may be transferred to an adjoining district, the judge of which is not the judge of a court of which the defendant is an officer, 19 & 20 Vict. c. 108, s. 21; see 28 & 29 Vict. c. 99, s. 21; and *Lin-*

ford v. Gudgeon, 40 L. J. (N. S.) Ch. 514.

(d) County Court Orders and Rules in Equity, 1868, Order XVIII. Rule 2.

(e) *Id.* Rule 3.

(f) *Id.* Rule 4.

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This is a strong power given to a judge of one court to transfer a suit absolutely from his own court to another. There is no appeal, however, from the order (*g*).

Order XXIII.
 Rule 20.
 Transfer of
 suits or pro-
 ceedings from
 one court to
 another in
 certain cases.

“Where suits or proceedings shall be commenced in different courts by parties in the same interest, such suits or proceedings shall be transferred to the court in which the first plaint or petition was filed, and shall there be proceeded with in the same way in all respects as if they had been commenced in that court” (*h*).

(*g*) As to appeals, see *post*, in Equity, 1868, Order XXIII. Rule
 Chap. X. 20.
 (*h*) County Court Orders and Rules

CHAPTER X.

APPEAL.

“The County Courts Act, 1865” (28 & 29 Vict. c. 99), enacts that—

Sect. 18. “If any party in a suit or matter under this act shall be dissatisfied with the determination or direction of a judge of a county court on any matter of law or equity, or on the admission or rejection of any evidence, such party may appeal from the same to the vice-chancellor authorized as aforesaid, provided that such party shall, within thirty days after such determination or direction, give notice of such appeal to the other party or his attorney, and also deposit with the registrar of the county court the sum of ten pounds as security for the costs of the appeal; and the said court of appeal may make such final or other decree or order as it shall think fit, and may also make such order with respect to the costs of the said appeal as such court may think proper; and such orders shall be final; provided that nothing herein contained shall authorize any party to appeal against any decision of a county court, given upon any question as to the value of any real or personal property, for the purpose of determining the question of the jurisdiction of the court under this act, nor to appeal against the decision of a county court on the ground that the proceedings might or should have been taken in any other county court.”

Parties aggrieved may appeal.

Sect. 19. “In any case which may be the subject of an appeal under this act in causes arising within the county palatine of Lancaster, the appeal may be made either to the High Court of Chancery or a vice-chancellor thereof, or to the court of chancery of the county palatine of Lancaster or the vice-chancellor thereof; and that in case of an appeal to the Court of Chancery for the said county palatine or the vice-chancellor thereof, the order on such appeal shall have the same effect as if it had been made by a vice-chancellor of the High Court of Chancery; but no appeal shall be made to the Court of Chancery of the said county palatine or the vice-chancellor thereof unless the consent thereto in writing of the respondent or respondents on such appeal, or of his or their solicitor or solicitors, shall be first obtained.”

Appeal to be made either to the High Court of Chancery or a vice-chancellor.

Sect. 18 appears to give a very reasonable and ample power of appeal, not confined at all by the amount in difference, and allowing full time, after the decision of the county court judge, for parties to decide whether they will appeal, and requiring a moderate sum by way of deposit for costs.

“Where any party desires to appeal under section 18 of the Act against the determination or direction of a judge of a county court, such appeal shall be had in accordance with the provisions of section 15 of 13 & 14 Vict. c. 61 (a), upon a case to be stated for

Order XIX. Rule 1. Appeal to be by case. 13 & 14 Vict. c. 61, ss. 14, 15 and 16, and ss. 18 and 19 of the Act.

(a) See *ante*, Vol. I. p. 287.

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Rule 2.
Notice of
appeal.

Rule 3.
Proceedings
not to be
stayed unless
vice-chancellor
or
judge otherwise
order.

Order XX.
Rule 8.
Registrar to
retain money
to abide
result of
appeal.

Order XIX.
Rule 4.
Case to be
signed by
judge.

Rule 5.
Where parties
do not
agree on case,
judge to
settle same.

Rule 6.
Copy of case
deposited
with registrar.

the opinion of the vice-chancellor appointed in that behalf by the lord chancellor" (b).

"The notice of appeal shall be in writing, and shall be signed by the appellant, his counsel or attorney, and such notice shall be sent, together with the statement of the grounds, by post or otherwise, to the registrar as well as to the successful party" (c).

"The pendency of an appeal shall not operate as a stay of proceedings, but the vice-chancellor to whom such appeal is made, or the judge from whose decree or order the appeal is made, may stay the proceedings pending the appeal, on such terms as to giving security or otherwise as to such vice-chancellor or judge may seem fit" (d).

"Whenever a notice for appeal is given, the registrar shall detain the proceeds of any execution which may then be in or may come into his hands pending such appeal, to abide the event of such appeal, unless the judge shall otherwise order" (e).

"The appellant shall prepare the case for appeal, and all cases on appeal shall, unless the judge shall otherwise order, be presented to him for signature at the court held next after the parties shall have agreed upon the same; and if the judge approves thereof it shall be signed by him, and sealed with the seal of the court; but where the judge does not approve of the case submitted to him, both parties shall be summoned to attend him where and when the judge shall appoint, and at the place and time so appointed both parties shall be heard as to the form of the case, and the judge shall finally settle and sign the same, and it shall then be sealed by the registrar" (f).

"Where the parties do not agree upon the form of the case to be stated, the appellant shall lodge with the registrar the draft case prepared by him, and the registrar shall give notice to the parties that the same has been so lodged, and will, on a day to be named in the notice, be presented to the judge for his signature, and on such day the parties may appear before the judge, who shall determine the form of the case, and finally settle and sign the same, and it shall then be sealed by the registrar" (g).

"When the case shall be so signed and sealed, a copy thereof shall be deposited with the registrar, and another sent by post or otherwise by the appellant to the successful party within three days next after the time of signing and sealing the same, and if the appellant do not comply with this rule the successful party may pro-

(b) County Court Orders and Rules in Equity, 1868, Order XIX. Rule 1.

(c) *Id.* Rule 2.

(d) *Id.* Rule 3. In accordance with this rule the vice-chancellor will, if he thinks fit, stay the proceedings without any application to the

judge. *Cheesewright v. Thorn*, 38 L. J. (N. S.) Ch. 615.

(e) County Court Orders and Rules in Equity, 1868, Order XX. Rule 8.

(f) *Id.* Order XIX. Rule 4.

(g) *Id.* Rule 5.

ceed upon the decree or order unless the judge shall otherwise direct" (*h*).

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"The appellant shall, within three days next after the case has been signed and sealed, transmit the same with a copy thereof under the seal of the court, by post or otherwise, to the office of the clerks of records and writs in chancery, or to such other office or officer in the court as the lord chancellor may by general order direct, and shall give notice, by post or otherwise, to the successful party that he has done so; in default whereof the successful party may proceed on the decree or order, and shall, on the application to the court, be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings; provided that, instead of proceeding on such decree or order, the respondent, if he think fit, may, within twenty-eight days from the signing and sealing of the case, transmit it in the manner described, and give the like notice to the appellant of such transmission" (*i*).

Rule 7.
Case to be transmitted.

"If, after the case has been transmitted, the appellant do not prosecute his appeal, the court of appeal may dismiss the same for want of prosecution, and thereupon the decree or order appealed from may be prosecuted and enforced as if there had been no such appeal, and the respondent in the appeal shall be entitled to all costs he may have incurred by reason of the appeal, to be recovered as costs in the court below" (*k*).

Rule 8.
If appeal not prosecuted, successful party to proceed.

"When the court of appeal shall have made a decree or order, either party may deposit the same or an office copy thereof with the registrar of the county court, and upon being so deposited such decree or order shall be filed and may be enforced as if it had been made by the county court" (*l*).

Rule 9.
Entering judgment on appeal.

"All the rules in this order shall apply to appeals under sect. 19 of the act to the Court of Chancery of the county palatine of Lancaster, and the vice-chancellor thereof, except that the case when signed and sealed shall be transmitted to the registrar of that court" (*m*).

Rule 10.
Appeal to Lancaster Court of Chancery.

Costs on Appeal.—In giving or withholding costs the court takes into consideration the conduct of the parties during the litigation and other circumstances, and there is no general rule that costs should follow the event (*n*).

(*h*) County Court Orders and Rules in Equity, 1868, Order XIX. Rule 6.

(*i*) *Id.* Rule 7.

(*k*) *Id.* Rule 8.

(*l*) *Id.* Rule 9.

(*m*) *Id.* Rule 10.

(*n*) In *Fallows v. Slatter*, 38 L. J. (N. S.) Ch. 609. *Stuart*, V.-C., said, "The rule of common law, that

costs should follow the result of an appeal, is contrary to the practice of Lord *Eldon*, Sir *William Grant* and all the great authorities. It has never been the rule of the Court of Chancery, and shall not be introduced by me." There is not, however, any inflexible rule at common law. See *ante*, Vol. I. pp. 295, 296.

CHAPTER XI.

FEES AND COSTS UNDER THE EQUITABLE JURISDICTION OF THE COUNTY COURTS.

§ 1.—FEES.

§ 2.—GENERAL RULES AS TO COSTS.

§ 3.—SCALE OF COSTS OF COUNSEL AND ATTORNIES.

§ 4.—MISCELLANEOUS RULES RELATING TO COSTS.

§ 1.—FEES.

SUITORS pay the following fees, which are received by the registrar and accounted for and paid over by them to the treasurers of their respective courts, or where there is no treasurer, as may be directed by order of the commissioners of the treasury (*a*).

	£	s.	d.
For every plaint or petition	0	10	0
For every suit or matter transferred to a county court	0	10	0
For the hearing	1	0	0
For a decretal order	1	0	0
For a final decree	1	0	0

N.B.—*These fees are only to be charged once in a suit or matter.*

The following further fees are received by the registrars for the use of themselves and the high bailiffs as the remuneration for the duties performed by them under the equitable jurisdiction of the courts:—

	Where the Subject-matter of the Suit or Proceeding	
	Does not exceed 100 <i>l</i> .	Where it exceeds 100 <i>l</i> .
REGISTRARS' FEES.	£ s. d.	£ s. d.
For filing every plaint or petition, and issuing summons or notice thereon	0 6 0	0 9 0
If more than one defendant, then for every additional defendant	0 2 0	0 2 0
If defendant out of England, then in addition (including filing affidavit)	0 5 0	0 7 0

(*a*) "The County Courts Act, 1865" (28 & 29 Viet. c. 99), sect. 13, and schedule, specified these fees in the first instance (see *ante*, Vol. I. pp. 20, n., and 91); but these fees are

superseded by an Order of the Treasury of 30th December, 1867. See the entire Order, *ante*, Vol. I. pp. 17–24.

	Where the Subject-matter of the Suit or Proceeding	
	Does not exceed 100 <i>l.</i>	Where it exceeds 100 <i>l.</i>
	£ s. d.	£ s. d.
REGISTRARS' FEES—continued.		
For filing or recording order by judge for adjournment	0 2 6	0 4 0
For issuing every warrant	0 2 0	0 3 0
For preparing power of attorney	0 3 0	0 3 0
For filing affidavit and receipt, giving certificate, and issuing notices in matters under Order XI., Rules 6 to 16 inclusive	0 6 0	0 9 0
Where the notices under Order XI., Rule 16, shall exceed five, then for every additional notice 6 <i>d.</i>		
For filing and sealing every affidavit, or other document not being a document annexed to an affidavit..	0 1 0	0 1 0
For every application to inspect an affidavit	0 1 0	0 2 0
For every summons to a witness	0 3 6	0 5 0
For attesting admission of defendant and filing ..	0 3 6	0 5 0
For filing statement of defendant, or notice by plaintiff for dismissal of cause	0 2 6	0 4 0
For drawing, filing, and sealing every decretal order, final decree, or an order on a petition, or application for an order in the nature of an injunction (including issuing the copy of same for service)	0 15 0	1 5 0
If more than one copy of decree, &c. to be issued, then for every additional copy	0 2 0	0 2 0
For perusing and filing papers, application to judge, drawing directions to proceed, and notice to parties on transfer of proceedings from Court of Chancery	1 1 0	1 1 0
For drawing advertisements and inserting	0 5 0	0 7 0
For advertisements, —sum paid.		
For every sitting in which the registrar is employed in taking accounts, making inquiries, or acting as a special examiner	0 7 0	0 10 0
When the sitting is longer than one hour, then for every additional hour or part of an hour ..	0 5 0	0 7 0
Where the registrar shall be required to attend elsewhere than at the court or office, in addition to the above	0 10 0	1 0 0
Mileage one way from the office to place of examination, for each mile	0 0 6	0 0 6
For application to judge for further directions (including drawing order)	0 7 0	0 12 0
For drawing draft order for an <i>ex parte</i> application, and the order as afterwards made	0 10 0	0 15 0
For certificate directed to be made by any decretal order	0 15 0	1 10 0
For every inspection of certificate at registrar's office	0 1 0	0 2 0
For giving any notice required by any of "the orders" (including copying)	0 2 0	0 2 6
For office copy of every document, per folio	0 0 4	0 0 4

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	Where the Subject-matter of the Suit or Proceeding	
	Does not exceed 100 <i>l.</i>	Where it exceeds 100 <i>l.</i>
	£ s. <i>d.</i>	£ s. <i>d.</i>
REGISTRARS' FEES—continued.		
For making and transmitting note of any decretal order or final decree, or of an order made on petition under Order XXIII., Rule 24	0 2 6	0 3 6
For auditing receiver's accounts where sum in account does not exceed 100 <i>l.</i>	0 5 0	0 5 0
And for every additional 50 <i>l.</i> , or fraction thereof .	0 2 6	0 2 6
For every application for a search and searching ..	0 2 0	0 2 0
For taxation of costs	0 5 0	0 7 0
For payment out of court and taking receipt for dividends on stock, exceeding 1 <i>l.</i> and not exceeding 5 <i>l.</i> ..	0 2 0	0 2 0
Exceeding 5 <i>l.</i>	0 3 0	0 3 0
For procuring investments in consols, 5 <i>s.</i> per cent. on the amount invested, exclusive of bankers' and brokers' commission.		
For drawing orders under Order XVII., Rule 7 ..	0 4 0	0 4 0
HIGH BAILIFFS' FEES.		
For calling the cause	0 2 0	0 3 0
For service, within home district, of every summons, petition, notice, or order, not being summonses to jurors—		
If within one mile of court house	0 2 6	0 5 0
If beyond one mile, then for every additional mile, or part of a mile	0 0 6	0 0 6
For service of every summons, petition, notice, or order in a foreign district	0 5 0	0 7 6
Where service is ordered to be personal, then an additional fee of	0 3 6	0 5 0
For affidavit of service, when required	0 2 0	0 4 0
For the execution of each warrant within home district	0 5 0	0 10 0
With an allowance of mileage, double the amount of the allowance on summonses.		
For execution of each warrant in a foreign district ..	0 10 0	0 15 0
Keeping possession, for each day the man is actually in possession	0 6 0	0 7 6
3 <i>s.</i> 6 <i>d.</i> of the above sum is to be paid to the man in possession, and his receipt produced to registrar.		
Superintending sale, whether by auction or private contract, making out account and paying money into court, 2 <i>l.</i> per cent. on first 50 <i>l.</i> so paid, and 1 <i>l.</i> per cent. on all afterwards.		

N.B.—Where the amount or value of the subject-matter of the suit or proceeding is not disclosed by the plaint or petition, it shall be taken not to exceed 100*l.*, and the fees charged accordingly. If, however, the judge shall

subsequently certify that the amount or value of the subject-matter does exceed 100*l.*, the difference between the fees up to that time taken and those that would have been taken had it exceeded 100*l.* may then be taken.

§ 2.—GENERAL RULES AS TO COSTS.

The giving of costs in equity is entirely discretionary. "It must not be supposed, however, that the court is not governed by definite principles in its decisions relative to the costs of proceedings before it. All that is meant by the *dictum* that the giving of costs in equity is entirely discretionary is, that the court is not, like the ordinary courts, held inflexibly to the rule of giving the costs of the suit to the successful party (*b*); but that it will, in awarding costs, take into consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise its discretion with reference to those points. In exercising this discretion, however, the court does not consider the costs as a penalty or punishment, but merely as a necessary consequence of a party having created a litigation in which he has failed (*c*); and the court is generally governed by certain fixed principles which it has adopted upon the subject of costs, and does not, as is frequently supposed, act upon the mere caprice of the judge before whom the cause happens to be tried" (*d*).

Costs out of the Estate or Fund.—“A difference between the courts of law and equity, with respect to costs, frequently arises from the nature of the property over which the latter are called upon to exercise their jurisdiction. A large proportion of suits in equity are instituted for the purpose of obtaining the administration of property; and in cases of that description, the practice of the court is, not to direct the costs of the proceedings to be paid by one party to another, but to order payment of them out of the estate. The court will also, for the purpose of affording due protection to trustees or others concerned in the administration of trust property, order the costs they have been put to, to be paid out of the trust fund which is the subject of litigation” (*e*).

(*b*) Costs in the courts of common law, in general, follow the event, not by reason of any “inflexible rule,” but by force of express statute. See Gray on Costs. As to costs on appeal see *ante*, p. 115. Costs may be given where the cause is struck out for want of jurisdiction. See 30 & 31 Vict. c. 142, s. 14, *ante*, Vol. I. p. 70.

(*c*) Per Lord Cranworth in *Clarke v. Hart*, 6 H. L. Cas. 633.

(*d*) Daniell's Chancery Practice, 5th edit. pp. 1238, 1239. In the

county courts the judge in exercising his discretion is expressly required to take into consideration the facts of a defendant having or not having availed himself of the powers given to a defendant after service of the summons to state the nature of his case or defence. See County Court Orders and Rules in Equity, 1868, Order II. Rule 3, *ante*, p. 63.

(*e*) Daniell's Chancery Practice, 5th edit. p. 1239.

Costs as between "Party and Party," and "Solicitor and Client."]—The Court of Chancery makes a distinction with regard to the principle upon which the officer of the court is to proceed in the taxation of costs, by allowing a larger proportion of actual expenditure to parties holding particular characters than it allows in ordinary circumstances. This distinction is marked by the terms of "costs as between party and party," which are the ordinary costs allowed by the court, and "costs as between solicitor and client," which are the costs allowed by the court to parties filling the characters alluded to (*f*).

The "scale of costs and charges to be paid to counsel and attorneys in equitable matters," under the County Courts Act, does not, however, appear to contemplate any system of taxation between "solicitor and client." The scale, however, expressly directs that "where in the course of a cause or matter a party suing or sued in a fiduciary or representative character necessarily incurs costs not allowed upon taxation between party and party, the registrar shall apply to the judge to allow such sums as he may think fit out of any funds in court applicable to that purpose" (*g*).

Costs, Charges and Expenses in the case of Trustees.]—"It frequently happens that in suits to which trustees or personal representatives are parties, either as plaintiffs or defendants, and which do not involve any account, they have incurred expenses which it is very right they should be reimbursed, but which do not fall under the denomination of costs of the suit, even when directed to be taxed as between solicitor and client. Of this nature are cases laid before counsel, for their opinion preparatory to the institution of the suit, and many other charges of that description, to which, when there is a decree directing an account, a trustee would be considered entitled under the head of just allowances, but which, when there is no decree for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing; especially in cases where the suit does not involve property out of which they can be retained, or dispose of the whole of the trust fund. The court will, therefore, in such cases, upon the statement that such charges have been incurred, extend the order for the taxation of costs, as between solicitor and client, to the costs, charges and expenses properly incurred by the trustee. Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred, relating to the trust property, in or in connection with the suit, although they are not properly costs in the cause" (*h*).

(*f*) Daniell's Chancery Practice, 5th edit. p. 1239. As an illustration of the fixed rules governing the courts of equity as to costs between "solicitor and client," see *Turner v. Col-*

lins, 40 L. J. (N. S.) Ch. 614.

(*g*) See the scale of costs, *post*, p. 123.

(*h*) Daniell's Chancery Practice, 5th edit. p. 1304.

§ 3.—SCALE OF COSTS OF COUNSEL AND ATTORNIES.

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The act giving equitable jurisdiction to the county courts empowered the county court judges, who framed rules and orders for the practice of the court, also to frame a scale of costs and charges to be paid to counsel and attornies (*i*).

The following is the scale of costs and charges now in force (*k*):—

A Scale of Costs and Charges to be paid to Counsel and Attornies in Equitable Matters, under "The County Courts Act, 1865," and "The County Courts Act, 1867."

	Lower Scale not exceed- ing 100 <i>l</i> .	Higher Scale above 100 <i>l</i> .
	£ s. d.	£ s. d.
Instructions to sue or defend	0 10 0	0 15 0
Application for substituted service or service out of England	0 4 0	0 6 0
Service sum allowed by judge.		
Drawing plaint, or petition, or statement by defendant, or preparing instructions for counsel to draw the same, and attendance therewith	0 13 4	1 0 0
Fee to counsel and clerk therewith	1 3 6	2 4 6
Attendance, and filing plaint, petition, admission, or statement	0 3 4	0 6 8
Every copy of plaint, petition, admission, or statement .	0 2 0	0 3 0
Examining and taking minutes of evidence of each witness afterwards allowed by the judge (whether counsel employed or not)	0 3 4	0 6 8
If above six folios, allowed on taxation for every additional folio	0 1 0	0 1 0
Drawing brief for counsel, per folio	0 1 0	0 1 0
Copy brief, per folio, and necessary documents to ac- company same	0 0 4	0 0 4
Attending counsel therewith	0 3 4	0 3 4
Fee to counsel and clerk, sum paid not exceeding ..	3 5 6	5 10 0
If conference with counsel allowed, appointing it and attending counsel	0 10 0	0 13 4
Fee to counsel and clerk, on conference	1 6 0	1 6 0
Attending court on trial, with counsel	0 13 4	1 1 0
Attending court and conducting cause, where no counsel employed	1 10 0	2 2 0
Where judgment is deferred, attending court to hear it .	0 6 8	0 6 8
Plans and models, where necessary for use at hearing, by special order on taxation, not exceeding	2 2 0	2 2 0
Witnesses' expenses, according to scale in force.		
Attending taxing costs	0 6 8	0 6 8

(*i*) See "The County Courts Act, 1865" (28 & 29 Vict. c. 99), s. 17, *ante*, Vol. I. p. 69. See also "The County Courts Act, 1867" (30 & 31

Vict. c. 142), sect. 15, *ante*, Vol. I. p. 59, n.

(*k*) This scale came into operation in all county courts on the 1st January, 1868.

	Lower Scale not exceed- ing 100 <i>l.</i>	Higher Scale above 100 <i>l.</i>
OCCASIONAL COSTS.		
Lodging order of transfer	£ s. d. 0 10 0	£ s. d. 0 16 8
Notice to produce, notice to admit,—notice of application for a new trial, or to set aside proceedings,—including copies or duplicate originals and service, and attending registrar of the court therewith, such notices and copies being signed by the attorney	0 6 8	0 13 4
On receipt of notice to produce or admit perusing same, and advising thereon	0 6 8	0 13 4
Attending inspecting documents	0 6 8	0 6 8
Mileage, one way, from the attorney's place of business to place of inspection of documents, for each mile, not exceeding, unless by special order of judge, in the whole 20 miles	0 1 0	0 1 0
All necessary affidavits, not exceeding five folios, including filing, each	0 5 0	0 5 0
For every additional folio	0 1 0	0 1 0
Oath (sum paid).		
Attending court to support or oppose any application or motion without counsel	1 1 0	1 1 0
Attending in the last-mentioned cases with counsel	0 15 0	0 15 0
Fee to counsel and clerk not exceeding	1 3 6	2 4 6
Preparing admission by defendant	0 3 4	0 6 8
Attorney's travelling expenses to attend court, one way, not exceeding 20 miles, per mile	0 1 0	0 1 0
If above 20 miles, actual cost.		
Where in the opinion of the registrar he cannot return the same night, in addition to the above mileage	1 11 6	1 11 6
Any attendance on the registrar, or before an examiner, or any attendance upon the opposite party, which the registrar may, upon taxation, think was necessary	0 5 0	0 7 0
When the attendance is longer than one hour, then for every additional hour or part of an hour	0 4 0	0 6 0
All costs for letters, and for searches for certificates of births, marriages, and deaths which the registrar may, upon taxation, think necessary, such sum as the registrar shall deem reasonable.		
Fees and copies (sum paid).		
Drawing accounts and other documents not included in the foregoing costs, but allowed upon taxation of costs to be necessary, per folio	0 0 8	0 0 8
For perusing and adapting old abstracts of title, per three sheets	0 3 4	0 3 4
Drawing abstracts of additional deeds and documents, per sheet	0 6 8	0 6 8
For preparing conditions and contracts of sale, and fair copy, per folio	0 0 8	0 0 8
Where condition and contract are not submitted to counsel, in addition to the above there shall be allowed for perusing abstracts, every three sheets	0 3 4	0 3 4
Where conditions and contracts are to be settled by counsel, instructions to counsel to accompany abstract, and attendance therewith, or letter	0 6 8	0 13 4

	Lower Scale not exceed- ing 100l.	Higher Scale above 100l.
	£ s. d.	£ s. d.
Fee to counsel and clerk	—	—
Fair copies of abstracts of title or of accounts, docu- ments, opinion of counsel, and of papers received from counsel, per folio	0 0 4	0 0 4
Attending sale	1 1 0	2 2 0
Where by any proceeding taken by the opposite party it becomes necessary to advise or receive instruction from a client in the progress of a suit or matter, for each attendance	0 6 8	0 13 4
Where in the course of a cause or matter a party suing or sued in a fiduciary or representative character necessarily incurs costs not allowed upon taxation between party and party, the registrar shall apply to the judge to allow such sums as he may think fit out of any funds in court applicable to that purpose.		
Attending taxing costs	0 5 0	0 7 0
All necessaries copies, per folio	0 0 4	0 0 4
Office copies obtained from Court of Chancery (sum paid).		
Letters and messages	0 5 0	0 10 0
COSTS OF THE DAY ON ADJOURNMENT.		
Attending court where no counsel employed	0 15 0	1 0 0
Attending with counsel	0 10 0	0 15 0
Refresher fee to counsel and clerk not exceeding ..	1 3 6	2 4 6
Witnesses' expenses same as on trial.		
COSTS ON APPEAL.		
Preparing notice of appeal, including copies and service	0 7 0	0 10 0
Preparing case, including copies	0 10 0	1 15 0
Attending judge to sign	0 5 0	0 7 0
Attending judge in case of difference to settle ..	0 10 0	0 15 0
Application to stay proceedings	0 7 0	0 10 0
Transmitting case and copies, including notice, to suc- cessful party	0 5 0	0 7 0
Application to judge for leave to proceed on judgment	0 5 0	0 7 0
Depositing decree or order of Court of Appeal ..	0 3 0	0 4 0

N.B.—The registrar is to tax the Bills of Costs upon the lower scale when the subject-matter of the suit or proceeding does not exceed 100l., and upon the higher when it exceeds 100l.

§ 4.—MISCELLANEOUS RULES RELATING TO COSTS.

Taxation.—

“The registrar shall be the taxing officer of the court” (*l*).

Order XXIII.
Rule 21.

Taxing
officer.

Allowance to Witnesses.—

“The allowance to be made to witnesses for attendance either before the court or registrar shall in no case exceed the highest rate of the allowance in actions” (*m*).

Order III.
Rule 11.
Allowance to
witnesses.

Costs to Creditors.—Creditors are entitled to the costs of successfully proving debts according to the scale of costs in that behalf (*n*).

Interest on Costs.—Where a decree or order is made in which the payment of any costs previously taxed, is ordered, the amount as taxed, including the costs of taxation, may be ordered and directed by the court to be paid with interest at four per cent. from the date of the certificate of taxation; “the amount of such interest to be verified by affidavit and to be payable and recoverable out of the same fund or in the same manner as the amount of such costs” (*o*).

Charging Property with Costs.—The act 23 & 24 Viet. c. 127, enacts that—

Sect. 28. “In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, it shall be lawful for the court or judge, before whom any such suit, matter or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property as to such court or judge shall appear just and proper, and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: provided always, that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges and expenses is barred by any Statute of Limitations” (*p*).

(*l*) County Court Orders and Rules in Equity, 1868, Order XXIII. Rule 21.

(*m*) *Id.* Order III. Rule 11. See *ante*, Vol. I. p. 213.

(*n*) See County Court Orders and Rules in Equity, 1868, Order XXIII.

Rule 22, *ante*, p. 100.

(*o*) 23 & 24 Viet. c. 127, s. 27.

(*p*) See *In re Keane*, and *In re Lumley v. Desborough*, 40 L. J. (N. S.) Ch. 617. See also “The Attorneys and Solicitors Act, 1870,” *post*, p. 140.

CHAPTER XII.

SPECIAL EQUITABLE JURISDICTION OF THE COUNTY COURTS IN VARIOUS MATTERS.

- § 1.—EQUITABLE JURISDICTION IN CHARITABLE TRUSTS.
- § 2.—LITERARY INSTITUTIONS.
- § 3.—FRIENDLY AND OTHER SOCIETIES.
- § 4.—EQUITABLE JURISDICTION OF COUNTY COURTS IN WINDING-UP SOCIETIES AND COMPANIES.
- § 5.—ENFORCING OR SETTING ASIDE AGREEMENTS BETWEEN ATTORNEYS AND THEIR CLIENTS.
- § 6.—ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN.



§ 1.—EQUITABLE JURISDICTION IN CHARITABLE TRUSTS.

APART from and previously to the general equitable jurisdiction of the county courts, conferred by the Act of 1865, those courts had and still have a special jurisdiction of an equitable kind in various matters. Some branches of this special jurisdiction, already more than once referred to (*a*), form the subject of the present chapter. The first branch of this special jurisdiction relates to charitable trusts (*b*).

(*a*) See *ante*, p. 2, and Vol. I. p. 46. As to the original jurisdiction in partnerships and legacies and distributive shares, see *ante*, Vol. I. pp. 29, 767.

(*b*) The jurisdiction of the county court in charitable trusts is so rarely exercised, and the powers of the county court judge are, by the acts, so blended with the powers and jurisdictions of the High Court of Chancery, that it is considered inexpedient to do more in this work than to give an outline of the practice. The statutes must in every case be carefully examined, and the rules and forms (in the possession of every registrar) referred to, before proceedings are actually taken in the county court.

The following acts relate to charit-

able trusts, 16 & 17 Vict. c. 137, ("The Charitable Trusts Act, 1853"); 18 & 19 Vict. c. 124 ("The Charitable Trusts Amendment Act, 1855"); 23 & 24 Vict. c. 136 ("The Charitable Trusts Act, 1860"); 25 & 26 Vict. c. 112 ("The Charitable Trusts Act, 1862"); 32 & 33 Vict. c. 110 ("The Charitable Trusts Act, 1869"). All the preceding acts are to be construed together and may be cited as "The Charitable Trusts Acts, 1853 to 1869." A subsequent act, 33 & 34 Vict. c. 34, amended the law as to the investments on real securities of trust funds held for public and charitable purposes. The analysis of the practice given in the text is taken principally from the Report of the County Court Commissioners, 1855.

By the 16 & 17 Vict. c. 137 ("The Charitable Trusts Act, 1853," establishing a board of charity commissioners), and by amending and extending acts, where the gross annual income of any charity (*c*) does not exceed 50*l.* (*d*), and where equitable relief is required, jurisdiction, subject to certain conditions in the acts, is given to the county court to entertain the application, and to give such relief and make such orders and directions in relation to the matter of such application as might "be made or given by the Court of Chancery, in respect either of its ordinary or its special or statutory jurisdiction, or by the lord chancellor intrusted with the care and commitment of the custody of lunatics," in a suit regularly instituted, or upon petition, as the case may require. It is provided, however, that no county court shall, upon any proceedings under these acts, have jurisdiction "to try or determine the title at law or in equity to any real or personal property, or any term or interest therein as between any charity or the trustee thereof, and any person holding or claiming such real or personal property, term or interest, adversely to such charity, or to try or determine any question as to the existence or extent of any charge or trust" (*e*). A right of appeal, subject to certain conditions, is given to the party who alleges himself to be aggrieved by or dissatisfied with any order made by any county court (*f*).

The practice with reference to applications under the act, relating to charitable trusts, depends principally on the provisions of "The Charitable Trusts Act, 1853," on certain orders framed by the lord chancellor, in pursuance of a power contained in the act (*g*), and on the general practice of the county court.

The county court in which proceedings are instituted, is the court of the district where the charity is established or administered, or is applicable wholly or partially to or for objects or purposes within the district, or any two or more of such districts (*h*). Where two or more county courts have jurisdiction concurrently, the

(*e*) "Charity" means "every endowed foundation and institution taking or to take effect in England or Wales, and coming within the meaning, purview or interpretation of the statute of the forty-third year of Queen Elizabeth, chapter 4, or as to which, or the administration of the revenues or property whereof the Court of Chancery has or may exercise jurisdiction" (16 & 17 Vict. c. 137, s. 66); and it includes "every institution in England or Wales endowed for charitable purposes," 18 & 19 Vict. c. 124, s. 48. See also 25 & 26 Vict. c. 112; see exceptions, however, 16 & 17 Vict. c. 137, s. 62; 18 & 19 Vict. c. 124, ss. 47, 48.

(*d*) Originally limited to 30*l.*, but

extended to 50*l.* by "The Charitable Trusts Act, 1860" (23 & 24 Vict. c. 136), s. 11. It may be observed, that although the jurisdiction under the original act extended only to charities, the annual income whereof does not exceed 30*l.*, yet should the amount with which a defaulting trustee is chargeable exceed the sum of 50*l.*, there is no provision in the statute which excludes the jurisdiction of the county court in such a case.

(*e*) 16 & 17 Vict. c. 137, s. 41.

(*f*) *Id.* s. 39.

(*g*) These Orders are dated March 6, 1854.

(*h*) 16 & 17 Vict. c. 137, s. 32.

board may order to which of such courts any application shall be made (*i*), and no application can be made to or entertained by more than one county court at the same time (*k*).

The persons entitled to apply to the county court under this jurisdiction are, her majesty's attorney-general, the trustee or one or more of the trustees of any charity, or the person or persons administering, or claiming to administer, or interested in the charity which is the subject of the application, or any two or more of the inhabitants of any parish or place within which the charity is administered or applicable. This distinction, however, exists between applications by the attorney-general and those by any of the other persons before mentioned: that the former may apply to the court at his discretion, but the latter require the sanction of the charity commissioners for the purpose.

Persons entitled to apply.

It will be convenient in describing the practice of the court on these applications to state—first, that which applies to private persons; and, secondly, that which applies to the attorney-general.

Applications by Private Persons.]—The person who is desirous of applying to the county court for relief having obtained the proper order or certificate from the charity commissioners, pursuant to notice given to the board (*l*), must file it with the registrar. That officer will then, at the instance of the applicant (who is deemed the plaintiff), and subject to the discretion of the judge, summon or give notice to the proper persons to appear or attend proceedings at an appointed court. These summonses and notices are served by post, unless the judge otherwise directs. On the appointed day, the persons summoned to appear, or who have received notice to attend, or any of the persons who are entitled to apply under the act, may appear and oppose the application. The judge then proceeds to make such order in the matter as to him seems just. This order, together with a copy of the other proceedings, is then transmitted to the charity commissioners. If it meet with their approval the order is final, unless some person authorized to make an application under the statute is desirous of appealing against the order.

In such a case the intended appellant must, within a calendar month after making the order, give notice in writing to the commissioners and to the court, of his wish to appeal, stating the grounds of his intended appeal. If the commissioners think that the appeal should be entertained, they give a certificate to that effect, and proceedings on the order are suspended during such time as the circumstances require. The commissioners may require the appellant to join in a bond with two sufficient sureties to be approved by the registrar of the county court, to the treasurer of the court, or such other person as they think fit, in such sum as

Appeal.

(*i*) 16 & 17 Vict. c. 137, s. 34.

(*k*) *Id.* s. 32.

(*l*) *Id.* s. 17.

they think reasonable, to pay such costs of the appeal as the appellate court shall order; and also, if they think fit, to indemnify the charity against the costs and expenses of or attending such appeal. On compliance with the requisition of the commissioners, an order is made allowing the appeal. Within three calendar months the appellant must present a petition to the Court of Chancery praying such relief as the case may require. Upon the hearing of the petition the court may confirm, vary or reverse the order appealed against, or may remit the order to the county court by which it was made, with or without any declaration of the Court of Chancery in relation to it; or the court may dispose of the matter of the order as in the case of a suit regularly instituted, or a petition. If the appellant do not proceed within three calendar months from the time at which the appeal is allowed, the order of the county court becomes final. If the costs adjudged by the appellate court to be paid by the appellant are not paid, the bond may be put in suit, and the sum recovered on it applied to indemnify the charity or the person damnified, as the case may require, and as the appellate court thinks right.

Proceedings by the Attorney-General.]—The attorney-general's power to proceed ex officio continues in the same manner as if the act had not been passed; and he may, without the sanction of the charity commissioners, make application to the county court in such matters. On making such an application, he must lodge with the registrar a statement similar to the commissioners' certificate or order. On the production of this statement, the registrar will take the same steps for the purpose of bringing the cause to a hearing, as on the application of a private person. At the hearing, the same proceedings as in other cases take place. The judge having heard the application, pronounces his judgment and makes his order. Against this order the attorney-general, acting ex officio, may, at any time within three calendar months after the order has been made, lodge, commence and prosecute an appeal, without giving notice or becoming bound, as in the case of private persons, and the county court is thereupon bound to make an order allowing the appeal. The subsequent proceedings on the appeal are the same as in other cases.

No deputy judge was formerly allowed to dispose of these matters (*m*), but a deputy judge has now all the powers of the principal (*n*).

The registrar enters the proceedings in each case under its respective title, in a book kept for that purpose, and the various documents lodged with him are filed.

All proceedings, orders and directions are enforced and executed in the same manner as other proceedings, orders, judgments and

(*m*) 16 & 17 Vict. c. 137, s. 33.

(*n*) See 30 & 31 Vict. c. 142, s. 20, *ante*, Vol. I. p. 93.

directions under the ordinary jurisdiction of the court, and the judge has the same powers as are given for enforcing the payment of any debt, damages or costs (*o*).

Fees.]—Where the annual income of the charity exceeds 10*l.*, the court fees are payable as in cases within the ordinary jurisdiction of the court, and the charitable funds may be made liable to the payment at the discretion of the judge.

When the annual income does not exceed 10*l.* no fees of court are payable out of the funds of the charity, nor shall any fees be paid by any party to the proceeding unless the judge shall, in his discretion, order any of the parties to the proceeding before him to pay such fees of court as he shall think fit.

Where more than one charity is joined in one application, one set of court fees only is payable, such fees to be calculated on the aggregate amount of the incomes of the charities so joining.

Where court fees are payable, they are to be calculated according to the scale of fees applicable to proceedings for the recovery of tenements, the annual income of the charity, like the annual rent of the tenement, being treated as the basis of calculation (*p*).



§ 2.—LITERARY INSTITUTIONS.

“The Literary and Scientific Institutions Act, 1854” (17 & 18 Vict. c. 112), provides for the adjustment of the affairs of literary institutions by the judge of a county court in the event of any dispute on the dissolution of such an institution.

The following are the provisions on this subject:—

“Any number not less than three-fifths of the members of any institution may determine that it shall be dissolved, and thereupon it shall be dissolved forthwith, or at the time then agreed upon, and all necessary steps shall be taken for the disposal and settlement of the property of the institution, its claims and liabilities, according to the rules of the said institution applicable thereto, if any, and if not, then as the governing body shall find expedient; provided, that in the event of any dispute arising among the said governing body or the members of the institution (*q*), the adjustment of its affairs shall be referred to the judge of the county court of the district in which the principal building of the institution shall be situated, and he shall make such order or orders in the matter as he shall deem requisite, or, if he find it necessary, shall direct that proceedings shall be taken in the Court of Chancery for the adjustment of the affairs of the institution” (*r*).

(*o*) 16 & 17 Vict. c. 137, s. 38.

(*p*) Orders, Nos. 13—16.

(*q*) As to who is a member, and for the definition of the governing body, see sects. 31, 32 of the same act.

(*r*) 17 & 18 Vict. c. 112, s. 29.

Poundage is estimated upon the amount in dispute; and if no account is in dispute, or is not ascertained, then as upon a claim for 20*l.* Treasury Order, 30th December, 1867, see *ante*, Vol. I. p. 19.

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"If upon the dissolution of any institution there shall remain after the satisfaction of all its debts and liabilities any property whatsoever, the same shall not be paid to or distributed among the members of the said institution or any of them, but shall be given to some other institution, to be determined by the members at the time of the dissolution, or in default thereof by the judge of the county court aforesaid; provided that this clause shall not apply to any institution which shall have been founded or established by the contributions of shareholders in the nature of a joint stock company" (s).

"The act shall apply to every institution for the time being established for the promotion of science, literature, the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments or designs; provided, that the Royal Institution, and the London Institution for the advancement of literature and the diffusion of useful knowledge, shall be exempt from the operation of this act" (t).

For the County Court Rules applicable to proceedings under this act, see *post*, p. 135, Rules 269, 270.

§ 3.—FRIENDLY AND OTHER SOCIETIES.

By the statute 18 & 19 Vict. c. 63, the rules required to be framed before any friendly society (u) can be established under the

(s) 17 & 18 Vict. c. 112, s. 30.

(t) *Id.* s. 33.

(u) By sect. 9, a friendly society may be established under the provisions of the act, for the purpose of raising by voluntary subscriptions of the members thereof, with or without the aid of donations, a fund for any of the following objects: (that is to say,) 1. "For insuring a sum of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife, or child of a member. 2. For the relief or maintenance of the members, their husbands, wives, children, brothers, or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members or nominees of members at any age. 3. For any purpose which shall be authorized by one of the principal secretaries of state, &c., as a purpose to which the powers and facilities of the act ought to be extended, provided that no

member shall subscribe or contract for an annuity exceeding 30*l.* per annum, or a sum payable on death or on any other contingency, exceeding 200*l.*" Under this section the following purposes have been authorized by the secretary of state, namely: First, for assisting members when they are compelled to travel in search of employment. Second, for granting temporary relief to members in distressed circumstances. Third, for the relief and maintenance of the members in case of lameness, blindness, or bodily hurt through accident. Fourth, for the purchase of coals and other necessaries, to be supplied to the members. Fifth, for the purpose of assuring the members against loss by disease or death of cattle employed in trade or agriculture. The provisions of the act, however, so far as relate to the jurisdiction of the county court, are not confined to certified friendly societies, for sect. 44 enacts, that "in the case of any

act, may, amongst other things, make provision for "the manner in which disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled" (*x*); and "every dispute between any member or members of any society" (*y*) (established under the act, or under the acts thereby repealed), "or any person claiming through or under a member, or under the rules of such society, and the trustee, treasurer or other officer, or the committee thereof, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties, without appeal" (*z*).

"All applications for the removal of any trustee, or for any other relief, order or direction, or for the settlement of disputes that may arise or may have arisen in any society, the rules of which do not prescribe any other mode of settling such disputes, or to enforce the decision of any arbitrators, or to hear and determine any dispute, if no arbitrator shall have been appointed, or if no decision shall be made by the said arbitrators within forty days after application has been made by the member or person claiming through or under a member, or under the rules of the society, shall be made to the county court of the district within which the usual or principal place of business of the society shall be situate (*a*); and such court shall, upon the application of any person interested in the matter, entertain such application, and give such relief and make such orders and directions in relation to the matter of such application as hereinafter mentioned, or as may now be given or made

friendly society established for any of the purposes mentioned in sect. 9 of this act, or for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the registrar, provided a copy of such rules shall have been deposited with the registrar, every dispute between any member or members of such society, and the trustees, treasurer or other officer, or the committee of such society, shall be decided in manner hereinbefore provided with respect to disputes." (The rules must have been deposited before the dispute arose. *Reg. v. Trafford*, 26 L. J. (N. S.) Q. B. 95.) See also sect. 46 of the same act. The provisions of the Friendly Societies Acts, moreover, so far as relate to the determination of disputes by the county courts, extend, as stated in the text, to industrial and provident societies. See 30 & 31 Vict. c. 117, s. 3. (As to rules and extended powers of industrial and provident societies, see 34 & 35 Vict. c. 80.) Trades Unions are not within the

Friendly or Industrial Societies Acts. See 34 & 35 Vict. c. 31, s. 5. It is to be observed, moreover, that by sect. 49, the word "society" extends to and includes every branch of a society by whatever name it may be designated.

(*x*) Sect. 25.

(*y*) Or, "between the executors, administrators, nominee, or assigns, of a member," 21 & 22 Vict. c. 101, s. 6.

(*z*) Sect. 40; and see 21 & 22 Vict. c. 101, s. 5.

(*a*) It seems there may be a usual place of business to give jurisdiction, although not the principal place; for where it was sought to prohibit a metropolitan court from proceeding with a plaint under the Friendly Societies Acts, and the affidavit stated that "the usual and principal place of business" of the society was in Liverpool, it was held insufficient, especially as it appeared there was a London branch. *Shea v. United Sick and Burial Society of St. Patrick*, 37 L. J. (N. S.) C. P. 50.

by the Court of Chancery in respect either of its ordinary or its special or statutory jurisdiction; and the decision of such county court upon and in relation to such application as aforesaid shall not be subject to any appeal" (a).

The above provisions relating to the determination of disputes by the county courts are expressly applied to all societies registered under "The Industrial and Provident Societies Act, 1867" (b).

In case any member is dissatisfied with the provision required to be made on the dissolution or determination of any such society, for satisfying the claims of every member, he may apply to the judge of the county court of the district within which the usual place of business of the society is situated for relief or other order; and the judge has the same powers to entertain the application and to make such order or direction in relation thereto as he may think the justice of the case may require, as is enacted in regard to the settlement of disputes (c).

Parties to the Suit.—Every society is required by a resolution of the majority of the members present at a meeting to nominate and appoint one or more persons as trustee or trustees for the society, and a copy of the resolution must be sent to the registrar (d); and all the real and personal estate whatsoever belonging to such society is vested in the trustees, or in the trustees of a branch of the society, and is under the control of such trustees, their respective executors or administrators, according to their respective claims and interest; and upon the death or removal of any such trustee the same vests in the successors without assignment, "and in all actions or suits or indietments, or summary proceedings before magistrates touching or concerning any such property, the same shall be stated to be the property of the person or persons for the time being holding the said office of trustee, in his or their proper name or names as trustees of such society, without any further description" (e).

"The trustee or trustees of any such society are hereby authorized to bring or defend, or cause to be brought or defended, any action, suit or prosecution in any court of law or equity, touching or concerning the

(a) 18 & 19 Vict. c. 63, s. 41. See also applications by married women as to property in friendly and other societies, 33 & 34 Vict. c. 93 ("Married Women's Property Act, 1870"), s. 5, and *ante*, p. 21, and *ante*, Vol. I, p. 509.

(b) 30 & 31 Vict. c. 117, s. 3. See note (u), *ante*, p. 130. This jurisdiction in disputes in industrial and provident societies must not be confused with the jurisdiction of

the county courts in winding-up such societies. See § 4, *post*, p. 138.

(c) 18 & 19 Vict. c. 63, s. 13; see also 23 & 24 Vict. c. 58, s. 1.

(d) 18 & 19 Vict. c. 63, s. 17. Where no trustee has been appointed in any society established under former acts, the treasurer or other person having the custody of monies of the society is a trustee within the act. *Id.*

(e) *Id.* s. 18.

property, right or claim to property of the society, for which he or they are such trustee or trustees as aforesaid; and such trustee or trustees shall and may, in all cases concerning the real or personal property of such society, sue and be sued, plead and be impleaded, in any court of law or equity, in his or their proper name or names as trustee or trustees of such society, without other description; and no such action, suit or prosecution shall be discontinued or shall abate by the death of such person, or his removal from the office of trustee, but the same shall and may be proceeded in, by or against the succeeding trustee or trustees as if such death or removal had not taken place; and such succeeding trustee or trustees shall pay or receive the like costs as if the action or suit or prosecution had been commenced in his or their name or names, for the benefit of or to be reimbursed from the funds of such society" (f).

With regard to proceedings against the society in respect of disputes not involving a claim directly to the property of the society, but under the rules (to sick pay, for example), the secretary or other officer of the society is the party to be made defendant by his name and the title of the office he holds in the society, and such proceedings are not abated or prejudiced by the death, resignation or removal, or by any act of such officer after the commencement of the proceeding (g).

In consequence of the careless manner in which the rules of these societies are generally framed, it is often difficult to ascertain whether the county court has or has not jurisdiction. Little more can be laid down generally than that, if another tribunal be appointed by the rules, that tribunal has exclusive jurisdiction, and the equitable jurisdiction of the county court is ousted (h), and that the equitable jurisdiction of the county court can only be set in motion by an interested person, for it is a condition precedent to the jurisdiction of the county court judge, that the person making the application before him should be interested in the matter, that is, either personally or as representing the society (i).

Cases within
the jurisdic-
tion of the
county court.

The rules of a society provided that "disputes arising under the rules, of any kind whatsoever, were to be referred to a private committee, and if not settled by them to mutual satisfaction, they were then to be referred to a district committee, whose decision was to be final." The officers of the society refused to continue sick pay to a member on the ground that his daughter, who received the money for him, had received too much, and they told him the matter had been heard by a committee and by the society, and that he had been expelled, and that his name had been crossed out of the books. The Court of Queen's Bench doubted whether

(f) 18 & 19 Vict. c. 63, s. 19. The trustees, however, are only liable for monies actually received by them on account of the society. *Id.* s. 20.

(g) 21 & 22 Vict. c. 101, s. 7.

(h) Per *Martin, B., Denton v. Marshall*, 32 L. J. (N. S.) Exch. 91.

(i) Per *Willes, J., in Hull v. Mac-*

farlane, 27 L. J. (N. S.) C. P. 41, where it was held that trustees of a society, but who were not members, could not apply, *ex mero motu*, to prevent the enrolment of amended rules passed at a meeting, alleged by the trustee to have been improperly held.

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a dispute of this kind was one within the rule, but that the county court had jurisdiction to inquire into the fact of whether the member had really been expelled, and also to reinstate him if the judge thought fit, and then, being reinstated as a member, either to inquire into the merits of the dispute and decide it, or, if it really were a dispute within the rule, then to direct the society to hear the applicant according to that rule (*k*).

A difficulty of another kind sometimes arises in determining whether a right of action exists, or whether such right of action is taken away by the combined operation of the statute and of the particular rules.

An action is sometimes brought in the county court against the officers of a society, and the defence is set up that the proper mode of proceeding is not by action but by the tribunal provided by the rules of the society. In the case of a person who has done work or supplied goods for the society, it seems that any right of action is not taken away merely by reason of the officers or members of the society refusing to pay; nor, on the other hand, is it taken away from the society against a person who has received money for the society (*l*); but where the right is dependent on the rules a greater difficulty arises. Has, for example, a surgeon or medical officer of the society a right of action, his election and remuneration being frequently regulated by the rules of the society, of which he has notice? He is a person, in one sense, claiming under the rules; but he is not himself a member. It seems clear that a dispute as to his remuneration would not be a matter to which any rules, providing for the reference of disputes to a committee of the society itself, would be applicable; for, the dispute being with the society, such a reference would be in fact a reference to one of the disputants; and, if the rules do not provide any other tribunal, no great practical difficulty would arise, for the county court would have jurisdiction either in respect of the common law action or in equity under the Friendly Societies Act, and the form of summons is so nearly the same in the one case as in the other that only a slight amendment would be necessary (*m*). But if the rules provided for the reference of disputes to justices, considerable difficulty may and has arisen (*n*).

(*k*) *Ex parte Wooldridge*, 31 L. J. (N. S.) Q. B. 122. The member was afterwards reinstated by the county court judge, and he heard the dispute, and directed the sick pay to be continued to him.

(*l*) See *Linden v. Bankes*, 30 L. J. (N. S.) Q. B. 102, where an action was held maintainable by the trustees against a former treasurer and of all members of the society for money received by him when treasurer.

(*m*) The parties would not neces-

sarily be the same, but under the Friendly Societies Acts it is sufficient to make an officer of the only defendant, and on the other hand, an *action* may be against any one or more of several persons jointly liable, the same person or persons might be properly defendants.

(*n*) See the cases bearing on this question collected in Tidd Pratt's Laws relating to Friendly Societies, 6th edit., p. 55—58.

Proof of Rules.]—Two printed or written copies of the rules are transmitted to the registrar, who, upon giving a certificate of conformity, returns one of the copies to the society and keeps the other (*o*). All rules and tables of any society established under the act, and “all alterations and amendments thereof, and all copies thereof or extracts therefrom, and all writings and documents relating to a friendly society, and purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received in all courts of law and equity, and elsewhere, without proof of the signature thereto” (*p*).

Enforcement of Orders.]—

“In all cases where the order of such county court shall be for the payment of money, the same may be enforced in the same manner as the ordinary judgments of such court are enforced; but where the order of the said court shall be for the doing of some act, not being for the payment of money, it shall be lawful for the judge of such county court in his said order to order the party to do such act, or that in default of his doing it he shall pay a certain sum of money; and in case he refuse or neglect to do the act required, upon demand in that behalf, the sum of money or penalty in the said order may then be recovered in the same manner as a judgment for debt or damages in such court; and it shall not be lawful to remove the same by *certiorari* or other writ or process to any superior court of record” (*q*).

Rules.]—The following Rules apply to proceedings under the Literary and Scientific Institutions, the Friendly Societies, and the Industrial and Provident Societies Acts:—

“In proceedings in the county courts under 17 & 18 Vict. c. 112 (*r*), 18 & 19 Vict. c. 63, and 30 & 31 Vict. c. 117, a plaint shall be entered, and a summons shall be issued thereon, and the rules and practice of such courts shall be adopted with respect to such proceeding, so far as the same are applicable” (*s*).

17 & 18 Vict.
c. 112.
18 & 19 Vict.
c. 63.
30 & 31 Vict.
c. 117.

“Where a defendant is a trustee, member of the general committee of management, treasurer, or other officer of an institution or society established under any act mentioned in the last rule, the summons shall be served in the mode, if any, prescribed by the act under which any such institution or society is established or regulated, and if no mode of service be thereby prescribed, then at the usual place of business of the institution or society, and if there be no such place of business, then according to the ordinary practice of the court” (*t*).

Fees.]—

“In proceedings under ‘The Friendly Societies Act, 1855,’ and ‘The Industrial and Provident Societies Act, 1867,’ the poundage shall be estimated upon the amount in dispute; but if the application to the court is not for the payment of money, the poundage shall be estimated upon

(*o*) 18 & 19 Vict. c. 63, s. 26.

(*p*) *Id.* s. 30.

(*q*) *Id.* s. 42.

(*r*) See *ante*, p. 129.

(*s*) County Court (Common Law) Rules, 1868, No. 269.

(*t*) *Id.* No. 270.

the amount of the sum of money stated by the applicant to be that which he will apply to the court to order the payment of."

"In the above cases where the poundage would, but for this direction, be estimated on an amount exceeding twenty pounds, it shall be estimated at twenty pounds only" (u).

Costs.—The tables of costs are silent as to proceedings relating to disputes in societies. Although the jurisdiction is of an equitable kind, the general practice is to allow costs as in actions at law.

The following Forms are provided for proceedings under the above acts:—

Summons under the Friendly Societies and other Acts (x).

You are hereby summoned to appear at a court to be holden at
on the day of 187 , at the hour of in
the noon, to answer the plaintiff in the matter the particulars of
which are hereunto annexed.

Dated the day of 187 .

Registrar of the court.

To the defendant.

Summonses for witnesses and for the production of documents will be issued upon application at the office of the registrar.

Order under the Friendly Societies and other Acts (y).

Upon hearing this cause at a court this day holden it is ordered that the defendant do [*here insert the terms of the order made by the court*].

And it is further ordered, that if the defendant do not obey the terms of the said order, he shall pay to the registrar of this court, on or before the day of the sum of by way of penalty and the sum of £ for costs.

Order for Warrant of Execution to issue under the Friendly Societies and other Acts (z).

Whereas at a court holden at on the day of
187 , it was ordered by the said court that [*here insert the terms of the order of the court*]:

And it was then further ordered, that if the defendant should not obey the terms of such order, that he should pay to the registrar of the court, on or before the day of the sum of pounds by way of penalty.

And whereas it appears to the court that the defendant has not obeyed either of the said orders, although demand in that behalf was duly made upon him:

It is therefore ordered that a warrant of execution issue for the said sum, being the amount of such penalty and the costs thereof.

(u) Order of the Treasury, 30th Law), No. 162.
December, 1867.

(y) *Id.* No. 163.

(x) County Court Forms (Common (z) *Id.* No. 164.

Warrant of Execution against the Goods under the Friendly Societies and other Acts (a).

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Whereas at a court holden at _____ on the _____ day of 187____, it was ordered by the said court that [*here insert the terms of the order of the court*]:

And it was then further ordered, that if the defendant should not obey the terms of such order, that he should pay to the registrar of the court, on or before the _____ day of 187____, the sum of £ _____ by way of penalty and costs:

And whereas the defendant has not obeyed either of the said orders:

These are therefore to require and order you forthwith to make and levy, by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this court (excepting the wearing apparel and bedding of the defendant or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount of such penalty and costs, including the costs of this execution, and also to seize and take any money, bank-notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of the court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court, this _____ day of 187____.

By the court,
Registrar of the court.

To the high bailiff of the said court, and others the bailiffs thereof.

	£	s.	d.
Amount ordered to be paid			
Costs			
Poundage for issuing this warrant			
Total amount to be levied			

NOTICE.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said defendant.

Application was made to the registrar for this warrant at _____ minutes past the hour of _____ in the _____ noon of the _____ day of 187____.

19 & 20 Vict.
c. 108, s. 46.

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§ 4.—EQUITABLE JURISDICTION OF COUNTY COURTS IN WINDING-UP SOCIETIES AND COMPANIES.

“The Industrial and Provident Societies Act, 1862,” 25 & 26 Vict. c. 87 (to consolidate and amend the Laws relating to Industrial and Provident Societies), provides that,—

Winding-up
of societies.

Sect. 17. “Any society registered under this act may be wound up either by the court or voluntarily, in the same manner and under the same circumstances under and in which any company may be wound up under any acts or act for the time being in force for winding-up companies; and all the provisions of such acts or act with respect to winding-up shall apply to such society, with this exception, that the court having jurisdiction in the winding-up shall be the county court of the district in which the office of the society is situated” (b).

Winding-up Joint Stock Companies.]—By sect. 126 of “The Companies Act, 1862” (25 & 26 Vict. c. 89), judges of county courts sitting at places more than twenty miles from the general post-office were appointed commissioners for taking evidence in cases where companies are wound up, and the court may refer the whole or any part of the examination of any witnesses to any such judge, who is vested with full powers for that purpose.

“The Companies Act, 1867” (30 & 31 Vict. c. 131), enacts,—

Winding-up
may be re-
ferred to
county
courts.

Sect. 41. “Where the High Court of Chancery in England makes an order for winding-up a company under the principal act (c), it may, if it thinks fit, direct all subsequent proceedings to be had in a county court held under an act of the session of the ninth and tenth years of the reign of her present majesty, chapter ninety-five, and the acts amending the same; and thereupon such county court shall, for the purpose of winding-up the company, be deemed to be ‘the court’ within the meaning of the principal act, and shall have, for the purposes of such winding-up, all the jurisdiction and powers of the High Court of Chancery.”

As to transfer
of suits from
one county
court to
another.

Sect. 42. “If during the progress of a winding-up it is made to appear to the High Court of Chancery that the same could be more conveniently prosecuted in any other county court, it shall be competent for the High Court of Chancery to transfer the same to such other county court, and thereupon the winding-up shall proceed in such other county court.”

Parties ag-
grieved may
appeal.

Sect. 43. “If any party in a winding-up under this act is dissatisfied

(b) The acts now in force for winding-up companies are “The Companies Act, 1862” (25 & 26 Vict. c. 89), and “The Companies Act, 1867” (30 & 31 Vict. c. 131); see also “The Joint Stock Companies Arrangement Act, 1870” (33 & 34 Vict. c. 104). Under sect. 17, *Byles, J.*, intimated that the judge of the county court has power to stay proceedings in actions brought against individual members of the society for goods supplied to the society before registration. See *Henderson*

v. *Bamber*, 35 L. J. (N. S.) C. P. 65. It will be borne in mind that this jurisdiction on winding-up is quite distinct from the settlement of disputes in industrial and provident societies, as to which, see *ante*, § 3. As to the jurisdiction of the county courts in winding-up ordinary partnerships, see *ante*, p. 21.

(c) “The Principal Act” referred to, is “The Companies Act, 1862” (25 & 26 Vict. c. 89).

with the determination or direction of a judge of a county court on any matter in such winding-up, such party may appeal from the same to the vice-chancellor named for that purpose by the lord chancellor by general order; provided that such party shall, within thirty days after such determination or direction, give notice of such appeal to the other party or his attorney, and also deposit with the registrar of the county court the sum of ten pounds as security for the costs of the appeal; and the said court of appeal may make such final or other decree or order as it thinks fit, and may also make such order with respect to the costs of the said appeal as such court may think proper, and such order shall be final" (d).

The exercise by county courts of these powers is so rare, as to render it not only unnecessary, but inexpedient to enter upon the jurisdiction and practice in relation to winding-up companies, involving as they do a very large proportion of the business of the Court of Chancery and a multitude of decisions.

General Orders and Rules.—“The general orders, rules, and forms of the High Court of Chancery regulating for the time being the mode of proceeding under ‘The Companies Act, 1862,’ shall be the orders, rules, and forms in all proceedings in the county courts for the winding-up of a society registered under ‘The Industrial and Provident Societies Act, 1862,’ or for the winding-up of a company under ‘The Companies Act, 1867,’ so far as the same are applicable: provided that, where it shall appear to the court inconvenient that the Bank of England should be the bank used for the purposes mentioned in the order and rules, it shall be competent for the court to name some bank to be used in lieu of the Bank of England” (e).

Orders under the Companies Act, 1867; and the Industrial and Provident Societies Act, 1862. 25 & 26 Vict. c. 87, 89. 30 & 31 Vict. c. 131.

Court Fees.—

Proceedings under “The Industrial and Provident Societies Act, 1862.”

For every petition presented to a court, under section 17 of the	£	s.	d.
above act	1	0	0
For every order for winding-up	2	0	0
For every sitting or adjourned sitting of the court in the matter			
after the order for winding-up shall have been made	0	15	0
For the taxation of every bill of costs	0	10	0

“The Companies Act, 1862.”

For every sitting to take evidence	2	0	0
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(d) In a case arising before this provision, it was held that the ordinary county court right of appeal to a common law court, did not apply to winding-up orders under sect. 17 of “The Industrial and Provident Societies Act, 1862.” *Henderson v. Bamber*, 35 L. J. (N. S.) C. P. 65.

(e) County Court Orders and Rules, 1868 (appended to Orders and Rules

in Equity). “The Companies Act, 1867,” sects. 44, 45, 46, provided for the framing of county court rules and the scale of costs and charges for counsel and attorneys, and also fees for the remuneration of the registrars and high bailiffs of county courts. The above general order has been the only exercise of the power to frame rules and orders.

"The Companies Act, 1867."

	£	s.	d.
For every sitting before the judge (f)	2	0	0

Registrars' and High Bailiffs' Fees under "The Companies Act, 1867."—

Registrars' Fees.

For every summons	0	3	0
For every order	0	5	0
For every office copy of order	0	5	0
For every advertisement	1	0	0
For every certificate	0	5	0
For filing every affidavit or statement on affirmation, declaration, or attestation upon honour	0	1	6
For every sitting by the registrar	0	10	0
When the sitting is longer than an hour, then for every additional hour or part thereof	0	7	0

High Bailiffs' Fees.

Same fees for service and execution as in equitable matters.

Costs.]—The following is the "Scale of Costs and Charges to be paid to Counsel and Attornies, under 'The Industrial and Provident Societies Act, 1862,' and 'The Companies Act, 1867,'" (g).

"Attorneys shall be entitled to charge and be allowed in proceedings under 'The Industrial and Provident Societies Act, 1862,' and in proceedings transferred to a county court under 'The Companies Act, 1867,' the same costs and charges as they would be allowed in the Court of Chancery, except that where the amount of the subscribed capital of the society or company shall not exceed 2,000*l.*, they shall be allowed such costs and charges according to the lower scale authorized by the second rule of the 38th Consolidated General Orders of the Court of Chancery."

§ 5.—ENFORCING OR SETTING ASIDE AGREEMENTS BETWEEN
ATTORNEYS AND THEIR CLIENTS.

"The Attorneys and Solicitors' Act, 1870" (33 & 34 Vict. c. 28), contains some provisions which may be conveniently treated under the head of Equitable Jurisdiction of County Courts.

The above-mentioned statute enacts,—

SECT. 4. "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done or to be done by such attorney

(f) Order of the Treasury, 30th December, 1867.

(g) See note (c), ante, p. 139.

or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or per-centage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this act contained: provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

After some other provisions, the act proceeds,—

Sect. 8. "No action or suit shall be brought or instituted upon any such agreement; but every question respecting the validity or effect of any such agreement may be examined and determined, and the agreement may be enforced or set aside, without suit or action, on motion or petition of any person, or the representative of any person, a party to such agreement, or being or alleged to be liable to pay, or being or claiming to be entitled to be paid, the costs, fees, charges or disbursements in respect of which the agreement is made by the court in which the business, or any part thereof, was done, or a judge thereof, or if the business was not done in any court, then, where the amount payable under the agreement exceeds fifty pounds, by any superior court of law or equity or a judge thereof, and where such amount does not exceed fifty pounds, by the judge of a county court which would have jurisdiction in an action upon the agreement."

Sect. 9. "Upon any such motion or petition as aforesaid, if it shall appear to the court or judge that such agreement is in all respects fair and reasonable between the parties, the same may be enforced by such court or judge by rule or order, in such manner and subject to such conditions, if any, as to the costs of such motion or petition as such court or judge may think fit; but if the terms of such agreement shall not be deemed by the court or judge to be fair and reasonable, the same may be declared void, and the court or judge shall thereupon have power to order such agreement to be given up to be cancelled, and may direct the costs, fees, charges and disbursements incurred or chargeable in respect of the matters included therein to be taxed in the same manner and according to the same rules as if such agreement had not been made; and the court or judge may also make such order as to the costs of and relating to such motion or petition, and the proceedings thereon, as to the said court or judge may seem fit."

Sect. 10. "When the amount agreed for under any such agreement has been paid by or on behalf of the client, by any person chargeable with or entitled to pay the same, any court or judge having jurisdiction to examine and enforce such an agreement may, upon application by the person who has paid such amount, within twelve months after the payment thereof, if it appears to such court or judge that the special cir-

circumstances of the case require the agreement to be re-opened, re-open the same, and order the costs, fees, charges and disbursements to be taxed, and the whole or any portion of the amount received by the attorney or solicitor to be repaid by him, on such terms and conditions as to the court or judge may seem just."

"Where any such agreement is made by the client in the capacity of guardian or of trustee under a deed or will, or of committee of any person or persons whose estate or property will be chargeable with the amount payable under such agreement, or with any part of such amount, the agreement shall before payment be laid before the taxing officer of a court having jurisdiction to enforce the agreement, and such officer shall examine the same, and may disallow any part thereof, or may require the direction of the court or judge to be taken thereon by motion or petition; and if in any such case the client pay the whole or any part of the amount payable under the agreement without the previous allowance of such officer or court or judge as aforesaid, he shall be liable at any time to account to the person whose estate or property is charged with the amount paid, or with any part thereof, for the amount so charged; and if in any such case the attorney or solicitor accept payment without such allowance, any court which would have had jurisdiction to enforce the agreement may, if it think fit, order him to refund the amount so received by him under the agreement."

Subsequent sections (ss. 13 & 14) provide for the case of an attorney or solicitor dying or becoming incapable to act before the agreement has been completely performed.

It is to be observed that the registrar is the taxing officer of a county court.

§ 6.—ACKNOWLEDGMENT OF DEEDS BY MARRIED WOMEN (*h*).

In pursuance of a recommendation of the county court commissioners, 1855, "The County Courts Act, 1856" (19 & 20 Vict. c. 108, s. 73), enacts that—

"Any acknowledgment to be made by any married woman of any deed under the act of the third and fourth years of the reign of his late majesty King William the Fourth, chapter seventy-four, may be received by a judge of a county court in the same manner as such acknowledgment may be received by a judge of a superior court."

Pursuant to the provisions of the act referred to, 3 & 4 Will. 4, c. 74 ("For the Abolition of Fines and Recoveries, and for the substitution of more simple modes of assurance"), the judge, before he receives the acknowledgment by any married woman "of any deed by which any disposition, release, surrender, or extinguishment shall be made by her" under that act, "shall examine her,

(*h*) Although not part of the duties of the courts of equity, this power, expressly given to judges of the

county courts, may be conveniently added to the present chapter.

apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consents to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void" (*i*).

When the deed is acknowledged (having been previously executed) the judge signs a memorandum "indorsed on or written at the foot or in the margin of such deed" in a form provided by the act (*k*); and also signs a certificate, "written or engrossed on a separate piece of parchment," of the taking of such acknowledgment, in a form also provided by the act (*l*).

As this form of certificate includes a statement that the married woman was, at the time of her acknowledging the deed, "of full age and of competent understanding," the judge must satisfy himself on this point, as a statement of mere belief is insufficient (*m*).

"Every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed," is lodged with an officer of the Court of Common Pleas, appointed by the chief justice (*n*).

The act empowered the Court of Common Pleas from time to time to make orders and regulations touching the mode of examination, and "touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place" (*o*).

Rules of Hilary Term, 1834, require the affidavit of verification to "be made by some practising attorney or solicitor of one of the courts at Westminster, or of one of the Counties Palatine of Lancaster or Durham, and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding," and "the place or places where such acknowledgment shall be taken shall be set forth in such affidavit; and that previously to such acknowledgment being taken, the deponent had inquired of such married woman whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reasons

(*i*) 3 & 4 Will. 4, c. 74, s. 80.

(*k*) *Id.* s. 84.

(*l*) *Id.*

(*m*) See *Re Coventry*, 8 Scott, 147.

(*n*) 3 & 4 Will. 4, c. 74, ss. 85, 89.

(*o*) *Id.* s. 89.

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to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said judge or commissioners."

A rule of Trinity Term, 1834, modified the above rule by ordering that "where such parts of the affidavit verifying the certificate of acknowledgment, as state the deponent's knowledge of the party making the acknowledgment and her being of full age, cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do."

The following is a form of affidavit of verification, to be made by the attorney or solicitor (generally the attorney acting in the matter), sworn before a commissioner of the Common Pleas :—

In the Common Pleas.

I, A. B., of in the county of gentleman, one of the attorneys of the court of , make oath and say :—

1. That I know H., the wife of E. F., in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said H., and the certificate signed by the judge of the county court in the said certificate mentioned, on the day and year therein mentioned at in the county of in my presence.

2. That at the time of making such acknowledgment the said H. was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made.

3. That previous to the said H. making the said acknowledgment, I inquired of her, the said H., whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for or in consequence of her so giving up her interest in such estates; and that in answer to such inquiry the said H. declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said H., I have no reason to doubt the truth, and I verily believe the same to be true (*p*) [*or*, declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates].

[4. That before her acknowledgment was so taken I was satisfied, and do now verily believe, that such provision has been made by deed [*or*, writing, *or*, that the terms thereof have been reduced into writing].]

4 [*or* 5]. That it appears by the deed acknowledged by the said H.

(*p*) As to this statement (required by Rules of Hilary Term, 1834), see *In re Dowling*, 18 C. B. Rep., N. S.

223; *S. C.*, nom. *In re Dornig*, 34 L. J. (N. S.) C. P. 173.

that the premises wherein she is stated to be interested are described to be in the [parish] of _____ in the county of _____ .
 Sworn at _____ in the county of _____ this }
 day of _____ 187 . }
 Before me,

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Although strict compliance with the rules is in general required, yet as the rules are not in the nature of an enactment, but only as a guide, they can and will be modified by the court in very exceptional cases (*q*).

The affidavit and certificate are generally transmitted through the London agents of the attorney to the officer of the Court of Common Pleas for enrolment.

By Rule 6 of Hil. Term, 1834, these documents must be delivered within one month from the making the acknowledgment. Nevertheless, where several years had elapsed between the making the acknowledgment and the taking the certificate to the office for enrolment, the court allowed it to be received by the officer for that purpose on the delay being accounted for and shown to have been unintentional, and on the court being satisfied as to how the property had been dealt with, and the purpose for which the certificate was wanted to be enrolled (*r*).

The following note is appended to the County Court (Common Law) Rules, 1868 :—

“It is considered to be unnecessary to give any rules with respect to taking acknowledgments of married women, as it is the duty of the attorney employed to prepare the certificate and affidavit, and swear to the latter; and the course to be followed by the judge is laid down in the act 3 & 4 Will. 4, c. 74. The only duty for the registrar to perform, besides that of swearing the attorney to the affidavit (*s*), is that of putting his initials against all ALTERATIONS, INTERLINEATIONS, or ERASURES either in the CERTIFICATE or AFFIDAVIT” (*t*).

A treasury order (*u*) provides the following court fee :—

For taking the acknowledgment of a married woman . . . £1 0 0

(*q*) See *In re Packer*, 39 L. J. (N. S.) C. P. 238. In that case the acknowledgment had been taken twelve years before and not filed, and the woman and the commissioners were now dead. The court allowed the certificate to be received for enrolment on an affidavit of an attorney verifying the signatures under sect. 85, and an affidavit of the husband as to the other matters required to be deposed to. See also, *Re Hall*, 19 C. B. Rep., N. S. 369; *Ex parte Stevens*, 3 Hodges, 13.

(*r*) *Re Edge*, 35 L. J. (N. S.) C. P. 263.

(*s*) The registrar cannot take the affidavit *quâ* registrar. He can only do so if he is a commissioner to take affidavits in the Common Pleas.

(*t*) It seems, however, that the initials to the certificate should be those of the judge, not of the registrar; and, in the case of the affidavit, the commissioner before whom it is sworn must initial the alterations, &c.

(*u*) Order of Commissioners of her Majesty's Treasury regulating Fees, 30th December, 1867.

PART V.

AD MIRALTY JURISDICTION OF THE COUNTY COURTS.

CHAPTER I.

JURISDICTION IN MARITIME CASES BEFORE THE COUNTY COURTS ADMIRALTY JURISDICTION ACT, 1868.

- § 1.—OF THE NATURE AND JURISDICTION OF ADMIRALTY CASES IN GENERAL.
- § 2.—THE ARREST OF FOREIGN SHIPS UNDER “THE MERCHANT SHIPPING ACT, 1854.”
- § 3.—COUNTY COURT JURISDICTION IN SALVAGE CASES UNDER THE MERCHANT SHIPPING ACTS, 1854 AND 1862.

§ 1.—OF THE NATURE AND JURISDICTION OF ADMIRALTY CASES IN GENERAL.

THE original jurisdiction of the county courts was confined (with the exceptions of balance of partnership accounts and legacies and distributive shares) to “pleas of personal actions” (*a*). Those courts, therefore, had no jurisdiction over matters cognizable by the admiralty courts. Another reason, moreover, prevented county courts having jurisdiction in such matters. Admiralty cases, strictly speaking, could not arise within the precincts of any county, and therefore not within any district established under the County Courts Acts, the districts consisting only of counties and parts of counties (*b*).

(*a*) See *ante*, Vol. I. p. 28.

(*b*) “The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shown hereafter; but they are not subject to the common law. This main sea begins at the low-water mark. But between the high-water mark and the low-water mark, where the sea ebbs and flows, the common law and the admiralty

have *divisum imperium*, and alternate jurisdiction; one upon the water, when it is full sea; and the other upon land, when it is an ebb.” 1 Bla. Comm. 110; see also *Constable’s case*, 5 Co. Rep. 106. Creeks and inland seas, however, are within the body of the adjoining counties. Thus the Bristol Channel is part of the counties by the shores of which it is bounded — namely, Somerset and Glamorganshire

In order to a clear view of this matter it is desirable to refer somewhat more fully to the ordinary admiralty jurisdiction.

“The courts maritime, or admiralty courts,” says Mr. Justice Blackstone, “have jurisdiction and power to try and determine all maritime causes; or such injuries, which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be, therefore, causes arising wholly upon the sea, and not within the precincts of any county. For the statute 13 Ric. II. c. 5, directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea; and the statute 15 Ric. II. c. 3, declares that the court of the admiral hath no manner of cognizance of any contract, or of any other thing, done within the body of any county, either by land or by water; nor of any wreck of the sea; for that must be cast on land before it becomes a wreck. But it is otherwise of things *flotsam, jetsam* and *ligan*; for over them the admiral hath jurisdiction, as they are in and upon the sea. If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the admiralty court from its jurisdiction; for, part belonging properly to one cognizance and part to another, the common or general law takes place of the particular. Therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as seamen’s wages, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land (*c*); yet, in general, if there be a contract made in England and to be executed upon the seas, as a charterparty or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on ship board to pay money in London or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law” (*d*).

“Where the admiral’s court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law. And so *vice versâ*, if it hath jurisdiction of the original, it hath also jurisdiction of all consequential questions, though properly determinable at common law” (*e*).

respectively. *The Queen v. Cunningham*, 1 Bell, C. C. R. 66; 28 L. J. (N. S.) M. C. 66. So the sea between the Isle of Wight and Hampshire is all within the county of Southampton. *Per* Wightman, J., *S. C.*

(*c*) But now no suit or proceeding for the recovery of wages under 50*l.*

can be instituted in the admiralty or vice-admiralty court or in any superior court. See 17 & 18 Vict. c. 104, s. 189.

(*d*) 3 Bla. Comm. 106, 107.

(*e*) *Id.* p. 108. Blackstone further says, that “In case of prizes also in time of war, between our own nation

PART V.
CHAP. I.Jurisdiction
under 3 & 4
Vict. c. 65.

The original jurisdiction of the admiralty court has been considerably extended by statute.

The 3 & 4 Vict. c. 65, gave the court jurisdiction over claims and causes of action by mortgagees of vessels (*f*), and "all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said court" (*g*). And also "jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received or necessaries furnished, in respect of which such claim is made" (*h*). The act, however, provided that "nothing herein contained shall be deemed to preclude any of her Majesty's courts of law or equity now having jurisdiction over the several subject-matters and causes of action hereinbefore mentioned from continuing to exercise such jurisdiction as fully as if this act had not been passed" (*i*).

Jurisdiction
under "The
Admiralty
Court Act,
1861."

"The Admiralty Court Act, 1861" (24 & 25 Vict. c. 10), further extended the jurisdiction (and improved the practice) of the High Court of Admiralty. It gave the court jurisdiction over any claim for the building, equipping or repairing of ships, if under arrest of the court (*h*); and also over "any claim for necessaries supplied to any ship elsewhere than in the port to which the ship

and another, or between two other nations, which are taken at sea, and brought into our ports, the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations." The Court of Admiralty, however, has no original jurisdiction in prize matters; the jurisdiction which it exercises is derived from the authority of parliament and the royal prerogative, at the outbreak of a war requiring the services of the navy, it has been customary for the crown to issue a proclamation, bestowing the proceeds of maritime captures upon the takers, and at the same time to issue a commission, requiring the Lords of the Admiralty to empower the admiralty court "to take cognizance of and judicially proceed in matters of prize," and "to hear and determine the same according to the course of admiralty and the law of nations." See *The Banda and Kirtwee Booty*, 35 L. J. (N. S.) Adm. 17. Some permanent provisions on this

subject were made by "The Naval Prize Act, 1864" (27 & 28 Vict. c. 25). The court's jurisdiction with respect to booty commenced with the passing of the 3 & 4 Vict. c. 65, s. 22.

(*f*) Sect. 3. See also 24 & 25 Vict. c. 10, s. 11.

(*g*) 3 & 4 Vict. c. 65, s. 4.

(*h*) *Id.* sect. 6. See also 9 & 10 Vict. c. 99, s. 40; and 17 & 18 Vict. c. 104, *post*, p. 152. All questions relating to salvage, both as regards the amount due in respect of services and the apportionment of the amount among the different classes of salvors, are within the jurisdiction of the admiralty court subject to "The Merchant Shipping Act, 1854," *post*; *Atkinson v. Woodall*, 31 L. J. (N. S.) M. C. 174.

(*i*) Sect. 23.

(*k*) 24 & 25 Vict. c. 10, s. 4. This section does not give a maritime lien. See judgment in *Johnson v. Black (The Two Ellens)*, 41 L. J. (N. S.) Adm. 35.

belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: provided always, that if in any such cause the plaintiff do not recover 20*l.* he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court" (*l*), also "over any claim by the owner, or consignee, or assignee of any bill of lading of any goods carried into any port of London or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: provided always, that if in any such cause the plaintiff do not recover 20*l.*, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court" (*m*); also "over any claim for damage done by any ship" (*n*); and also "jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit" (*o*). The act further gave the Court of Admiralty jurisdiction over any claim by a seaman of any ship "for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship: provided always, that if in any such cause the plaintiff do not recover 50*l.* he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court" (*p*).

It has been held that jurisdiction is given under this section to the admiralty court to entertain a claim by seamen for wrongful dismissal and the consequential damages (*q*).

(*l*) 24 & 25 Vict. c. 10, s. 5. See *Johnson v. Black (The Two Ellens)*, 41 L. J. (N. S.) Adm. 33.

(*m*) *Id.* s. 6.

(*n*) *Id.* s. 7. This includes claims for personal injuries caused by unskilful navigation. *The Beta*, 38 L. J. (N. S.) Adm. 50.

(*o*) *Id.* s. 8. One who has parted with his shares in a vessel may, nevertheless, sue under this section for the

accounts as to earnings while he was a co-owner. *The Lady of the Lake*, 39 L. J. (N. S.) Adm. 40.

(*p*) *Id.* s. 10. The act also gave the High Court of Admiralty extended jurisdiction in respect of mortgaged ships, and also certain powers of the Court of Chancery under "The Merchant Shipping Act, 1854."

(*q*) *The Great Eastern*, 36 L. J. (N. S.) Adm. 15.

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The Court of Admiralty was formerly held before the Lord High Admiral of England or his deputy called the judge of the court. Its proceedings are according to the method of the civil law like those of the ecclesiastical courts; upon which account it was usually held at the same place with the superior ecclesiastical courts, at Doctors' Commons, in London. It was not a court of record (*r*). Now, however, it is a court of record (*s*), and is presided over by a single judge specially appointed to that office, or by the Dean of Arches (*t*).

Claims *in rem*, and *in personam*.

Where the plaintiff's claim rests upon a true maritime lien, or even if it be a simple right of action given by statute to the admiralty court, it may be urged either against such property as is subject to the power and jurisdiction of the court, *i. e.*, ships, cargoes, and freights, or against their owners; in the former case, the proceeding or action is *in rem*; in the latter case it is *in personam*. The causes of action, which are also in themselves maritime liens, are damage by collision, salvage, towage, pilotage, bottomry, and seamen's and master's wages (*u*).

Where there is a remedy both *in personam* and *in rem* a person who has resorted to one of these remedies may, if he does not get thereby full satisfaction, resort to the other; but if a person has resorted to one of these remedies and has recovered full compensation and such compensation has been paid, no further proceeding can be taken (*x*).

§ 2.—THE ARREST OF FOREIGN SHIPS UNDER “THE MERCHANT SHIPPING ACT, 1854.”

The first matter of a maritime kind in which county courts obtained jurisdiction, related to the arrest of foreign ships injuring the property of English subjects, and this jurisdiction was not given to county courts in direct terms, but to all courts of record, in which definition county courts are of course included. The provision referred to is contained in “The Merchant Shipping Act, 1854” (17 & 18 Vict. c. 104).

Sect. 527 of that act enacts that—

Power of judge of Court of Record or Admiralty to

“Whenever any injury has, in any part of the world, been caused to any property belonging to her Majesty or to any of her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom or within three miles of the

(*r*) 3 Bla. Comm. 69.

(*s*) 24 Vict. c. 10, s. 14.

(*t*) See 3 & 4 Vict. c. 65, s. 1.

(*u*) See Coote's Admiralty Practice, 2nd edit., p. 16. There is no maritime lien for necessities, and the ship is not chargeable with them until the suit is actually instituted. *John-*

son v. Black (The Two Ellens), 41 L. J. (N. S.) Adm. 33. The county court admiralty jurisdiction may be exercised either by proceedings *in rem* or by proceedings *in personam*. See 32 & 33 Vict. c. 51, s. 3, *post*, p. 161.

(*x*) *Yeo v. Tatem (The Orient)*, 40 L. J. (N. S.) Adm. 29.

coast thereof, it shall be lawful for the judge of any court of record in the United Kingdom, or for the judge of the High Court of Admiralty, or in Scotland the Court of Session, or the sheriff of the county within whose jurisdiction such ship may be, upon its being shown to him by any person applying summarily that such injury was probably caused by the misconduct or want of skill of the master or mariners of such ship, to issue an order directed to any officer of customs or other officer named by such judge, requiring him to detain such ship until such time as the owner, master or consignee thereof has made satisfaction in respect of such injury, or has given security to be approved by the judge, to abide the event of any action, suit or other legal proceeding that may be instituted in respect of such injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom such order is directed, shall detain such ship accordingly."

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arrest foreign
ship that
has occa-
sioned da-
mage.

Sect. 528. "In any case where it appears that before any application can be made under the foregoing section, such foreign ship will have departed beyond the limits therein mentioned, it shall be lawful for any commissioned officer on full pay in the military or naval service of her Majesty, or any British officer of customs, or any British consular officer, to detain such ship until such time as will allow such application to be made, and the result thereof to be communicated to him; and no such officer shall be liable for any costs or damages in respect of such detention, unless the same is proved to have been made without reasonable grounds."

Power in
certain cases
to detain
ship before
application
made to
judge.

Sect. 529. "In any action, suit or other proceeding in relation to such injury, the person so giving security as aforesaid shall be made defendant or defender, and shall be stated to be the owner of the ship that has occasioned such damage; and the production of the order of the judge made in relation to such security shall be conclusive evidence of the liability of such defendant or defender to such action, suit or other proceeding."

Who to be
defendant
to suit in
such cases.

§ 3.—COUNTY COURT JURISDICTION IN SALVAGE CASES UNDER THE MERCHANT SHIPPING ACTS, 1854 AND 1862.

"The Merchant Shipping Act Amendment Act, 1862" (25 & 26 Vict. c. 63), gave a jurisdiction to county courts in salvage cases. Sect. 49 of that act, amending the provisions contained in the eighth part of the principal act ("The Merchant Shipping Act, 1854"), for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeals and litigation in such cases, enacted (sub-section (6)), that it shall be competent in England, for any county court judge "to exercise the same jurisdiction in salvage cases as is given to two justices," and (sub-section (8)) "all the provisions of the principal act relating to summary proceedings in salvage cases, and to the prevention of unnecessary appeals in such cases, shall, except so far as the same are altered by this act, extend and apply to all such proceedings, whether under the principal act or this act, or both of such acts."

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In order, therefore, to ascertain the jurisdiction of county courts under this act it is necessary to refer to the principal act. That act (17 & 18 Vict. c. 104, Part VIII.) under the head of salvage in the United Kingdom, enacts that—

Sect. 458. "In the following cases (that is to say),

"Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,

"(1) In assisting such ship or boat,

"(2) In saving the lives of the persons belonging to such ship or boat (*y*),

"(3) In saving the cargo or apparel of such ship or boat, or any portion thereof;

"And whenever any wreck is saved by any person other than a receiver within the United Kingdom;

"There shall be payable by the owners of such ship or boat, cargo, apparel or wreck, to the person by whom such services or any of them are rendered or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned."

Sect. 459. "Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund, such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives."

Sect. 460. "Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have hitherto been determined (*z*); but wherever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel or wreck as aforesaid, and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof by arbitration or otherwise.

"Then, if the sum claimed does not exceed two hundred pounds (*a*),

"Such dispute shall be referred to the arbitration of any two justices of the peace resident as follows; (that is to say)—

(*y*) By "The Admiralty Courts Act, 1861" (24 & 25 Vict. c. 10), s. 9, "All the provisions of 'The Merchant Shipping Act, 1854,' in regard to salvage of life from any ship or boat within the limits of the united kingdom shall be extended to the salvage of life from any British ship or boat, wheresoever the services may have been rendered, and from any foreign

ship or boat, where the services have been rendered either wholly or in part in British waters."

(*z*) For the limits of the jurisdiction of the Lord Warden of the Cinque Ports, see 1 & 2 Geo. 4, c. 76, s. 18.

(*a*) See the extended jurisdiction under 25 & 26 Vict. c. 63, s. 49, *post*, p. 153.

Salvage in respect of services rendered in the united kingdom.

Salvage for life may be paid by Board of Trade out of Mercantile Marine Fund.

Disputes as to salvage, how to be settled.

“In case of wreck, resident at or near the place where such wreck is found;

“In case of services rendered to any ship or boat, or to the persons, cargo, or apparel belonging thereto, resident at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim for salvage arises.

“But if the sum claimed exceeds two hundred pounds (*b*),

“Such dispute may, with the consent of the parties, be referred to the arbitration of such justices as aforesaid, but if they do not consent shall in England be decided by the High Court of Admiralty of England, in Ireland by the High Court of Admiralty of Ireland, and in Scotland by the Court of Session: subject to this proviso, that if the claimants in such dispute do not recover in such court of admiralty or court of session a greater sum than two hundred pounds, they shall not, unless the court certifies that the case is a fit one to be tried in a superior court, recover any costs, charges or expenses incurred by them in the prosecution of their claim:

“And every dispute with respect to salvage may be heard and adjudicated upon on the application either of the salvor or of the owner of the property salvaged or of their respective agents.”

Sect. 461. “Whenever in pursuance of this act any dispute as to salvage is referred to the arbitration of two justices, they may either themselves determine the same, with power to call to their assistance any person conversant with maritime affairs as assessor, or they may if a difference of opinion arises between them, or without such difference, if they think fit, appoint some person conversant with maritime affairs as umpire to decide the point in dispute; and such justices or their umpire shall make an award as to the amount of salvage payable, within the following times, that is to say, the said justices within forty-eight hours after such dispute has been referred to them, and the said umpire within forty-eight hours after his appointment, with power nevertheless for such justices or umpire by writing under their or his hands or hand to extend the time within which they and he are hereby respectively directed to make their or his award.”

Manner in which justices may decide disputes.

“The Merchant Shipping Act Amendment Act, 1862” (25 & 26 Vict. c. 63), which, as already stated, empowered a county court judge to exercise the jurisdiction thus given to two justices, at the same time enacted (s. 49, sub-s. (1)), that the provisions of the principal act for giving summary jurisdiction to two justices “shall extend to all cases in which the value of the property saved does not exceed 1,000*l.*, as well as to the cases provided for by the principal act,” and also empowered “one of her Majesty’s principal secretaries of state to determine a scale of costs to be awarded in salvage cases by any such justices or court as aforesaid.”

Other provisions applicable as well to the exercise of this juris-

(*b*) See the extended jurisdiction under 25 & 26 Vict. c. 63, s. 49, *infra*.

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CHAP. I.Jurisdiction
in salvage
cases under
the Merchant
Shipping
Acts.

diction by a county court judge as by justices, relate to the production of documents and the examination of witnesses on oath (*c*); the valuation of the property (*d*); appeal to the Court of Admiralty (*e*), the payment and apportionment and manner of enforcing payment of the salvage (*f*), and power to award costs (*g*).

It will be convenient to state how the jurisdiction in salvage cases stands under the Merchant Shipping Acts. Under the 460th section of "The Merchant Shipping Act, 1854," the justices had jurisdiction only where the salvage service was performed within the kingdom, or within three miles from shore, and where the claim did not exceed 200*l.*; and that jurisdiction (except cases within the Cinque Ports) was exclusive of the High Court of Admiralty (*h*). By "The Merchant Shipping Act, 1862," the justices and the county court have jurisdiction wherever the service was performed (except in the Cinque Ports), and also in all cases where either the sum claimed does not exceed 200*l.*, or where the value of the property saved does not exceed 1,000*l.*, and under these acts the jurisdiction so given to justices and the county courts was exclusive of the High Court of Admiralty (*i*).

It has been held, however, that "The County Courts Admiralty Jurisdiction Act, 1868" (31 & 32 Vict. c. 71) (*k*), has made an alteration in this respect, and that the High Court of Admiralty has jurisdiction where the value is under 1,000*l.*, and will exercise a discretion as to taking cognizance of salvage suits under that amount (*l*).

As regards cases arising in the Cinque Ports, the High Court and the Court of Admiralty of the Cinque Ports, and the commissioners appointed by the lord warden have concurrent jurisdiction in salvage cases (*m*); for the general words in sect. 49 of "The Merchant Shipping Act Amendment Act, 1862," do not refer to or affect the earlier part of sect. 460 of "The Merchant Shipping Act, 1854," which provided that disputes with respect to salvage arising within the boundaries of the Cinque Ports should be determined in the manner in which the same had previously been determined (*n*).

The meaning in sect. 460 of "The Merchant Shipping Act, 1854," of "the sum claimed," is a claim or sum asked antecedent to any proceedings, for the section enacts that the dispute shall be

(*c*) 17 & 18 Vict. c. 104, s. 463.

(*d*) 25 & 26 Vict. c. 63, s. 50.

(*e*) 17 & 18 Vict. c. 104, ss. 464, 465.

(*f*) *Id.* ss. 466—470.

(*g*) *Id.* s. 462.

(*h*) See *Atkinson v. Bell*, 31 L. J. (N. S.) M. C. 174.

(*i*) *The William and John*, Br. & Lush. 55; 32 L. J. (N. S.) Adm. 102; and see *The Louisa*, Br. & Lush. 58. The court, however, had power to

condemn in costs, and also in damages in case of a wrongful arrest. *The Kate*, 33 L. J. (N. S.) Adm. 122.

(*k*) See the act and especially s. 9, *post*, Chap. II.

(*l*) *The Herman Wedel*, 39 L. J. (N. S.) Adm. 30; *The Empress*, 41 L. J. (N. S.) Adm. 32.

(*m*) *The Maria Luisa*, Swabey, 67.

(*n*) *The Jenne Paul*, 36 L. J. (N. S.) 11.

referred, and in substance that is a direction to refer to a tribunal after a claim. The claim must exist before there could be a reference, and the claim could not be made in any court, for the proceedings were to follow, not precede (*o*).

It is to be observed that under the Merchant Shipping Acts the jurisdiction of the court being determined by the value of the property, the time at which such value must be estimated is when it is brought into a place of safety by the salvors, and not at any subsequent period (*p*); and the burthen of proof as to value lies upon the party who seeks to show that the court has no jurisdiction (*q*).

Although the jurisdiction given by "The Merchant Shipping Act, 1854," relates to the "reasonable amount of salvage" to be paid, the jurisdiction of the county court (and consequently of the justices also) is not ousted in cases where the *quantum meruit* had been already determined by a special agreement, for such an agreement is not necessarily binding on the court. If the bargain is a fair one, the court acts upon it, and will not set it aside or allow the salvors to claim upon a *quantum meruit*. But as a ship in distress would very likely be driven to make a hard bargain, where it is altogether extortionate, the Court of Admiralty is not bound by it, neither is the county court (*r*).

Cases under the Merchant Shipping Acts went before the county court judge sitting not under his ordinary jurisdiction, but sitting as an arbitrator (*s*). Nevertheless, as the cause must be brought before the county court judge, and the parties must be made to appear before him in some manner or other, the County Court Rules (Common Law) provided that in proceedings in the county courts under the 25 & 26 Vict. c. 63, a plaint shall be entered, and a summons shall be issued thereon, and the rules and practice of the court shall be adopted with respect to such proceedings, so far as the same are applicable (*t*).

(*o*) *The William and John*, Br. & Lush. 55; 32 L. J. (N. S.) Pro. M & Adm. 102.

(*p*) *The Stella*, 36 L. J. (N. S.) Adm. 13.

(*q*) *Id.*

(*r*) *Beadnell v. Beeson*, 37 L. J. (N. S.) Q. B. 171; and see *The William and John*, 32 L. J. (N. S.) Pro. M. & Adm. 102. In *Beadnell v. Beeson*, the agreement was in these words: "I, G. H., master of *The Pride*, the ship being on shore and in danger of becoming a wreck, agree to pay 250*l.* to a certain number of men, providing they can get the ship and cargo off and safely into some place of safety." It is to be observed that, although the sum claimed exceeded

200*l.* the whole value of the ship (a schooner) and cargo did not exceed 1,000*l.*, and therefore there was no objection to the jurisdiction in respect of the amount.

(*s*) Blackburn, J., in his judgment in *Beadnell v. Beeson*, 37 L. J. (N. S.) Q. B. 173.

(*t*) County Court (Common Law) Rules, 1868, Rule 276. The Treasury Order of 30th December, 1867, directs that in proceedings under "The Merchant Shipping Act, 1854," the poundage shall be estimated upon the amount in dispute; see *ante*, Vol. I. p. 19. See now as to the procedure in general in admiralty cases in the county courts, *post*, Chap. II.

The power given to a county court judge is ambiguous, so far as relates to the area of his jurisdiction. In the case of wreck, jurisdiction is given to justices resident "at or near the place where such wreck is found;" and in the case of services rendered to the ship or persons, cargo or apparel, to justices resident "at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident, by reason whereof the claim for salvage arises" (*u*).

The intention of the legislature could scarcely have been to make the jurisdiction of the county court judge depend on the position of his personal residence, but rather on the stranding or distress of the vessel on a part of the shore within his county court district. Whether such an intention has been effectually provided for, may be doubted.

This and many other questions respecting the jurisdiction of the county courts under the Merchant Shipping Acts may never now be raised, for although the general admiralty jurisdiction subsequently conferred on the county courts by the Act of 1868 (the subject of the next Chapter) has not expressly repealed the former jurisdiction, the provisions of the Merchant Shipping Acts, so far as they relate to the county courts, are, for most purposes at least, practically merged in the general jurisdiction.

(*u*) See *ante*, pp. 152, 153.

CHAPTER II.

ADMIRALTY JURISDICTION UNDER "THE COUNTY COURTS ADMIRALTY JURISDICTION ACT, 1868," AND THE AMENDMENT ACT, 1869.

- § 1.—COUNTY COURT DISTRICTS FOR ADMIRALTY PURPOSES.
- § 2.—EXTENT OF JURISDICTION.
- § 3.—COMMENCEMENT OF SUIT.
- § 4.—DEFENDANT'S PROCEEDINGS IN THE SUIT.
- § 5.—TRANSFER OF ADMIRALTY CAUSES FROM THE COUNTY COURT.
- § 6.—SECOND OR CROSS SUITS.
- § 7.—ARREST AND DETENTION OF VESSEL OR PROPERTY PENDING PROCEEDINGS.
- § 8.—INSPECTION AND COPIES OF INSTRUMENTS AND DOCUMENTS.
- § 9.—TRIAL OF ADMIRALTY CAUSES.
- § 10.—ENFORCEMENT OF DECREES.
- § 11.—APPEAL.
- § 12.—FEES AND COSTS.

§ 1.—COUNTY COURT DISTRICTS FOR ADMIRALTY PURPOSES.

"The County Courts Admiralty Jurisdiction Act, 1868" (31 & 32 Vict. c. 71), enacted that:—

Sect 2. "If at any time after the passing of this act it appears to her Majesty in council, on the representation of the lord chancellor, expedient that any county court should have admiralty jurisdiction, it shall be lawful for her Majesty, by order in council, to appoint that court to have admiralty jurisdiction accordingly, and to assign to that court as its district for admiralty purposes any part or parts of any one or more district or districts of county courts; and the district so constituted for that court, with the parts of the sea (if any) adjacent to that district to a distance of three miles from the shore thereof, shall be deemed its district for admiralty purposes; and accordingly the judge and all officers of the court shall have jurisdiction and authority for those purposes throughout that district, as if the same was the district of the court for all purposes; and, from a time to be specified in each such order, this act shall have effect in and throughout the district so constituted; and any such order may be from time to time varied as seems expedient; and a county court so appointed to have admiralty jurisdic-

Appointment
of county
courts for
admiralty
purposes.

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tion, and no other county court shall, for the purposes of this act, be deemed a county court having admiralty jurisdiction: provided, that no judge of a county court, except the judges of the London court, shall have jurisdiction in the city of London" (a).

No county court other than that appointed to have jurisdiction.

Sect. 5. "From and after the time specified in each order in council under this act appointing a county court to have admiralty jurisdiction within any district as the time from which this act shall have effect in and throughout that district, no county court, other than the county court so appointed, shall have jurisdiction within that district in any admiralty cause; provided that all admiralty causes at that time pending in any county court within that district may be continued as if no such order in council had been made."

County court acts applied to this.

Sect. 34. "This act shall be read as one act with so much of 'The County Courts Act, 1846,' and the acts amending or extending the same, as is now in force."

Practice, &c. to be regulated by general orders.

Sect. 35. "General orders shall be from time to time made under this act for the purposes in this act directed, and for regulating the practice and procedure of the admiralty jurisdiction of the county courts, the forms of processes and proceedings therein or issuing therefrom, and the days and places of sittings for admiralty causes, the duties of the judges and officers thereof, and the fees to be taken therein."

Authority for making general orders.

Sect. 36. "General orders under this act shall be made by the lord chancellor, with the advice and assistance of the judge of the High Court of Admiralty of England, and, as far as they relate to fees, or to the receipt and expenditure of and accounting for money, with the approval of the Commissioners of her Majesty's treasury" (b).

Pursuant to the second section of the act, by an order in council of the 9th December, 1868, it was ordered and appointed that, from the 31st day of January, 1869, certain county courts should "have admiralty jurisdiction," and to those county courts so appointed, the districts of specified county courts were assigned for admiralty purposes (c). The courts thus appointed to have admi-

(a) Section 25 enacted, that "the Court of Passage of the borough of Liverpool shall, upon an Order in Council being made which shall appoint the county court of Lancashire holden at Liverpool to have admiralty jurisdiction, have the like jurisdiction, powers, and authorities as by that order are conferred on the said county court; but nothing herein shall be deemed to enlarge the area over which the jurisdiction of the Court of Passage extends, or to alter the rules and regulations for holding the said court, or to take away or restrict any jurisdiction, power, or authority already vested in that court; and fees received in that court under this act shall be dealt with as fees received in that court under its ordinary jurisdiction." There is now a registry court of admiralty in Liverpool, see 33 & 34

Vict. c. 45.

(b) "The assessor of the Court of Passage of the borough of Liverpool shall have power from time to time to make general rules and orders for regulating the practice and procedure of the admiralty and maritime jurisdiction in the said court, and for other purposes mentioned in section thirty-five of 'The County Courts Admiralty Jurisdiction Act, 1868;' and any general rules and orders already made or hereafter to be made by the said assessor for any of the purposes aforesaid shall be of full force and effect as if the same had been made under this or the aforesaid act." "County Courts Admiralty Jurisdiction Amendment Act, 1869" (32 & 33 Vict. c. 51, s. 8).

(c) *E. g.*, "The county court of Northumberland holden at Newcastle-on-Tyne" is the name of a court ap-

ralty jurisdiction comprised the whole of the sea board of England from Berwick-on-Tweed to the Lands End, and again northwards to Carlisle.

General orders were also issued pursuant to the act, and these orders, together with forms, will be found under appropriate heads in the present Chapter (*d*).

The order provides, however, that:—

Rule 77. "The rules, orders, practice and forms in actions in the county courts shall, subject to these orders, be adopted with reference to admiralty suits, so far as they shall be respectively applicable." Common law rules.

§ 2.—EXTENT OF JURISDICTION.

"The County Courts Admiralty Jurisdiction Act, 1868," enacts:—

Sect. 3. "Any county court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and Extent of admiralty jurisdiction

pointed to have admiralty jurisdiction, and the districts which are for admiralty purposes, the district of that court, are "the county court of Northumberland holden at Berwick, Belford, Alwrick, Morpeth, North Shields and Newcastle-on-Tyne; and the county court of Durham, holden at Gateshead and South Shields."

(*d*) The orders are not dated nor do they state from what time they were to take or did take effect. The orders provide that—

"In the construction of these orders, forms and schedules, the following terms shall (if not inconsistent with the context or subject-matter) have the respective meanings hereinafter assigned to them, that is to say:—

'Court' shall mean a county court appointed to have admiralty jurisdiction:

'Judge' shall mean the judge or any deputy judge of any such court:

'Registrar' shall mean the registrar or any deputy registrar of any such court:

'Counsel' shall mean any advocate or barrister-at-law entitled to plead in any such court:

Attorney' shall mean any proctor,

attorney or solicitor entitled to practise in any such court, or the party himself if conducting his suit in person:

'Suit' shall mean any suit, cause or other proceeding instituted in the said court:

'Name' of any person shall mean both the Christian name and surname of such person:

'Affidavit' shall include statutable affirmations and attestations upon honour, and the word 'sworn' shall include affirmed according to statute and attested upon honour:

'Vessel' shall include every description of vessel used in navigation not propelled by oars only."

The orders are in many respects founded on the rules, orders and regulations of the High Court of Admiralty. See those rules in Coote's Admiralty Practice, 2nd edit., p. 191.

Rule 74 directs, that "the forms annexed to these Rules shall be followed as nearly as the circumstances of each case will allow; and in cases where no forms are provided, these forms shall be used as guides in framing the forms required."

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determine, subject and according to the provisions of this act, the following causes (in this act referred to as admiralty causes);

- (1.) As to any claim for salvage—any cause in which the value of the property saved does not exceed one thousand pounds, or in which the amount claimed does not exceed three hundred pounds (*e*):
- (2.) As to any claim for towage, necessaries (*f*), or wages (*g*)—any cause in which the amount claimed does not exceed one hundred and fifty pounds:
- (3.) As to any claim for damage to cargo, or damage by collision (*h*)—any cause in which the amount claimed does not exceed three hundred pounds:
- (4.) Any cause in respect of any such claim or claims as aforesaid, but in which the value of the property saved or the amount claimed is beyond the amount limited as above-mentioned, when the parties agree by a memorandum signed by them or by their attorneys or agents that any county court having admiralty jurisdiction, and specified in the memorandum, shall have jurisdiction."

Restrictions
on county
court juris-
diction in
certain cases.

Sect. 4. "Nothing in this act, or in any order in council under it, shall confer on a county court jurisdiction in any prize cause, or in any other matter within 'The Naval Prize Act, 1864,' (*i*), or in any matter arising under any of the acts for the suppression of the slave trade, or any admiralty jurisdiction by way of appeal."

Consents.]—With respect to consents, the rules provide that—

38. "Any consent in writing between the attornies in a suit may, by permission of the registrar, be filed, and shall thereupon become an order of court, and such order shall be as valid as if made by the court" (*k*).

The jurisdiction given to the county courts in respect of the matters specified, is the same jurisdiction as that exercised by the High Court of Admiralty, and, therefore, the subject-matter must be an "admiralty cause" within the jurisdiction of the high court (*l*). Therefore a suit for damage by one dumb barge to another (that is to say, barges propelled by oars only) is not within the county court jurisdiction, because it would not be within the jurisdiction of the High Court of Admiralty (*m*). So, therefore, to give the

(*e*) As to the prior jurisdiction of county courts in salvage cases, see *ante*, p. 151.

(*f*) See 24 & 25 Vict. c. 10, s. 5, *ante*, pp. 148, 149. As to the meaning of necessaries see *The Riga*, 41 L. J. (N. S.) Adm. 39.

(*g*) As to the recovery of seamen's wages, in general, see "The Merchant Shipping Act, 1854" (17 & 18 Vict. c. 104), ss. 188—191; and also 24 & 25 Vict. c. 10, s. 10, *ante*, p. 149; and as to recovery of wages during illness see 30 & 31 Vict. c. 124, s. 8.

(*h*) See 32 & 33 Vict. c. 51, s. 4, *infra*.

(*i*) "The Naval Prize Act, 1864" (27 & 28 Vict. c. 25), gave the High Court of Admiralty jurisdiction throughout her Majesty's dominions, as a prize court.

(*k*) Orders under "The County Courts Admiralty Jurisdiction Act, 1868," No. 38.

(*l*) *Everard v. Kendall*, 39 L. J. (N. S.) C. P. 234; *The Dowse*, 39 L. J. (N. S.) Adm. 46.

(*m*) *Everard v. Kendall*, 39 L. J. (N. S.) C. P. 234; as to the non-jurisdiction of the High Court in such a case, see *The Bilbao*, 1 Lushington, 149.

county court jurisdiction for necessities, they must have been supplied elsewhere than at the port to which the ship belonged, and at the time of the institution of the cause, no owner or part-owner of the ship was domiciled in England or Wales, for it is only under those limitations that jurisdiction for necessities exists in the high court (*n*).

This jurisdiction was extended in the following year by the act 32 & 33 Vict. c. 51, which came into operation on the 1st September, 1869, and enacted that—

Sect. 1. "This act may be cited as 'The County Courts Admiralty Jurisdiction Amendment Act, 1869,' and shall be read and interpreted as one act with 'The County Courts Admiralty Jurisdiction Act, 1868.'"

Short title.

Sect. 2. "Any county court appointed or to be appointed to have admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—

Extension of jurisdiction over ships and goods.

(1.) As to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed three hundred pounds :

(2.) As to any cause in respect of any such claim or claims as aforesaid, but in which the amount claimed is beyond the amount limited as above mentioned, when the parties agree, by a memorandum signed by them or by their attorneys or agents, that any county court having admiralty jurisdiction, and specified in the memorandum, shall have jurisdiction."

If parties agree, causes in respect of claims of higher amount may be determined by county court.

Sect. 3. "The jurisdiction conferred by this act and by 'The County Courts Admiralty Jurisdiction Act, 1868,' may be exercised either by proceedings *in rem* or by proceedings *in personam*" (*o*).

Proceedings in rem or in personam.

Sect. 4. "The third section of 'The County Courts Admiralty Jurisdiction Act, 1868,' shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds."

Amendment of sect. 3 of 31 & 32 Vict. c. 71.

Concurrent Jurisdiction of the High Court of Admiralty.—

Although where a county court has jurisdiction in an admiralty cause, the High Court of Admiralty has, strictly speaking, a concurrent right to entertain the suit, the county courts, have practically an exclusive jurisdiction in ordinary cases by reason of the withholding of costs if the parties elect to proceed in the high court; for "The County Courts Admiralty Jurisdiction Act, 1868" (31 & 32 Vict. c. 71), enacts that—

Sect. 9. "If any person shall take in the High Court of Admiralty of England or in any superior court proceedings which he might, without agreement, have taken in a county court, except by order of the judge of the High Court of Admiralty, or of such superior court or of a county

Restrictions on proceedings in the Court of Admiralty or superior court.

(*n*) *The Dowse*, 39 L. J. (N. S.) Adm. 46; see 3 & 4 Vict. c. 65; 24 & 25 Vict. c. 10, s. 5, *ante*, pp. 148, 149.

(*o*) *Sec ante*, p. 150. Brokers cannot sue *in rem* in the County Court

for commission under a charter-party stipulating for commission to them. *The Nuova Raffaelina*, 41 L. J. (N. S.) Adm. 37.

court having admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that admiralty cause is limited by this act, and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty or in any superior court in respect of property saved, the value of which when saved does not exceed one thousand pounds (*p*), he shall not be entitled to costs, and shall be liable to be condemned in costs (*q*), unless the judge of the High Court of Admiralty or of a superior court before whom the cause is tried or heard shall certify that it was a proper admiralty cause to be tried in the High Court of Admiralty of England or in a superior court."

Under this section the order to proceed in the high court must be applied for before the suit is commenced. If not so applied for, the plaintiff can only avoid being condemned in costs by obtaining a certificate at the hearing (*r*).

The judge of the High Court of Admiralty will certify for costs if it be less expensive to try in the high court than in the county court (*s*).

It is to be observed that although the jurisdiction of the county courts, so far as regards the amount, depends in general on the amount *claimed*, the right to costs under sect. 9 depends on the amount *recovered*, and, therefore, although a larger sum may be claimed, yet if the amount recovered in a superior court does not exceed the limit of jurisdiction, the plaintiff is not entitled to costs (*t*). Payment of money into court and acceptance out is a recovery within this section (*u*).

But where the actual loss in the case of a collision was admitted to exceed 300*l.*, but the defendant availed himself of sect. 54 of "The Merchant Shipping Act Amendment Act, 1855," limiting the liability in certain cases to a certain sum for each ton of the ship's tonnage, and that total was less than 300*l.*, and the defendant accepted the sum, which was paid into court, it was held that the case was not one in which proceedings might have been taken in the county courts, and that, therefore, the plaintiff was entitled to costs notwithstanding sect. 9 (*x*).

Where in a case of salvage a tender is made, the practice laid down in the High Court of Admiralty is, that it must be either stated to be a tender for salvage, reward and costs, or the grounds must be specified upon which costs are not tendered, and the question of costs referred to the consideration of the court (*y*).

(*p*) See as to the prior jurisdiction in salvage cases, *ante*, p. 151.

(*q*) The term "superior court" in this section includes the superior courts of common law at Westminster, notwithstanding that the provision as to liability to be "condemned in costs," is difficult of application to such a court. *Hewitt v. Corry*, 39 L. J. (N. S.) Q. B. 279.

(*r*) *The Loretta*, 40 L. J. (N. S.) Adm. 50.

(*s*) *The Beaumaris Castle*, 40 L. J. (N. S.) Adm. 41.

(*t*) *Hewitt v. Corry*, 39 L. J. (N. S.) Q. B. 279.

(*u*) *Id.*

(*x*) *The Young James*, 39 L. J. (N. S.) Adm. 1.

(*y*) *The Hickman*, 39 L. J. (N. S.) Adm. 7. In that case the judge certified under sect. 9 for costs to the time of tender, although a tender of 282*l.* was held sufficient.

§ 3.—COMMENCEMENT OF SUIT.

PART V.
CHAP. II.

The District in which Proceedings are commenced.—“The County Courts Admiralty Jurisdiction Act, 1868,” enacts that—

Sect. 21. “Proceedings in an admiralty cause shall be commenced—

- (1.) In the county court having admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings :
- (2.) If the foregoing rule be not applicable, then in the county court having admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides, or if such owner or agent does not reside within any such district, then in the county court having admiralty jurisdiction the district whereof is nearest to the place where such owner or agent resides :
- (3.) If for any reason the last foregoing rule is not applicable or cannot be acted on, then in such county court having admiralty jurisdiction as general orders direct :
- (4.) In any case in the county court or one of the county courts having admiralty jurisdiction in which the parties by a memorandum, signed by them or by their attorneys or agents, agree shall have jurisdiction in the cause.”

As to proceedings in county court for commencement of cause.

Institution of Suit.—The following rules relate to the institution of the suit :—

4. “An attorney desiring to institute a suit shall file a præcipe, and thereupon an entry of the institution of the suit shall be made in a book to be kept by the registrar, called ‘The Admiralty Suits Book’”(z).

(z) The following form of book is given:—

“Admiralty Suits Book.
Pro formâ.”

DATE.			
Day.	Month.	Year.	
10	Feb.	1869	Suit for damage by collision, instituted on behalf of A. B., of _____ against the owner or owners, unknown, of a schooner named “The Kate,” lying at _____ within the district of the court, in the sum of 200 <i>l.</i>
			Attorney for the plaintiff, Mr. L. M., of _____
10	Feb.	1869	Application made for arrest; affidavit filed; warrant issued, the evidence being satisfactory.
11	Feb.	1869	Application for judge’s permission for suit to be heard at _____
13	Feb.	1869	Permission granted.
15	Feb.	1869	Appearance entered by C. D., of _____
			Attorney for defendant, R. S., of _____
18	Feb.	1869	The suit having been heard the court decreed that [here set forth the decree]. If any further proceedings had they should be entered in same manner.”

5. "The præcipe shall state the nature of the suit, the name, address, and description of the party in whose behalf it is instituted, the name of the attorney, and an address within three miles of the court house at which it shall be sufficient to leave all instruments and documents in the suit required to be served upon him, and it shall also state the name of the owner or owners or other person against whom the suit is instituted if known, and if not known, then it shall state that the suit is instituted against the owner or owners unknown of the vessel or other property to which the suit relates."

6. "Any number of persons having the same right of action may join in one and the same suit."

7. "In a suit for wages against the owners of a foreign vessel, notice of the institution of the suit shall be given to the consul or vice-consul of the state to which the vessel belongs, if there be one resident within the district of the court, and a copy of the notice shall be annexed to the præcipe" (a).

No. 1. *Præcipe to institute a Suit.*

In the county court of _____, holden at _____.

I, L. M., attorney, hereby institute a suit for [state the nature of the suit] on behalf of [state name, address, and description of plaintiff] against [if the owner or owners be not known, state the owner or owners unknown of the property to which the suit relates, describing its name and nature and where it then is; if known, state name, address, and description of party proceeded against, the name and nature of the property to which the suit relates, and where it is], in the sum of [state sum in letters] pounds. And I consent that all instruments and documents in the said suit may be left for me at [state address required by General Order No. 5], [add, where so desired, and I require the summons to be served by the bailiff of the court].

Dated the _____ day of _____, 187 _____.

[To be signed by the party, his attorney, or his clerk for him.]

Application may be made to the judge for special permission to have the case heard at a place in which a county court is not generally held; and in that case the plaintiff's attorney must file the following additional præcipe (b):—

No. 2. *Præcipe for Permission for Suit to be heard at a Special Place.*

In the county court of _____, holden at _____.

(Title of Suit.)

I, X. Z., attorney, do pray that permission may be granted for the hearing of this suit at [here state the name of the place at which and description of the building in which it is desired that the sitting should be held, and if the building is not one in which the county court ordinarily sits add,

(a) Orders under "The County Courts Admiralty Jurisdiction Act, 1868," Nos. 4-7.

(b) See 31 & 32 Vict. c. 71, s. 14, and Rules 1 & 2, *post*, p. 173.

and I undertake to hire the use of the said building at my expense, to be allowed as costs in the suit if the court shall allow thereof].

Dated this day of , 187 .

[To be signed by the party, his attorney, or his clerk for him.]

PART V.
CHAP. II.

Summons.—

8. Immediately upon the filing of the præcipe the registrar shall issue a summons for service by the attorney, or if so required, by the bailiff of the court.

9. Where the vessel or property to which the suit relates is within the district, the summons may be served by delivering it to the person who is at the time of service apparently in charge of the vessel or property, or, if there is no person in charge, by affixing it on some conspicuous part thereof; and in other cases the summons must be served personally upon the defendant unless the judge, or, in his absence, the registrar, shall upon facts duly verified upon affidavit allow of substituted service.

Seal of the Court.—

60. All instruments and documents issued from the court shall be signed by the registrar, and shall have the seal of the court affixed.

61. The day on which the seal is affixed to an instrument or document shall be deemed to be the date of the issue thereof.

No. 3. *Summons* (c).

In the county court of holden at .

[Seal.]

Whereas a suit for [*state the nature of the suit*] has been instituted in this court on behalf of A. B. of , against the owner or owners unknown of the [*state description of vessel*], called the [*name of vessel*], (whereof C. D. is now or lately was master), [*where suit is against owner or owners unknown of vessel and freight add, and the freight due for the transportation of the cargo now or lately laden therein; or where the suit is against the owner or owners unknown of vessel, cargo, and freight, add instead thereof, and the cargo now or lately laden therein, together with the freight due for the transportation thereof*] in the sum of [*state sum in letters*] pounds.

You are hereby summoned to enter an appearance in the said suit within four clear days of the service hereof.

You are also warned that if you do not enter an appearance as aforesaid, the judge of this court will proceed to hear and determine the said suit, or to make such orders therein as to him shall seem fit.

Dated and sealed this day of , 187 .

Registrar of the court.

To the owner or owners of the [*state description and name of vessel*], and all persons who have or claim to have any right, title or interest in the said vessel.

N.B.—The attorney for A. B. is of [*here state the address given in the præcipe*].

(c) "*Mem. to be placed at foot of every summons, notice, decree, order, warrant, or any other process of the court.*

Hours of attendance at the office of

the registrar [*place of office*] from ten till four o'clock, except on [*here insert the day on which the office will be closed*], when the office will be closed at one o'clock."

tuted]. And I consent that all instruments and documents in the suit may be left for me at [state address required by General Order No. 11].

Dated the day of 187 .
[To be signed by the defendant, his attorney,
or his clerk for him.]

Notice of Defence in Collision.—

49. "Where in suits for damage by collision the defendant intends to set up as a defence that the vessel was by compulsion of law in the charge of a pilot, he should give notice thereof to the adverse attorney as soon after the service of summons as may be, and if he shall fail to give such notice the judge shall, in exercising his discretion as to costs, consider what effect the non-delivery of the notice has had in the suit."

Tenders.—

50. "An attorney desiring to make a tender shall give a notice to the adverse attorney of the terms and amount of the tender, and shall pay the amount into court, and file a præcipe."

51. "Within forty-eight hours from the payment the adverse attorney shall file a notice stating whether he accepts or rejects the tender, and, if he shall not do so, he shall be deemed to have rejected it."

No. 18. *Præcipe for paying in Money.*

In the county court of , holden at , 187 .
(Title of Suit.)

I, A. B., of , do pay the sum of [state sum in letters] pounds into court in this suit at the request and by the authority of , he having agreed to pay [or tender] the same in settlement of the claim of the plaintiff [or as the case may be].

Dated the day of , 187 .
[To be signed by the party, his attorney,
or his clerk for him.]

§ 5.—TRANSFER OF ADMIRALTY CAUSES FROM THE COUNTY COURT.

Transfer by the High Court of Admiralty.—

Sect. 6. "The High Court of Admiralty of England, on motion by any party to an admiralty cause pending in a county court, may, if it shall think fit, with previous notice to the other party, transfer the cause to the High Court of Admiralty, and may order security for costs, or impose such other terms as to the court may seem fit" (d).

As to transfer from county court by order of High Court of Admiralty.

Transfer by the County Court to the High Court of Admiralty where Amount exceeds Limit of Jurisdiction.—

Sect. 7. "If during the progress of an admiralty cause in a county court it appears to the court that the subject-matter exceeds the limit in respect

As to transfer of causes by order of

(d) 31 & 32 Vict. c. 71, s. 6. As to security for costs, see Rule 19, *post*, p. 170.

PART V.
CHAP. II.
county court
of High Court
of Admiralty.

of amount of the admiralty jurisdiction of the court, the validity of any order or decree theretofore made by the court shall not be thereby affected, but (unless the parties agree, by a memorandum signed by them or by their attorneys or agents, that the court shall retain jurisdiction) the court shall by order transfer the cause to the High Court of Admiralty; but that court may, nevertheless, if the judge of that court in any case thinks fit, order that the cause shall be prosecuted in the county court in which it was commenced, and it shall be prosecuted accordingly" (e).

Transfer by County Court to another County Court or to High Court on the Ground of Convenience.—

As to transfer
of causes to
other county
courts or
court of ad-
miralty.

Sect. 8. "If during the progress of an admiralty cause in a county court it shall appear to the court that the cause could be more conveniently prosecuted in some other county court, or in the High Court of Admiralty of England, the court may by order transfer it to such other county court, or to the High Court of Admiralty of England, as the case may be, and the cause shall thenceforward be so prosecuted accordingly" (f).

The cases arising within the jurisdiction of the Cinque Ports, causes may be transferred to the court of admiralty there, instead of to the High Court of Admiralty (g).

The High Court of Admiralty may, by transfer from a county court, acquire jurisdiction in a cause as to which the high court has no original jurisdiction, as for example, a suit to recover damages under a charterparty, which the county court would have jurisdiction over under "The County Courts Admiralty Amendment Act, 1869," as a claim arising out of an agreement made in relation to the use or hire of a ship (h).

The following rules relate to the transfer of a suit:—

34. "Where a suit is transferred to the High Court of Admiralty by order thereof, the registrar of the court, upon the service of the order of transfer, shall send by post the proceedings to the registrar of the high court."

35. "Where a court orders the transfer of a suit to the High Court of Admiralty or to another court, the registrar of the court shall send by post the order, together with the proceedings, to the registrar of the high court or to the court to which it is transferred."

The rule has been already given which permits any person claiming to have an interest in the vessel or property, whether cognizable by the court or not, to intervene for the purpose of having the case transferred to the High Court of Admiralty (i).

(e) 31 & 32 Vict. c. 71, s. 7.

(f) *Id.* s. 8.

(g) *Id.* s. 33. See *post*, p. 183.

(h) *The Swan*, 40 L. J. (N. S.) Adm. 8.

(i) See Rule 12, *ante*, p. 166.

No. 12. *Order of Transfer to High Court of Admiralty.*

In the county court of _____, holden at _____ .
(*Title of Suit.*) [Seal.]

Whereas it appears that the subject of this suit exceeds the limit in respect of amount of the admiralty jurisdiction of this court [*or state otherwise as the case may be*], it is ordered that this suit be transferred to the High Court of Admiralty together with the proceedings that have been had therein in this court.

Given under the seal of the court, this _____ day of _____ 187 .
By the court,
Registrar of the court.

No. 13. *Order of Transfer to County Court or the High Court of Admiralty.*

In the county court of _____, holden at _____ .
(*Title of Suit.*) [Seal.]

Whereas it hath been made to appear that the suit could be more conveniently prosecuted in the county court of _____ holden at _____, appointed to have admiralty jurisdiction [*or in the High Court of Admiralty*], it is ordered that this suit be transferred to the said court together with the proceedings that have been had therein in this court.

Given under the seal of the court this _____ day of _____ 187 .
By the court,
Registrar of the court.

◆

§ 6.—SECOND OR CROSS SUITS.

The following rules relate to "second or cross suits:"—

36. "Where it shall appear to the court that the plaintiff in a suit (hereafter called the second suit), was or is the defendant in a suit (hereafter called the first suit), in another court arising out of the same transaction, and that he did not propose to the plaintiff in the first suit that by agreement jurisdiction should be given to the court in which the first suit was instituted, to hear and determine the second suit, the judge may refuse the plaintiff in the second suit his costs if he shall think fit."

37. "Where a second or cross suit for damage has been instituted by a defendant in a suit for damage, and the second suit has been instituted by agreement or otherwise, in the court in which the first suit was instituted, or has been transferred to the said court by order of any other court, the court may direct that both suits may be heard at the same time and upon the same evidence."

Cross causes of damages heard together under Rule 37, are, as to the right of appeal, to be considered distinct; and, therefore, where in the court below the plaintiff in the one case recovered an amount under 50*l.*, and in the other the suit was dismissed, it was held there was no appeal in respect of the case in which the owner was

condemned in 50*l.*, sect. 31 of 31 & 32 Vict. c. 71, enacting that no appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l.* (*k*).

§ 7.—ARREST AND DETENTION OF VESSEL OR PROPERTY PENDING PROCEEDINGS.

“The County Courts Admiralty Jurisdiction Act, 1868” (31 & 32 Vict. c. 71), enacts that—

Limitation
of arrest.

Sect. 22. “In an admiralty cause in a county court if evidence be given to the satisfaction of the judge, or in his absence the registrar of the court, that it is probable that the vessel or property to which the cause relates will be removed out of the jurisdiction of the court before the plaintiff’s claim is satisfied, it shall be lawful for the said judge, or in his absence for the registrar, to issue a warrant for the arrest and detention of the said vessel or property, unless or until bail to the amount of the claim made in such cause, and to the reasonable costs of the plaintiff in such cause, be entered into and perfected, according to general orders, by or on behalf of the owner of the vessel or property or his agent, or other the defendant in such cause; and, except as in this section expressly provided there shall be no arrest or detention of a vessel or property in an admiralty cause in a county court otherwise than in execution.”

The following rules relate to the subject of arrest and detention:—

Arrest.—

15. “Where, after the institution of a suit, it is desired to arrest any vessel or property, the attorney must file an affidavit stating the facts which render it probable that it will be removed out of the jurisdiction of the court.”

16. “In a suit for necessaries or for wages the national character of the vessel shall be stated in the affidavit.”

17. “Where, upon the filing of such affidavit, the registrar, in the absence of the judge, is satisfied with the evidence, he may issue a warrant for the arrest and detention of the vessel or property, and where he is not satisfied he may require further evidence to be adduced.”

18. “A warrant of arrest may be executed on Sunday, Good Friday or Christmas Day, as well as on any other day.”

Security.—

19. “Security may be given either by bond or deposit of money as in any ordinary action in a county court.”

Release of Property.—

20. “Where the amount sued for is paid into court or the security completed, the registrar shall deliver to the attorney an order directed

(*k*) *The Elizabeth*, 39 L. J. (N. S.) Adm. 53; see *post*, p. 182.

to the high bailiff of the court, authorizing and directing him, upon payment of all costs, charges and expenses attending the custody of the property, to release it forthwith."

21. "Notwithstanding the last order, the property, in a suit for salvage, shall not be released until its value has been ascertained either by affidavit, by agreement or by appraisement, save by consent of the plaintiff or his attorney."

No. 5. *Warrant of Arrest and Detention.*

In the county court of _____, holden at _____
(*Title of Suit.*) [Seal.]

Whereas a suit has been instituted in this court on behalf of A. B., of _____, against the owner or owners of [*state description and name of vessel or property*] in the sum of [*state sum in letters*] pounds. These are therefore to require and order you to arrest the said _____, and to keep the same under safe arrest, until you shall receive further orders from this court.

Given under the seal of the court this _____ day of _____ 187 _____

By the court,
Registrar of the court.

To the high bailiff of the said court
and others the bailiffs thereof.

No. 6. *Notice of Sureties.*

In the county court of _____, holden at _____
(*Title of Suit.*)

Take notice that the sureties whom I propose in the above suit are [*here state the names and additions of the sureties, whether housekeepers or freeholders, and their residences for the last six months, therein mentioning the county or city, places, streets and numbers, if any.*]

Dated the _____ day of _____, 187 _____

To A. B. [*the party in whose behalf the suit is instituted*] or C. D., the attorney of A. B. [*the, &c.*]

No. 7. *Affidavit of Justification.*

In the county court of _____, holden at _____
(*Title of Suit.*)

I [*state name, address and description*] one of the proposed sureties in this suit, make oath and say, that I am worth more than the sum of [*state the sum in letters in which bail is to be given*] pounds after the payment of all my debts.

(*Signature of Surety.*)

On the _____ day of _____ 187 _____, the said _____ was duly sworn to the truth of this affidavit, at _____,

Before me,

No. 8. *Bail Bond.*

In the county court of _____, holden at _____
(*Title of Suit.*)

Whereas a suit for _____ has been instituted in this court on behalf of A. B. of _____, against _____

Now therefore we [*state names, addresses, and description of sureties*] jointly and severally submit ourselves to the jurisdiction of the said court, and consent that if he [*or they*] the said shall not pay what may be adjudged against him [*or them*] in the said suit, with costs, execution may issue forth against us, our heirs, executors, and administrators, our goods and chattels, for a sum not exceeding [*state sum in letters*] pounds.

(*Signatures of Sureties.*)

The bail bond was signed by the said _____, and _____ the sureties,
the _____ day of _____ 187 .

Before me,
Registrar of the court
[*or one of his clerks*].

No. 9. Order of Release.

In the county court of _____ holden at _____
(*Title of Suit.*) _____ [*Seal.*]

You are hereby authorized and directed to release the _____ now under arrest of this court by virtue of its warrant, upon the payment of all costs, charges, and expenses attending the custody thereof.

Given under the seal of the court this _____ day of _____ 187 .

By the court,
Registrar of the court.

To the high bailiff of the said court
and others the bailiffs thereof.



§ 8.—INSPECTION AND COPIES OF INSTRUMENTS AND DOCUMENTS.

As the provisions of the Common Law Procedure Act with respect to the inspection and discovery of documents are applied to county courts generally, it seems clear that the provisions relating to the inspection of documents apply to suits under the admiralty branch of jurisdiction (*l*). For these provisions, see *ante*, Vol. I. p. 225.

The following rules relate to the inspection of records in the suit:—

Records of the Court.—

55. "The attornies in a suit, their clerks, and the parties themselves, may, while the suit is pending, and for one year after its termination, inspect, free of charge, all the records in the suit."

56. "In a pending suit no person other than the attorney or his clerk

(*l*) As to the inspection of documents in suits in the High Court of Admiralty, see 24 Vict. c. 10, s. 17, and *The MacGregor Laird*, 36 L. J. (N. S.) Adm. 10. The practice of

the High Court as to interrogatories follows that of the courts of equity rather than that of the common law courts. *The Mary*, otherwise *Alexandra*, 38 L. J. (N. S.) Adm. 29.

or the party in the suit, shall be entitled to inspect the records in the suit without the permission of the registrar."

57. "In a suit which is terminated, any person may, on filing a præcipe, and on payment of the proper fee, inspect the records in the suit."

Copies.]—

58. "Any person entitled to inspect any instrument or document in a suit shall, on filing a præcipe, and on payment of the proper charges for the same, be entitled to an office copy thereof."

59. "All copies of documents shall be counted and charged for at the rate of seventy-two words per folio; and every numeral, whether contained in columns or otherwise written, shall be counted and charged for as a word."

Filing.]—

68. "All instruments or documents directed to be filed shall be filed with the registrar of the court."

§ 9.—TRIAL OF ADMIRALTY CAUSES.

"The County Courts Admiralty Jurisdiction Act, 1868" (31 & 32 Vict. c. 71), enacts that—

Sect. 13. "The judge of every county court having admiralty jurisdiction shall hear and determine admiralty causes at the usual courts held within his jurisdiction, or at special courts to be held by him, and which he is hereby required to hold as soon as may be after he shall have had notice of an admiralty cause having arisen within the jurisdiction of his court."

Admiralty
causes to be
heard at
usual courts.

The following rules relate to the sittings of the court:—

Sittings of the Court.]—

1. "The place of sitting of each court shall be the place at which the county court is held in the city or town mentioned in the name of the court, or by special permission of the judge, a suit may be heard, or part heard at any place within the district of the court."

2. "Where application is made to the judge for the hearing or part hearing of a suit at a place in which a county court does not sit, the attorney shall file a præcipe undertaking to provide at his expense a place to the satisfaction of the judge in which the suit may be heard."

3. "The days of the sitting of the court shall be those appointed for the transaction of the ordinary general business of the county court held in the city or town mentioned in the name of the court, or such other days as the judge may from time to time appoint for the hearing of a suit, where from the detention of a vessel or otherwise a prompt determination of the suit is desirable."

No. 11. *Notice of Hearing.*

In the county court of _____, holden at _____
(*Title of Suit.*) [Seal.]

Take notice that this suit will be heard at a court to be holden on

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the day of at [here state where court is to be held], at the hour
of o'clock in the noon.

Dated and sealed this day of 187 .

Registrar of the court.

To the plaintiff and defendant.

Mode of deciding Admiralty Causes.—“The County Courts Admiralty Jurisdiction Act, 1868” (31 & 32 Vict. c. 71), enacts that—

Powers, &c.
of judges and
registrars.

Sect. 10. “In an admiralty cause in a county court the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in county courts; save and except that in any admiralty cause of salvage, towage or collision, the county court judge shall, if he think fit, or on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors.”

Nautical Assessors.—

Power to
judge of
county court
to summon
nautical as-
sessor to his
assistance.

Sect. 11. “In any such admiralty cause as last aforesaid it shall be lawful for the judge of the county court, if he think fit, and he shall, upon request of either party, summon to his assistance in such manner as general orders shall direct two nautical assessors, and such nautical assessors shall attend and assist accordingly.”

Appointment
of assessors
in county
courts.

Sect. 14. “The registrar of each county court having admiralty jurisdiction shall from time to time frame a list, to be approved by the judge of the High Court of Admiralty, before whom the same shall be laid by the county court judge, and without whose approval it shall have no validity, of assessors, of persons of nautical skill and experience residing or having places of business within the district of the county court, to act as assessors in that court, and shall cause the list to be published in the London Gazette” (m).

Attendance
of assessors.

Sect. 15. “Every person named in the list of assessors so framed and approved shall attend the county court under such circumstances, and in such rotation, and subject to such regulations, and shall receive such fees for his attendance, as general orders shall direct, and for every wilful non-attendance shall be liable, at the discretion of the court, to a penalty not exceeding five pounds” (n).

Removal of
assessors.

Sect. 16. “Every assessor named in such list shall hold his office until a new list of assessors shall have been framed and approved as aforesaid, or until he shall resign his appointment” (o).

The following rules relate to assessors:—

69. “Every attorney requiring the judge to be assisted by two nautical assessors shall at the time of filing the præcipe pay to the registrar the sum of two guineas if the amount claimed does not exceed 100*l.*, and four guineas if it does exceed that amount, and such payments shall be considered as costs in the suit, unless otherwise ordered by the judge.”

70. “Where the judge requires the assistance of two nautical assessors the above fees shall be paid by the plaintiff or his attorney before the hearing, and shall be costs in the suit unless otherwise ordered by the judge.”

(m) 31 & 32 Vict. c. 71, s. 14.

(n) *Id.* s. 15.

(o) *Id.* s. 16.

71. "Where a suit is adjourned, the plaintiff shall pay the assessor's fees for the day of adjournment forthwith after the order of adjournment is made by the court."

72. "Upon the filing of the aforesaid præcipe or upon the order of the judge as last aforesaid, the registrar shall select from the list of assessors the names of two persons whom he may, having reference to the nature of the suit to be heard, consider can most effectually assist the judge in hearing and determining it, and shall send to each of such persons by post a summons in the form annexed."

73. "The registrar of the court shall pay to every assessor for each day's attendance and service in every suit one guinea or two guineas, according as the amount claimed in the suit does or does not exceed 100l." (p).

Appointment of Mercantile Assessors.]—"The County Courts Admiralty Jurisdiction Amendment Act, 1869" (32 & 33 Vict. c. 51), enacts that—

Sect. 5. "In any admiralty or maritime cause the judge may, if he think fit, or on the request of either party, be assisted by two mercantile assessors; and all the provisions of 'The County Courts Admiralty Jurisdiction Act, 1868,' with reference to nautical assessors, shall apply to the appointment, approval, summoning and remuneration of such mercantile assessors."

As to ap-
pointment of
mercantile
assessors.

No. 19. *Summons to Assessors.*

In the county court of _____, holden at _____ .
(*Title of Suit.*) [Seal.]

You are hereby summoned to appear and serve as an assessor in this court at the _____, on the _____ day of _____, 187____, at the hour of _____ in the _____ noon, to assist the judge of this court in the hearing and determining of this suit, and in default of attendance you will be liable to a penalty of a sum not exceeding five pounds under sect. 15 of "The County Courts Admiralty Jurisdiction Act, 1868."

Dated and sealed this _____ day of _____, 187____ .
Registrar of the court.

To _____ of _____ .

No. 20. *Order fining an Assessor for Non-attendance.*

In the county court of _____, holden at _____ .
(*Title of Suit.*) [Seal.]

Whereas _____ was duly summoned to appear and serve as an assessor at a court holden at _____, on the _____ day of _____, 187____, and whereas he has neglected, without sufficient cause shown, to appear and serve as required: It is hereby ordered that he shall forthwith [*or* on the day of _____, 187____] pay to the registrar of this court a fine of £ _____ for such neglect.

Given under the seal of the court this _____ day of _____ 187____ .
By the court,
Registrar of the court.

(p) County Court Admiralty Orders and Rules, 1868.

Apportionment of Salvage.—In salvage cases the court at the same time that it decrees salvage, will also, at the request of the plaintiffs make an order, to form part of the decree, distributing or apportioning the salvage amongst the salvors, amongst whom are included the owners of the salving vessel, according to their rating and merits (*q*).

Interest.—It is an invariable practice of the Admiralty Court to allow interest in the case of master's wages, bottomry and damage (*r*), and interest is allowed, even in the case of a statutable limitation of liability for damage to a fixed sum (*s*).

Evidence.—As already stated, admiralty causes are heard and determined in the like manner as ordinary civil causes in the county courts (*t*), and consequently the evidence is given orally.

Power to registrars to administer oaths and take evidence.

Sect. 19. "The registrar of a county court shall have power to administer oaths in relation to any admiralty cause in a county court; and any person who shall wilfully depose or affirm falsely before the registrar in any admiralty cause shall be deemed to be guilty of perjury, and shall be liable to all the pains and penalties attaching to wilful and corrupt perjury" (*u*).

Evidence before registrar receivable in Admiralty Court.

Sect. 20. "Evidence taken in any admiralty cause before the registrar of a county court, as the judge of a county court or general orders shall direct, shall be received as evidence in any other county court, saving all just exceptions; and the registrar of any county court shall, for the purpose of the examination of any witnesses within the district of that court, have all and the like powers and authorities of an examiner of the High Court of Admiralty of England, and evidence taken by him in that capacity shall be received as evidence in the High Court of Admiralty of England, saving all just exceptions" (*x*).

Oral Evidence.—

"At the request of either attorney, and at his cost in the first instance, or by order of the judge at the cost in the first instance of the plaintiff, the evidence of witnesses examined in court shall be taken down by a shorthand writer or reporter appointed by the court, and sworn in each case faithfully to report the evidence; and a transcript of the shorthand writer's or reporter's notes, certified by him to be correct, shall be admitted to prove the evidence of the witnesses" (*y*).

(*q*) Coote's Admiralty Practice, 2nd edit., p. 5. See also *The Wigtonshire*, 36 L. J. (N. S.) Adm. 11; and 3 & 4 Vict. c. 65, s. 5; 17 & 18 Vict. c. 104, s. 498.

(*r*) Coote's Admiralty Practice, 2nd edit., p. 93.

(*s*) *The Northumbria*, 39 L. J. (N. S.) Adm. 3. By a direction of the High Court of 17 March, 1867, the

interest is 5*l.* per cent., except when the bank rate of discount exceeds 4*l.* per cent., and then it is to be at the rate of 1*l.* per cent. above that rate.

(*t*) See 31 & 32 Vict. c. 71, s. 10, *ante*, p. 174.

(*u*) 31 & 32 Vict. c. 71, s. 19.

(*x*) *Id.* s. 20.

(*y*) County Court Admiralty Orders, No. 32.

Affidavits.]—The following Rules relate to affidavits—

25. "Every affidavit shall be divided into short paragraphs, numbered consecutively, and shall be in the first person."

26. "Every affidavit shall state the deponent's age, name, address and description, and also what facts or circumstances deposed to are within his knowledge."

27. "The names of all the persons making any affidavit, and the dates when and the places where it is sworn, shall be inserted in the jurat."

28. "Affidavits not in conformity with the last three preceding orders may be rejected by the court, or the court may direct that the costs thereof shall not be allowed on taxation."

29. "An affidavit in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, or in which there is any interlineation, not duly authenticated by the person before whom it was sworn, may be rejected by the court, or the court may direct that the costs thereof shall not be allowed on taxation."

30. "Where an affidavit is made by any person who is blind, or who from his signature or otherwise appears to be illiterate, the person before whom the affidavit is sworn shall state in the jurat that the affidavit was read over to the deponent, and that the deponent appeared to understand the same, and made his mark or wrote his signature thereto in the presence of the person before whom the affidavit is sworn."

31. "The reception of any affidavit as evidence may be objected to, if the affidavit has been sworn before the party on whose behalf it is offered, or before his attorney or agent, or before a partner or clerk of the same."

Witnesses.]—

22. "On the application of either attorney, the registrar shall issue summonses for witnesses to be served by the attorney, or if so required, by the bailiff of the court."

23. "The allowance to be made to witnesses for attendance either before the court or registrar, shall in no case exceed the highest rate of the allowances mentioned in the scale hereunto annexed, unless the court shall by special order otherwise direct."

24. "Seamen necessarily detained on shore for the purpose of the suit shall be allowed such remuneration as the court may think reasonable compensation for their loss of time" (z).

Scale of Allowance to Witnesses (a).

	£	s.	d.	£	s.	d.
Gentlemen, merchants, bankers, and professional men, <i>per diem</i>	0	10	0	to	1	0
Tradesmen, auctioneers, accountants, clerks, and yeomen, <i>per diem</i>	0	5	0	to	0	10
Artisans and journeymen, <i>per diem</i>	0	3	0	to	0	5
Labourers, and the like, <i>per diem</i>	0	2	0	to	0	3
Females, according to station in life	0	2	0	to	0	10

(z) County Court Admiralty Orders, 1868.

(a) This scale is appended to Admiralty Forms.

Travelling expenses, sum reasonably paid, but not more than sixpence per mile, one way.

If the witnesses attend in more than one suit, they will be entitled to a proportionate part in each suit only.

No. 14. *Final Decree or Order.*

In the county court of _____, holden at _____
(*Title of Suit.*) [Seal.]

It is this day decreed that the plaintiff A. B. of _____ do recover against the defendant [or defendants] C. D. of _____ the sum of _____ pounds [in a suit for salvage, for services rendered to the above vessel; or in a suit for towage, for services rendered in towing the said vessel; or in a suit for necessaries, for necessaries supplied to the said vessel; or in a suit for wages, for wages in respect of services rendered on board the said vessel; or in a suit for damage to cargo, for damage caused to the cargo carried in the said vessel; or in a suit for damage by collision, for damage caused to the said vessel by the defendant's vessel the [the description and name of the vessel which caused the damage],] together with the costs of this suit.

And it is ordered that the defendant [or defendants] do pay the same to the plaintiff or his attorney within _____ days [add where the name of the defendant is known, and that in default thereof the registrar shall upon the application of the plaintiff or his attorney issue a warrant of execution against the vessel or property of the defendant].

Given under the seal of this court this _____ day of _____ 187 .

By the court,
Registrar of the court.

Registration of Decrees and Orders.—“The County Courts Admiralty Jurisdiction Act, 1868,” enacts that—

Registration of decrees and orders.

Sect. 24. “Such decrees and orders of county courts in admiralty causes as general orders shall direct shall be registered with the registrar of county court judgments in London in such manner as general orders shall direct” (b).

The Orders provide that—

33. “A note of every final decree or order made in any suit shall within seven clear days from the making thereof be transmitted by the registrar to the registrar of county court judgments in London, according to the form annexed” (c).

§ 10.—ENFORCEMENT OF DECREES.

“The County Courts Admiralty Jurisdiction Act, 1868,” enacts that,—

Decrees in county courts in admiralty causes to

Sect. 12. “The decree of the county court in an admiralty cause shall be enforced against the person or persons summoned as the defendant

(b) 31 & 32 Vict. c. 71, s. 24. final decree or order is accordingly given with the rules, but it is unnecessary to insert it here.
(c) County Court Admiralty Orders, 1868, No. 33. A form of note of

or defendants in the same manner as the decrees of the said court are enforced in ordinary civil causes, save and except as in this act otherwise provided."

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have same
force as those
in civil
causes.

For the mode of enforcing payment and other performance of orders in actions (*i. e.*, "ordinary civil causes") see *ante*, Vol. I. p. 74, and pp. 304—355.

Sect. 23. "For the execution of any decree or order of a county court in an admiralty cause the court may order, and the registrar on such order may seal and issue, and any officer of any county court may execute, process according to general orders; provided that where under such process a vessel or property would or might be sold, then, if the owner of the vessel or property desires that the sale should be conducted in the High Court of Admiralty instead of in the county court, he shall be entitled, on security for costs being first given, and subject and according to such other provisions as general orders direct, to obtain an order of the county court for transfer of the proceedings for sale, with or without (as the judge of the county court thinks fit) the transfer of the subsequent proceedings in the cause, to the High Court of Admiralty, which court shall have jurisdiction and all powers and authorities relating thereto accordingly" (*d*).

Power to
issue process.

The following rules relate to the enforcement of decrees:—

Rules relating to the Enforcement of Decrees.]—

39. "Where an attorney is desirous of obtaining the committal or warrant of execution against the goods of a party who has neglected to obey the order of the court to pay a sum of money, he shall file a præcipe for a summons for commitment, or for a warrant of execution against the goods, and thereupon such a summons or warrant shall be issued."

40. "Where a decree has been obtained against an unknown defendant the vessel or property to which the suit relates shall not be taken in execution, but it may be arrested and detained under the provisions of section twenty-two of 'The County Courts Admiralty Jurisdiction Act, 1868,' or kept under arrest if already arrested."

41. "Where a decree has been obtained in a suit against an unknown defendant, and the name of the defendant is subsequently ascertained, the adverse attorney may file a præcipe stating the name, address, and description of the defendant, and thereupon the registrar shall issue to the attorney, or if required to the bailiff for service, a notice of the decree stating that if the defendant does not within four clear days from the day of service file a præcipe applying for a rehearing of the suit, the vessel or property to which the suit relates will be sold in execution."

42. "The notice shall be served personally upon the defendant, unless the judge, or in his absence the registrar, shall upon facts duly verified upon affidavit allow of substituted service."

Execution against Vessel.]—

43. "Where under a warrant of execution a vessel is seized, the high bailiff shall before selling the same cause an inventory to be made by an appraiser, and the vessel shall not be sold for less than the appraised value thereof, except by order of the court."

(*d*) 31 & 32 Vict. c. 71, s. 23.

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44. "On the completion of the sale the high bailiff shall pay the proceeds arising therefrom into court, return the warrant, and file an account of the sale signed by him, together with the certificate of appraisement signed by the appraiser."

45. "On the completion of the purchase the high bailiff shall deliver up the property to the purchaser, and if required so to do shall execute a bill of sale to him."

No. 15. *Præcipe for a Warrant of Execution.* [*Admiralty Jurisdiction.*]

In the county court of _____, holden at _____ .
(*Title of Suit.*) [Seal.]

I, S. R., attorney, do require a warrant of execution to issue against the goods of C. D., of _____, who was ordered by decree of this court of the _____ day of _____, 187____, to pay to the plaintiff or myself, as his attorney, the sum of _____ pounds for [*here insert for what the sum was ordered to be paid*], and who has not paid the said sum as so ordered.

Dated the _____ day of _____, 187____ .
(*Signature of attorney.*)

No. 16. *Warrant of Execution against the Vessel or Property of Defendant.* [*Admiralty Jurisdiction.*]

In the county court of _____, holden at _____ .
(*Title of Suit.*) [Seal.]

Whereas on the _____ day of _____, 187____, the plaintiff obtained a decree in this court against the defendant for the sum of £ _____ for _____ and costs; and it was thereupon ordered by the court that the defendant should pay the same to the plaintiff on the _____ day of _____:

And whereas default has been made in payment according to the said order: These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this court (except the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff under the said order, including the costs of this execution; and also to seize and take any money or bank notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money of the defendant which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court, this _____ day of _____, 187____ .
By the court,
Registrar of the court.

To the high bailiff of the said court,
and others the bailiffs thereof.

Appraisement.—

54. "The registrar may, on the application of either attorney, and whether before or after judgment, order any property under arrest to be appraised" (e).

Transfer of Sale.—

46. "Where the vessel has been arrested or has been seized under a warrant of execution, and the sale of the vessel has been ordered to be transferred, the vessel shall be retained by the high bailiff until the marshal of that court shall, by order of the High Court of Admiralty, take possession thereof."

47. "An attorney desiring that the sale of any vessel or property should be conducted in the High Court of Admiralty may at any time after judgment give security to the amount of ten pounds, and file with the registrar an application for an order for the transfer of the proceedings for sale to the said court."

48. "The registrar shall transmit such application to the judge for his order thereon, if the court be not sitting, and shall in any case certify on the application that the security for costs has been given" (f).

No. 17. *Order for Transfer of Sale to High Court of Admiralty.* [*Admiralty Jurisdiction.*]

In the county court of _____, holden at _____ .
(*Title of Suit.*) [Seal.]

Whereas in a suit instituted in this court on behalf of A. B., of _____, against [*state name of defendant*], the judge of this court has ordered [*here insert the terms of the decree or order*]: And whereas the plaintiff [*or defendant*] in the said suit is desirous that the sale of the vessel should be conducted in the High Court of Admiralty and has given security for the sum of ten pounds: Now I, A. B., attorney, pray that an order to transfer the proceedings for sale to the said High Court of Admiralty do issue.

Dated the _____ day of _____, 187 _____ .

Signature of attorney.

I hereby certify that the security above-mentioned has been duly completed.

Registrar of the court.

I hereby order the transfer to be made as prayed.

Judge of the court.

Payment out of Court.—

52. "Money ordered to be paid out of court may be paid to the attorney without the production of a power of attorney from the party entitled to receive the money, unless the judge shall otherwise order."

53. "Where more than one suit has been instituted against a vessel or any property, and the same has been sold, the proceeds thereof shall be retained in court, to abide the decision of the court in the various suits, unless the judge shall otherwise order" (g).

(e) County Court Admiralty Orders,
1868, No. 54.

(f) County Court Admiralty Orders,
1868.

(g) *Id.*

“The County Courts Admiralty Jurisdiction Act, 1868” (31 & 32 Vict. c. 71), enacts that,—

Appeal to court of admiralty.

Sect. 26. “An appeal may be made to the High Court of Admiralty of England from a final decree or order of a county court in an admiralty cause, and, by permission of the judge of the county court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct.”

Time for appeal.

Sect. 27. “No appeal shall be allowed unless the instrument of appeal is lodged in the registry of the High Court of Admiralty within ten days from the date of the decree or order appealed from, but the judge of the High Court of Admiralty of England may, on sufficient cause being shown to his satisfaction for such omission, allow an appeal to be prosecuted, notwithstanding that the instrument of appeal has not been lodged within that time.”

Agreement not to appeal.

Sect. 28. “No appeal shall be allowed if, before the decree or order is made, the parties shall have agreed by a memorandum signed by them, or by their attorneys or agents, that the decree or order shall be final; and any such agreement need not be stamped, except in respect of any fee imposed by general orders.”

As to appeals to the Queen in council.

Sect. 29. “There shall be no appeal from a decree or order of the High Court of Admiralty of England made on appeal from a county court, except by express permission of the judge of the High Court of Admiralty.”

Costs of appeal.

Sect. 30. “On an appeal under this act, when the appellant is unsuccessful, he shall pay the costs of the appeal, unless the appellate court shall otherwise direct.”

No appeal unless amount exceeds 50*l.*

Sect. 31. “No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of fifty pounds.”

As to the right of appeal in cross suits, see *ante*, pp. 169, 170.

Security for costs of the appeal must be given in the county court and not in the High Court of Admiralty (*h*).

Appeal from Decree of High Court.—The permission under sect. 29 to appeal (to the privy council) from a decree or order of the high court, made on appeal from the county court, will not be in general given, except where the law is doubtful or novel in its application; or where the facts are such as to leave a substantial doubt on the mind of the court whether the conclusion at which it has arrived be right, or where the pecuniary interest (a case which may happen under the provisions of the statute) is large (*i*).

Conduct of sale, &c. in court of admiralty.

Sect. 32. “On an appeal under this act, the judge of the High Court of Admiralty, if it appears to him expedient that any sale decreed or ordered to be made of the vessel or property to which the cause relates should be conducted in the High Court of Admiralty instead of in the

(*h*) *The Forest Queen*, 40 L. J. (N. S.) Adm. 17.

(*i*) *The Samuel Laing*, 39 L. J. (N. S.) Adm. 42.

county court from which the appeal is brought, may direct the transfer of the proceedings for sale, with or without the transfer of the subsequent proceedings in the cause, to the High Court of Admiralty, which court shall have jurisdiction and all powers and authorities relating thereto accordingly."

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Sect. 33. "In all cases which shall arise within the jurisdiction of the Cinque Ports as defined by the act first and second George the Fourth, chapter seventy-six, section eighteen, causes may be transferred by the county court and appeals made to the Court of Admiralty of the Cinque Ports in lieu of the High Court of Admiralty; and in the case of appeals the instrument of appeal shall be lodged in the registry of the Cinque Ports, and the same discretion vested in the judge official and commissary of the said Cinque Ports court as is by this act vested in the judge of the High Court of Admiralty.

In certain cases causes may be transferred by county court and appeals made to Court of Admiralty of the Cinque Ports.

§ 12.—FEES AND COSTS.

"The County Courts Admiralty Jurisdiction Act, 1868," enacts that,—

Sect. 17. "The registrars of the county courts shall be remunerated for their duties in admiralty causes by receiving for their own use such fees as general orders shall direct."

Remuneration of registrars.

Sect. 18. "A scale of costs and charges in admiralty causes in the county courts shall be prescribed by general orders."

Scale of costs.

The rules provide with reference to Fees and Costs," that,—

75. "The fees and costs set forth in the schedules hereto annexed, marked I., II., shall be allowed on taxation."

Fees and costs.

76. "Where plaintiff recovers less than the sum claimed, the scale upon which the costs are to be taxed shall be in the discretion of the court."

SCHEDULE I.

Fees to be taken in County Courts having Admiralty Jurisdiction.

Fees to be taken by registrar and accounted for and paid over to the treasurer.

On every institution of a suit sixpence in the pound, and on the hearing of the same an additional fee of sixpence in the pound on the amount claimed, where it does not exceed fifty pounds; and where it does exceed fifty pounds, then five shillings additional on the institution, and on the hearing of the suit for every fifty or fraction of fifty pounds claimed over and above the first fifty pounds. Where the court is to be held beyond three miles from the registrar's office, then an additional fee of one shilling for each mile from the office to the place of sitting.

Fees to be taken by the Registrar for his own use.	Where the Amount claimed					
	does not exceed 20l.		exceeds 20l. and does not exceed 100l.		exceeds 100l.	
	£	s. d.	£	s. d.	£	s. d.
On every institution of suit and summons thereon	0	2 6	0	5 0	0	7 6
„ warrant of arrest of a vessel ..	0	2 6	0	5 0	0	7 6
„ release	0	2 6	0	5 0	0	7 6
„ bail bond	0	2 6	0	5 0	0	7 6
„ affidavit of justification	0	1 0	0	2 6	0	2 6
„ subpoena	0	1 0	0	2 0	0	3 0
„ notice of hearing each	0	1 0	0	1 6	0	2 6
Summons for the attendance of assessor at the hearing of any suit each	0	0 6	0	1 6	0	2 6
For every order of transfer	0	5 0	0	10 0	0	15 0
Where a court is to be held specially for the hearing of a suit under Rule 3	0	15 0	1	5 0	1	15 0
Where the court is to sit for the hearing or part hearing of a suit beyond three miles from registrar's office, then in addition ..	0	15 0	0	15 0	0	15 0
Mileage one way from office to place of sitting, for each mile	0	0 6	0	0 6	0	0 6
When the registrar cannot return the same night	1	1 0	1	1 0	1	1 0
For drawing final decree	0	7 6	0	10 0	0	15 0
For filing an affidavit or other document, not being a document annexed to an affidavit .	0	0 6	0	1 0	0	1 0
For every office copy of a document in the English language per folio	0	0 4	0	0 4	0	0 4
For office copies of papers in a foreign language, or of shorthand writers' or reporters' notes, or of abstracts or translations made in the office, in addition to the above fees, the charges of the copyist, shorthand writer, reporter or translator.						
On a receipt for money or for papers (<i>only one fee to be taken, however many may be the papers delivered in at one time</i>) ..	0	0 6	0	1 0	0	1 0
Poundage on monies paid out of the office in any suit for every 50l. or fraction thereof .	0	2 0	0	5 0	0	5 0
From a person who is not a party in the suit, nor his attorney, nor the clerk of the attorney, on examining the court books in respect of any suit	0	1 0	0	1 0	0	1 0
For every summons of commitment	0	1 6	0	3 0	0	5 0
For every warrant against the body or goods or order of sale of vessel	0	2 6	0	5 0	0	7 6
For making and transmitting note of any decree or order under Rule 33	0	1 6	0	2 6	0	3 6
On examining the documents in a suit in which no proceedings are pending, and which has been terminated within the last two years	0	1 6	0	2 6	0	2 6
Ditto ditto if beyond that period ..	0	2 0	0	3 6	0	3 6

Fees to be taken by the Registrar for his own use.	Where the Amount claimed		
	does not exceed 20 <i>l.</i>	exceeds 20 <i>l.</i> and does not exceed 100 <i>l.</i>	exceeds 100 <i>l.</i>
For every sitting in which the registrar is employed as an examiner	£ <i>s.</i> <i>d.</i> ..	£ <i>s.</i> <i>d.</i> 0 7 0	£ <i>s.</i> <i>d.</i> 0 10 0
When the sitting is longer than one hour, then for every additional hour or part of an hour	0 5 0	0 7 0
Where the registrar shall be required to attend elsewhere than at the court or office, in addition to the above	0 10 0	1 0 0
Mileage one way from the office to place of examination for each mile..	0 0 6	0 0 6
For taxation of costs	0 5 0	0 7 0

Fees to be taken for the use of the High Bailiff.	Where the Amount claimed		
	does not exceed 20 <i>l.</i>	exceeds 20 <i>l.</i> and does not exceed 100 <i>l.</i>	exceeds 100 <i>l.</i>
For service of summons or subpoena, if served within three miles of registrar's office ..	£ <i>s.</i> <i>d.</i> 0 3 6	£ <i>s.</i> <i>d.</i> 0 5 0	£ <i>s.</i> <i>d.</i> 0 5 0
If served beyond three miles of registrar's office, reasonable expenses for travelling and maintenance.			
Attendance on court if required by judge, where court is to be held specially for the hearing of a suit under Rule 3	0 5 0	0 10 0	0 15 0
On execution of a warrant of arrest of a vessel or property	0 10 0	0 15 0	1 0 0
On keeping possession of a vessel or property to include the cost of a vessel keeper, if required per day	0 3 6	0 5 0	0 5 0
If execution had at a greater distance than three miles from registrar's office, reasonable expenses for travelling and maintenance.			
On sale of vessel or property, including inventory, for every 50 <i>l.</i> or fraction thereof .	0 10 0	0 10 0	0 10 0
For service of summons of commitment ..	0 2 0	0 5 0	0 10 0
Execution of warrant against body or goods.	0 10 0	1 0 0	1 10 0
Conveyance to gaol, per mile	0 0 9	0 1 0	0 1 6
To the appraiser for appraisement of a vessel, including inventory.		Ten shillings per cent. on the appraised value of the property, with reasonable expenses for travelling and maintenance if the vessel is beyond three miles from registrar's office.	

SCHEDULE II.

PART V.
CHAP. II.

Costs and Charges to be paid to Counsel and Attorneys-at-Law under "The County Courts Admiralty Jurisdiction Act, 1868," between Party and Party.

	Lower Scale, not exceeding 100l.	Higher Scale, above 100l.
	£ s. d.	£ s. d.
Instructions to sue or defend	0 10 0	0 15 0
Application for substituted service	0 4 0	0 6 0
Attendance on the registrar, filling up and leaving præcipe, and obtaining the document or instrument for which the præcipe was required, including the getting the seal of the court affixed.. .. .	0 6 8	0 10 0
Serving any notice or summons on a party or his attorney, including copy thereof	0 3 6	0 5 0
If served beyond three miles of registrar's office, rea- sonable expenses for travelling and maintenance.		
Examining and taking minutes of evidence of each witness afterwards allowed by the judge (whether counsel employed or not)	0 3 4	0 6 8
If above six folios, for every additional folio ..	0 1 0	0 1 0
Drawing brief, per folio	0 1 0	0 1 0
Copy brief, per folio, and necessary documents to accompany same	0 0 4	0 0 4
Attending counsel therewith	0 3 4	0 3 4
Fee to counsel and clerk, sum paid not exceeding ..	3 5 6	5 10 0
If conference with counsel allowed, appointing it and attending counsel	0 10 0	0 13 4
Fee to counsel and clerk on conference	1 6 0	1 6 0
Attending court on trial, with counsel	0 13 4	1 1 0
Attending court and conducting suit, where no counsel employed	1 10 0	2 2 0
Where judgment is deferred, attending court to hear it	0 6 8	0 6 8
Witnesses' expenses, according to scale in force.		
OCCASIONAL COSTS.		
Lodging order of transfer	0 10 0	0 16 8
Notice of application for a new trial, or to set aside proceedings, including copies or duplicate originals and service, and attending registrar of the court therewith, such notices and copies being signed by the attorney	0 6 8	0 13 4
Any attendance which the registrar may think was necessary	0 3 4	0 6 8
All necessary affidavits, not exceeding five folios, including filing each	0 5 0	0 5 0
For every additional folio	0 1 0	0 1 0
Oath (sum paid).		
Attending court to support or oppose any application or motion without counsel	1 1 0	1 1 0
Attending in the last-mentioned cases with counsel ..	0 15 0	0 15 0
Fee to counsel and clerk not exceeding	1 3 6	2 4 6

	Lower Scale, not exceeding 100 <i>l</i> .	Higher Scale, above 100 <i>l</i> .
Attorney's travelling expenses to attend court or an examiner, where the place of sitting in either case is beyond three miles of the registrar's office, one way per mile	£ s. d. 0 0 6	£ s. d. 0 0 6
Where, in the opinion of the registrar, he cannot return the same night, in addition to the above mileage.. .. .	1 11 6	1 11 6
Any attendance on an examiner, which the registrar may, upon taxation, think was necessary	0 5 0	0 7 0
When the attendance is longer than one hour, then for every additional hour or part of an hour ..	0 4 0	0 6 0
Drawing all necessary documents .. per folio	0 1 0	0 1 0
Plans and charts to be allowed by special order of judge, not exceeding	2 2 0	3 3 0
Attending taxing costs	0 5 0	0 7 0
All necessary copies per folio	0 0 4	0 0 4
Letters and messages (<i>to be allowed once in the suit only</i>)	0 5 0	0 10 0
COSTS OF THE DAY ON ADJOURNMENT.		
Attending court where no counsel employed	0 15 0	1 0 0
Attending with counsel	0 10 0	0 15 0
Refresher fee to counsel and clerk, not exceeding ..	1 3 6	2 4 6
Witnesses' expenses same as on trial.		
COSTS ON APPEAL.		
Preparing notice of appeal, including copies and service	0 7 0	0 10 0
Application to stay proceedings	0 7 0	0 10 0
Transmitting case and copies, including notice to successful party	0 5 0	0 7 0
Application to judge for leave to proceed on judgment	0 5 0	0 7 0
Depositing decree or order of Court of Appeal ..	0 3 0	0 4 0

N.B.—The registrar is to tax the bills of costs of defendants upon the lower scale when the suit is for a sum not exceeding 100*l*., and upon the higher when it exceeds 100*l*.; and the bills of costs of plaintiffs upon the lower scale when the sum recovered does not exceed 100*l*., and upon the higher when it exceeds 100*l*., unless in either case the judge shall otherwise order.

“Costs between Attorney and Client shall be allowed on the above scale, with such additions thereto as the registrar may, on consideration of special circumstances, think fit to allow.”

“In Suits entered in the Court by Agreement of Parties under paragraph 4 of section 3 of ‘The County Courts Admiralty Jurisdiction Act, 1868,’ the costs shall be allowed on the scale of costs allowed in the High Court of Admiralty if the attorneys shall agree in the memorandum that they shall be so allowed, and if no such agreement shall be made, then according to the county court admiralty scale as between attorney and client.”

Taxation of Costs.]—

62. "Costs may be taxed by the registrar as well between party and party as between attorney and client."

63. "When a bill of costs has been filed for taxation, notice shall, as soon as conveniently may be, be sent to the respective attorneys, appointing a time for the taxation."

64. "At the time appointed, if either attorney is present, the taxation shall be proceeded with."

65. "After the expiration of a week from the taxation of the bill, if there is no objection thereto, the attorney may apply for payment of the same if the amount is to be paid out of monies in court."

66. "If in a taxation between attorney and client more than one-sixth of the bill is struck off, the attorney shall pay all the costs attending the taxation."

67. "If either attorney is dissatisfied with the taxation, he may, within a week thereof, give notice to the adverse attorney that he will apply to the judge to review the same, and file a præcipe objecting to the taxation" (*h*).

(*h*) County Court Admiralty Orders, 1868.

CHAPTER III.

APPEALS TO THE COUNTY COURTS FROM THE DECISION OF SURVEYORS AS TO THE UNSEAWORTHINESS OF VESSELS UNDER "THE MERCHANT SHIPPING ACT, 1871."

"The Merchant Shipping Act, 1871" (34 & 35 Vict. c. 110), enacts that:—

Sect. 10. "If complaint is made to the Board of Trade that any British ship is, by reason of the defective condition of her hull or equipments, unfit to proceed to sea, the board may cause such ship to be surveyed by one of the surveyors appointed by them, and if such surveyor report that the hull or equipments of such ship is or are in such a state that she could not proceed to sea without serious danger to human life, the Board of Trade may declare such ship to be unseaworthy, and thereupon any principal officer of customs may detain such ship.

"Every such complaint shall be in writing, and shall state the name and address of the complainant, and a copy of the complaint, including the name and address of the complainant, shall, before or during such survey, be given by the Board of Trade to the master or to an owner of the ship.

"If upon such survey such ship is found to be seaworthy, the expenses of the survey shall be paid to the Board of Trade by the person making the complaint, without prejudice to any right of suit or action against him by any person aggrieved by the complaint.

"If upon such survey such ship is found to be unseaworthy, the expenses of the survey shall be paid to the Board of Trade by the owner of the ship.

"Any shipowner who is dissatisfied with the decision of a surveyor under this section may appeal to any of the courts mentioned in this section, having jurisdiction in the place where such ship was surveyed, and such court may, if they think fit, appoint one or more competent persons to survey such ship anew, and any surveyor so appointed shall have the powers of a surveyor appointed by the Board of Trade. Upon any such appeal the court may make such order as to the detention or discharge of the ship, as to the payment of any costs and damages which may have been occasioned by her detention, and as to the payment of the expenses of the original survey and of the survey anew, as to the court seems just.

"The courts to which appeal may be made shall be:—

"In England, any court having jurisdiction under 'The County Court Admiralty Jurisdiction Act, 1868.'

"In Ireland, any court having jurisdiction under 'The Court of Admiralty (Ireland) Act, 1867.'

"In Scotland, the court of the sheriff for the county."

PART VI.

JURISDICTION OF THE COUNTY COURTS IN QUESTIONS AS TO THE GRANT AND REVOCATION OF PROBATE OF WILLS AND LETTERS OF ADMINISTRATION.

§ 1.—JURISDICTION.

§ 2.—PROCEDURE.

§ 3.—FEES AND COSTS.

§ 1.—JURISDICTION.

“The Court of Probate Act, 1857” (20 & 21 Vict. c. 77), which vested the voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased persons in the crown, and established the Court of Probate for exercising that jurisdiction, with a principal registry in London, and district registries and registrars throughout England, gave the county courts in certain cases the contentious jurisdiction and authority of the Probate Court (*a*). The section of that act giving this jurisdiction was repealed by “The Court of Probate Act, 1858” (21 & 22 Vict. c. 97), and the following provision substituted.

“Where it appears by affidavit to the satisfaction of a registrar of the principal registry that the testator or intestate in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for, had at the time of his death his fixed place of abode in one of the districts specified in schedule (A) to the said ‘Court of Probate Act,’ and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of 200*l.*, and that the deceased at the time of his death was not seised or entitled beneficially (*b*) of or to any real estate of the value of 300*l.* or upwards, the judge of the county court having jurisdic-

(*a*) 20 & 21 Vict. c. 77, s. 54; repealed by 21 & 22 Vict. c. 95, s. 11.

(*b*) The word “beneficially” here, as in the previous part of the section,

points to an ownership which is not one of trust. Lord Penzance in *Davies v. Brecknell*, 40 L. J. (N. S.) Prob. & M. 16.

Where personality is under 200*l.*, county court to have jurisdiction.

tion in the place in which the deceased had at the time of his or her death a fixed place of abode, shall have the contentious jurisdiction (c) and authority of the Court of Probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto" (d).

It is unnecessary to set out the schedule (A) specifying the districts and places of district registries throughout England and Wales, as it can be readily referred to.

Three things, it is to be observed, are necessary to confer jurisdiction on the judge of the county court. First, that the testator or intestate at the time of his death should have his fixed place of abode in one of certain districts. Secondly, that the personal estate should be under the value of 200*l.* Thirdly, that the deceased at the time of his death should not be seised or beneficially entitled to any real estate of the value of 300*l.* or upwards (e). As regards the last point, if the real estate is of the value of 300*l.*, it is immaterial that the heir at law has not been cited, and consequently that the probate would not affect the real estate; for the fact of the testator being entitled to real estate to the value of 300*l.* takes away the jurisdiction (f).

In estimating the value of the real estate, charges upon the estate cannot be taken into consideration. Therefore, if the estate be of the value of 300*l.*, but the value of the deceased's interest in it is reduced by mortgage to less than 300*l.*, the county court has no jurisdiction (g).

(c) With respect to what constitutes "contentious jurisdiction," the rules and orders of the Court of Probate (Rule 3 of the Rules and Orders of July, 1862) provide, that "all proceedings in the Court of Probate or in the registries thereof in respect of business not included in 'The Court of Probate Act, 1857,' under the expression 'common form business,' except the warning of caveats, shall be deemed to be contentious business." The interpretation clause (sect. 2) of "The Court of Probate Act, 1857" (20 & 21 Vict. c. 77), enacts "that 'common form business' shall mean the business of obtaining probate and administration where there is no con-

tention as to the right thereto, including the passing of probates and administrations through the Court of Probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration."

(d) 21 & 22 Vict. c. 97, s. 10.

(e) *Thomas v. Nurse*, 39 L. J. (N. S.) Prob. & M. 80.

(f) *Ibid.*

(g) *Davies v. Brecknell*, 40 L. J. (N. S.) Prob. & M. 15.



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§ 2.—PROCEDURE.

The following provisions of "The Court of Probate Act, 1857" (20 & 21 Vict. c. 77), apply to the jurisdiction of the county courts as settled by the Act of 1858:—

Registrar of county court to transmit certificate of decree for grant or revocation of probate.

Sect. 55. "On a decree being made by a judge of a county court for the grant or revocation of a probate or administration, in any such cause the registrar of the county court shall transmit to the district registrar of the district in which it shall have been sworn that the deceased had, at the time of his decease, his fixed place of abode, a certificate under the seal of the county court of such decree having been made, and thereupon, on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree."

The judge of the county court to decide causes and enforce judgments as in other cases.

Sect. 56. "The judge of any county court before whom any disputed question shall be raised relating to matters and causes testamentary under this act shall, subject to the rules and orders under this act, have all the jurisdiction, power and authority to decide the same and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the county court."

Affidavit of the facts giving the county court jurisdiction to be conclusive, unless disproved while the matter is pending.

Sect. 57. "The affidavit as to the place of abode and state of the property of a testator or intestate which is to give contentious jurisdiction to the judge of a county court under the previous provisions shall, except as hereinafter provided, be conclusive for the purpose of authorizing the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and no such grant of probate or administration shall be liable to be recalled, revoked or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the jurisdiction of such judge, or within any of the said districts at the time of his death, or by reason that the personal estate, sworn to be under the value of 200*l.*, did in fact amount to or exceed that value, or that the value of the real estate, of or to which the deceased was seised or entitled beneficially at the time of his death, amounted to or exceeded 300*l.* Provided, that where it shall be shown to the judge of a county court before whom any matter is pending under this act, that the place of abode or state of the property of the testator or intestate, in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration, has not been correctly stated in the affidavit, and if correctly stated would not have authorized him to exercise such contentious jurisdiction, he shall stay all further proceedings in his court in the matter, leaving any party to apply to the Court of Probate for such grant or revocation, and making such order as to the costs of the proceedings before him, as he may think just."

As to appeals from county court.

Sect. 58. "Any party who shall be dissatisfied with the determination of the judge of the county court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this act, may appeal from the same to the Court of Probate, in such manner, and subject to such regulations as may be provided by the rules and orders to be made under this act, and the decision of the Court of Probate on such appeal shall be final."

The only mode in which the decision of the county court judge can be reviewed is by appeal under the above section upon points of law and evidence. Upon questions of fact, the decision of the county court is final (*h*).

Sect. 59. "It shall not be obligatory on any person to apply for probate or administration to any district registry or through any county court, but in every case such application may be made through the principal registry of the Court of Probate, wherever the testator or intestate may, at the time of his death, have had his fixed place of abode: Provided, that where in any contentious matter arising out of any such application it is shown to the Court of Probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a county court, the Court of Probate may send the cause to such county court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his court in the first instance" (*i*).

Not obligatory to apply for probate, &c. to district registries or county court, but may in every case be made to Court of Probate.

For the particular procedure and practice of the county courts, so far as the above provisions or the County Court Rules (*post*, p. 194) do not extend, the Probate Acts must be referred to, and also the Rules of the Court of Probate must be followed (*j*).

Court of Probate must be followed (*j*).

Where a cause is sent to the county court, the Court of Probate which sends it cannot give any directions as to the mode in which the cause shall be tried. Application for a trial by jury, for example, must be made to the judge of the county court (*h*); and the decision of the county court can only be reviewed by appeal under sect. 58, for there is no distinction, under that section, between cases originally instituted in the county court, and causes sent to that court under sect. 59. The Court of Probate, therefore, cannot inquire whether the verdict in the county court was against evidence, or order a re-investigation of a question of fact already decided (*l*); nor can the Probate Court, after the decree in the county court, make any order confirming it; or order the payment by the unsuccessful party of costs incurred in the Probate Court before the transfer (*m*). Any application as to such costs must be made, therefore, to the Probate Court before the transfer.

(*h*) *Lealley v. Veryard*, 35 L. J. (N. S.) Prob. & M. 127; S. C. *nom. Zealley v. Veryard*, Law Rep., 1 Prob. & Div. 195.

(*i*) "The Court of Probate Act, 1858" (21 & 22 Vict. c. 95), s. 12, enacts, that "The Court of Probate Act, 1857," section 59, "shall, so far as the county courts or a judge thereof are concerned, apply to an application for the revocation of a grant of probate or administration as well as to an application for any such grant."

(*j*) Considering the few probate

cases taken in or sent to the county courts, it is out of the question attempting to give a complete practice here, as the bulk of the volume would be increased to a great extent without any corresponding advantage.

(*h*) *Norris v. Allen*, 2 S. & Tr. 601; 32 L. J. (N. S.) Prob. & M. 3.

(*l*) *Lealley v. Veryard*, 35 L. J. (N. S.) Prob. & M. 127; *Thomas v. Cronther*, 2 Sw. & Tr. 561, cannot be relied upon on this point.

(*m*) *Macleur v. Macleaur*, Law Rep., 1 Prob. & Div. 604; 37 L. J. (N. S.) Prob. & M. 68.

PART VI.

Rules and Orders.

“The Court of Probate Act, 1857,” enacts that—

Rules and orders for regulating the procedure of county courts under the acts to be made by the judges now having authority for the like purpose.

Sect. 60. “For regulating the procedure and practice of the county courts, and the judges, registrars, and officers thereof, in relation to their jurisdiction and proceedings under this act, rules and orders may be from time to time framed, amended and certified by the county court judges appointed for the time being to frame rules and orders for regulating the practice of the county courts under the act 19 & 20 Vict. c. 108, and shall be subject to be allowed, or disallowed or altered, and shall be in force from the day named for that purpose by the Lord Chancellor, as in the said act is provided in relation to other rules and orders regulating the practice of the same courts (*n*); and for establishing rules and orders to be in force when this act comes into operation, the power given by this enactment shall be exercised as soon as conveniently may be after the passing of this act.”

“The Court of Probate Act, 1858” (21 & 22 Vict. c. 95), enacts that—

Power to make rules and orders and frame scale of fees for the county courts.

Sect. 13. “The power and authority to make rules and orders for regulating the proceedings of the county courts shall extend and be applicable to all proceedings in the county courts under this act, and also to framing a scale of costs and charges to be paid to counsel, proctors, solicitors and attorneys, in respect of proceedings in county courts, under the said Court of Probate Act or this act.”

Under the powers given for that purpose as above mentioned the following rules and orders for regulating the practice of the county courts came into force on the 4th of February, 1858:—

“1. Any person desirous of taking proceedings in any county court under the statute 20 & 21 Vict. c. 77, for amending the law relating to probates and letters of administration in England, shall lodge with the registrar of the court having jurisdiction in the matter an application in writing according to form (A) annexed, duly stamped with the proper duty thereon.

“2. Where any person shall have lodged a caveat against the grant of probate or letters of administration, and proceedings are proposed to be taken in a county court, the person who shall have applied for the probate or letters of administration shall be deemed the plaintiff in the proceedings, and the person who shall have lodged the caveat shall be deemed the defendant.

“3. The party making application to a county court for the revocation of probate or letters of administration shall be deemed the plaintiff in the proceedings, and the party against whom the application is made shall be deemed the defendant.

“4. Where an application shall be made to a county court for the grant or revocation of probate or letters of administration, the person making the application shall produce to the registrar a certified copy of the affidavit made by the party who shall have applied for or obtained the probate or letters of administration: and thereupon, if, according to the statements in the affidavit, the deceased had, at the time of his death,

(*n*) For the general power to frame rules and orders under the 19 & 20 Vict. c. 108, see *ante*, Vol. I. p. 58.

his fixed place of abode within the district of such court, and the state of the property of the testator or intestate was such as to give jurisdiction to the judge of the county court, the registrar shall issue a notice to the defendant according to form (B) annexed, and deliver a notice, according to such form, then and there to the plaintiff or his agent.

"5. The above-mentioned notice shall be issued ten clear days before the day on which the judge shall proceed to make a decree in the matter.

"6. Notices shall be served by a bailiff of the court, by his delivering the same to some person at the respective places of residence of the parties, as mentioned in the application for proceedings to be taken.

"7. The registrar of the county court, at the time that he issues the notices in proceedings for the revocation of the grant of probate or letters of administration, shall give notice by post, according to form (C) annexed, to the district registrar by whom the probate or letters of administration has been granted, to produce the original will or other necessary documents at the county court at which the matter of the application will be considered.

"8. The certificate to be given by the registrar of a county court under sect. 55 of 20 & 21 Vict. c. 77, shall be according to form (D) annexed; and on or before the day mentioned in the notice the plaintiff shall deliver to the registrar such form, stamped with the proper duty thereon, and the cause shall not proceed until such form duly stamped is so delivered; provided, that the defendant may procure and deliver such form duly stamped if the plaintiff shall have neglected to deliver such form so stamped.

"9. Upon the day mentioned in the notice the judge, whether both parties are then before him or not, may proceed to consider the matter of the application, and to make a decree thereon, or he may adjourn the proceedings, from time to time, as he may think fit.

"10. The decree shall be according to form (E) annexed, and a copy of such decree shall be sent by post to the plaintiff and defendant.

"11. Where application for probate or letters of administration has been made at the principal registry, and any contentious matter shall arise out of such application, and the judge of the Court of Probate shall send the cause to a county court, the registrar, upon the receipt of such cause, shall forthwith issue a notice, according to form (B) in the schedule both to the plaintiff and defendant, without any application being made to the court by the plaintiff.

"12. In proceedings for which rules and orders are not hereby provided, the rules and practice of the Court of Probate shall be followed so far as they are applicable.

"13. The enactments, practice and forms in force and used in the county courts shall, subject to the foregoing rules and orders, be adopted with reference to proceedings in the county courts in matters of probate or letters of administration, so far as the same are applicable *mutatis mutandis*."

FORM A.

Application to a County Court for Proceedings to be taken under the Act 20 & 21 Vict. c. 77, for amending the Law relating to Probates and Letters of Administration in England.

I, A. B., of [or C. D. proctor, solicitor or attorney of A. B. of] do hereby apply to the judge of the above court for a decree

PART VI.

to be made by him, according to the provisions of the above act, for the grant [or revocation] of probate of the will [or letters of administration in the goods] of [*here insert name and address of testator or intestate*]: and I hereby state that the person who has applied for probate or letters of administration [or who has obtained probate or letters of administration, or is the party against whom this application is made] is E. F., of

A. B. [or C. D. proctor, solicitor or attorney of A. B. of _____].

FORM B.

(Seal.)

In the county court of _____ holden at _____ .

Between A. B., plaintiff,
[address]

and
C. D., defendant.
[address].

Take notice that at a county court to be holden at _____ on the day of _____, at the hour of _____ in the _____ noon, the judge of this court will proceed to make a decree for the grant [or revocation] of probate of the will [or letters of administration in the goods] of [*here insert name and address of testator or intestate*], unless cause be then shown to the contrary: and you are hereby informed, that if you do not attend on that day, the judge may proceed to make such decree in your absence.

Dated this _____ day of _____ 187 _____ .

To the plaintiff [or defendant]. _____ Registrar of the court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on _____, when the office will be closed at one.

FORM C.

(Seal.)

In the county court of _____ holden at _____ .

Between A. B., plaintiff,
and

C. D., defendant.

Whereas an application has been made to this court to revoke the grant of probate of the will [or letters of administration granted by you in the goods] of [*here insert the name and address of the testator or intestate*]; and whereas the matter of such application will be considered by the judge of this court on the _____ day of _____ at the hour of _____ in the _____ noon: I, therefore, request that you will cause to be produced before the judge on that day [the will (*n*) and] all documents which are in your possession relating to the matter.

Dated this _____ day of _____ 187 _____ .

Registrar of the court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on _____, when the office will be closed at one.

(*n*) To be left out where administration without will annexed has been granted.

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The other fees payable in the principal court must be collected from the table of general fees (*q*).

The fees are in general payable in stamps (*r*).

Costs of Counsel and Attorneys.]—The following order was framed and issued by the county court judges after approval by the Chancellor, pursuant to the powers vested in them by the acts 19 & 20 Vict. c. 108, and 21 & 22 Vict. c. 95 (*s*).

“The same costs and charges as are now paid to counsel and attorney in the county courts under the provisions of section 33 of the act 19 & 20 Vict. c. 108, shall be paid to counsel, proctors, solicitors and attorneys in respect of proceedings in the county courts under the acts 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95, except that the fee to counsel and clerk may be a sum not exceeding £5 : 10s.”

For the costs and charges so allowed, see *ante*, Vol. I. p. 121 (*t*).

(*q*) See table of “Fees to be taken in court and contentious business in the Court of Probate,” dated 30th July, 1862.

(*r*) 20 & 21 Vict. c. 77, s. 97. The

proper stamps must be applied for at the stamp distributors’ office.

(*s*) See *ante*, p. 194.

(*t*) The costs will be those given in the first column of the scale.

PART VII.

JURISDICTION AND PRACTICE OF THE COUNTY COURTS IN BANKRUPTCY.

CHAPTER I.

THE CONSTITUTION AND GENERAL POWERS OF COUNTY COURTS IN BANKRUPTCY.

- § 1.—THE GENERAL SCOPE AND PRINCIPLES OF “THE BANKRUPTCY ACT, 1869.”
- § 2.—DESCRIPTION OF THE COURT.
- § 3.—GENERAL POWERS AND JURISDICTION OF THE COURTS AND JUDGES.
- § 4.—RULES FOR REGULATING THE PRACTICE AND PROCEDURE IN BANKRUPTCY.
- § 5.—RECORD AND FORM OF PROCEEDINGS.

§ 1.—THE GENERAL SCOPE AND PRINCIPLES OF “THE
BANKRUPTCY ACT, 1869.”

THE law of bankruptcy has been from its origin the creature of legislative enactment.

As already stated elsewhere (*a*), the county courts first obtained a jurisdiction in insolvency and in protection cases under the act 10 & 11 Vict. c. 102. This jurisdiction was superseded and a fresh jurisdiction conferred by “The Bankruptcy Act, 1861” (24 & 25 Vict. c. 134), and that act was in turn repealed by the 32 & 33 Vict. c. 83, and from 1st of January, 1870, the jurisdiction of the county court in bankruptcy is under “The Bankruptcy Act, 1869” (32 & 33 Vict. c. 71), by which (coupled with the repealing statute 32 & 33 Vict. c. 83) all the pre-existing statutes were repealed, and a new law of bankruptcy established.

By that act the county court is the court having jurisdiction in bankruptcy in all cases where the bankrupt is resident in England,

(*a*) See *ante*, Vol. I. p. 49.

and does not reside or carry on business within the London bankruptcy district as defined by the act.

Further, "The Debtors Act, 1869" (32 & 33 Vict. c. 62), contains various provisions for the punishment of bankrupts and persons whose affairs are liquidated by arrangement under "The Bankruptcy Act, 1869," for offences of a fraudulent character (*b*).

It is evident that the practice in bankruptcy forms a very important branch of county court jurisdiction, requiring a separate treatment, although a few of the provisions and branches of the law of bankruptcy have necessarily been referred to and dealt with under the common law jurisdiction and practice in actions in the county courts (*c*).

By "The Bankruptcy Act, 1869," a new law of bankruptcy was established, because, although many of the principles of the former law are incorporated in it, a principle wholly new was at the same time introduced; and its most prominent features, as well in the enactments as in the provisions which are embodied in it by means of the rules, are to hand over to the creditors of insolvents generally an absolute power of determining the manner in which, and the terms upon which, the assets of a debtor who is found to be bankrupt in consequence of a hostile proceeding originated by his creditors or by his own confession, shall be administered and distributed.

In construing and in carrying into practical execution the provisions of the existing law, the principle above adverted to is to be kept in view as the only safe guide. The object of the statute is in this respect single, viz., the securing and administering, for the benefit of all the creditors, all the property of which, when the proceedings authorized by the statute commence, the debtor is possessed (*d*).

In order to present the provisions of "The Bankruptcy Act, 1869," in a systematic and at the same time practical form, it is necessary to depart from the arrangement of the sections made by the legislature (*e*).

(*b*) It is unnecessary to specially notice the provisions of "The Bankruptcy Repeal and Insolvent Court Act, 1869" (32 & 33 Vict. c. 83), providing among other things for the winding-up of the court for the relief of insolvent debtors.

(*c*) *Ante*, Vol. I., as to actions by and against bankrupts and trustees, pp. 575, 578, 628, 899, &c., and as to imprisonment of debtors having the means of payment, *ibid.* pp. 335—355.

(*d*) See the judgment of Bacon, C. J. of the Bankruptcy Court, in *Ex parte Duignan, Re Bissell*, 40 L. J. (N. S.) Bank. 33; approved of on appeal, *Id.* p. 68.

(*e*) The provisions are arranged in the act under the following heads:—PART I. ADJUDICATION AND VESTING OF PROPERTY (ss. 6—18); PART II. ADMINISTRATION OF PROPERTY (ss. 19—58); PART III. CONSTITUTION AND POWERS OF COURT (ss. 59—79); PART IV. SUPPLEMENTAL PROVISIONS (ss. 80—119); PART V. PERSONS HAVING PRIVILEGE OF PARLIAMENT (ss. 120—124); PART VI. LIQUIDATION BY ARRANGEMENT (s. 125); PART VII. COMPOSITION WITH CREDITORS (s. 126); PART VIII. TEMPORARY PROVISIONS (ss. 128—136). A reference to the table of statutes cited, prefixed to this

§ 2.—DESCRIPTION OF THE COURT.

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The court having jurisdiction in bankruptcy consists of the London court and county courts, the county court for such purpose being termed THE LOCAL BANKRUPTCY COURT.

“The Bankruptcy Act, 1869” (32 & 33 Vict. c. 71), enacts:—

Sect. 59. “From and after the commencement of this act, the following provisions shall take effect with respect to the courts having jurisdiction in bankruptcy, and their officers; that is to say,

Court to consist of London court and county courts.

If the person sought to be adjudged a bankrupt reside or carry on business within the London bankruptcy district as hereinafter defined, or be not resident in England, then ‘the court’ shall mean, for the purposes of this act, the Court of Bankruptcy in London as constituted by this act, and hereinafter referred to as the London Bankruptcy Court:

If the person sought to be adjudged a bankrupt, being resident in England, do not reside or carry on business within the London bankruptcy district, then ‘the court’ shall, subject to the provisions hereinafter contained for removing the proceedings, mean the county court of the district in which such person resides or carries on business, hereinafter referred to as the local bankruptcy court.”

volume, will show the order of the sections of “The Bankruptcy Act, 1869,” as they stand in the statute book, and also where they may be found in this volume. Temporary provisions, however, comprising ss. 128—136, are not given. The following “preliminary” sections are given here. The act, reciting that “it is expedient to consolidate and amend the law relating to bankruptcy,” enacts, that—

Sect. 1. “This act may be cited as ‘The Bankruptcy Act, 1869.’”

2. “This act shall not, except in so far as is expressly provided, apply to Scotland or Ireland.”

3. “This act shall not come into operation until the first day of January, one thousand eight hundred and seventy, which date is hereinafter referred to as the commencement of this act.”

4. “In this act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,—

‘The court’ shall mean the court having jurisdiction in bankruptcy as by this act provided:

‘The registrar’ shall mean the registrar of ‘the court’ as above defined:

‘Prescribed’ shall mean prescribed by rules of court to be made as in

this act provided:

‘Property’ shall mean and include money, goods, things in action, land, and every description of property, whether real or personal; also, obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property as above defined:

‘Debt provable in bankruptcy’ shall include any debt or liability by this act made provable in bankruptcy:

‘Person’ shall include a body corporate:

‘Trader’ shall, for the purposes of this act, mean the several persons in that behalf mentioned in the first schedule to this act annexed.”

Sect. 119 enacts, that “where in any act of parliament, instrument or proceeding passed, executed or taken before the commencement of this act mention is made of a commission of bankruptcy or fiat in bankruptcy, the same shall be construed, with reference to the proceedings under a petition for adjudication of bankruptcy, as if a commission of or a fiat in bankruptcy had been actually issued at the time of the presentation of such petition.”

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In order, therefore, to ascertain the area of county court jurisdiction in bankruptcy, it is necessary to see the area of the London Bankruptcy Court; this is fixed by the next section of the act, coupled with a schedule.

Definition of
the London
bankruptcy
district.

Sect. 60. "The London bankruptcy district shall, for the purposes of this act, comprise the following places; that is to say, the city of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any county court described as a metropolitan county court in the list contained in the second schedule hereto" (*f*).

The second schedule is as follows:—

"List of Metropolitan County Courts."

The Bloomsbury County Court of Middlesex; The Bow County Court of Middlesex; The Brompton County Court of Middlesex; The Clerkenwell County Court of Middlesex; The Lambeth County Court of Surrey; The Marylebone County Court of Middlesex; The Shoreditch County Court of Middlesex; The Southwark County Court of Surrey; The Westminster County Court of Middlesex; The Whitechapel County Court of Middlesex."

(*f*) Sects. 61 to 65 inclusive relate to the London Court. Sect. 61 enacts that "the London Bankruptcy Court shall from and after the commencement of this act consist of a judge, to be called the chief judge in bankruptcy, and, subject to the provisions of this act with respect to the officers of the existing London Bankruptcy Court, of such number of registrars not exceeding four, clerks, ushers, and other subordinate officers, as may be determined by the chief judge with the sanction of the Treasury.

"Subject to the provisions of this act with respect to the appointment of the first chief judge, the office of chief judge in bankruptcy shall be filled by such one of the judges of her Majesty's superior courts of common law or of equity as may, with his assent, be assigned to hold such office by the Lord Chancellor; the judge so assigned shall hold the office of chief judge in bankruptcy in addition to the office of judge in the court to which he belongs. Any puisne judge or vice-chancellor appointed to any of the said courts after the passing of this act shall, when required by the

lord chancellor, perform the duties of chief judge in bankruptcy."

Sect. 62 relates to the appointment, sect. 63 to the salaries, and sect. 64 to the duties of registrars and other officers of the London Court, and therefore need not be inserted here. Sect. 65 enacts that "the London Court of Bankruptcy shall continue to be a court of law and of equity and a principal court of record, and the chief judge in bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any judge of her Majesty's superior courts of common law at Westminster, or by any judge of her Majesty's High Court of Chancery, and the orders of such judge shall be of the same force as if they were judgments in the superior courts of common law or decrees in the High Court of Chancery. The chief judge in bankruptcy may sit in chambers, and when in chambers shall have the same jurisdiction and exercise the same powers as if sitting in open court."

As to the office of Comptroller in Bankruptcy, see s. 55, *post*, Chap. VIII., § 7.

Change of Jurisdiction by Chancellor.—Under the head of “Change of Jurisdiction by Chancellor,” “The Bankruptcy Act, 1869,” enacts that—

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Sect. 79. “Notwithstanding anything in this act contained, the Lord Chancellor may from time to time, by order under his hand, exclude any county court from having jurisdiction in bankruptcy, and for the purposes of bankruptcy jurisdiction may attach its district or any part thereof to any other county court or courts, and may from time to time revoke or alter any order so made.”

Change of jurisdiction by Lord Chancellor.

Subject to the provisions of the act, “every court having original jurisdiction in bankruptcy shall be deemed to be the same court, and to have jurisdiction throughout England; and cases may be transferred from one court to another in such manner as may be prescribed” (*g*).



§ 3.—GENERAL POWERS AND JURISDICTION OF THE COURTS AND JUDGES.

“The Bankruptcy Act, 1869” (32 & 33 Vict. c. 71), enacts that—

Sect. 66. “Every judge of a local court of bankruptcy shall, for the purposes of this act, in addition to his ordinary powers as a county court judge, have all the powers and jurisdiction of a judge of her Majesty’s High Court of Chancery, and the orders of such judge may be enforced accordingly in manner prescribed.”

Jurisdiction of county court judges.

Sect. 69. “No judge, registrar, or officer having jurisdiction in bankruptcy, or attached to any court having jurisdiction in bankruptcy, shall, during his continuance in office, be capable of being elected or sitting as a member of the House of Commons; and no registrar or officer of such court shall, during his continuance in office, either directly or indirectly, by himself or partner, act as an attorney or solicitor in any proceeding in any bankruptcy in any court of which he is registrar or officer, or in any appeal from such court, or in any prosecution of a bankrupt by order of such court, under pain of dismissal by the judge; and such dismissal shall be in writing, stating the reasons for the same; and a copy thereof shall be sent to the chief judge in bankruptcy, who, if he shall see fit, may reinstate such registrar or officer.”

Judges and officers in bankruptcy to be ineligible to sit in parliament.

Every court having jurisdiction under the act may review, rescind, or vary any order made by it in pursuance of the act (*h*).

For the purpose of ensuring the right distribution of the estate, and at the least expense, the Court of Bankruptcy is appointed, exclusively of other courts, to decide questions relating to the estate. “The Bankruptcy Act, 1869,” enacts that—

Exclusive jurisdiction.

Sect. 72. “Subject to the provisions of this act, every court having jurisdiction in bankruptcy under this act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether

General power of bankruptcy courts.

(*g*) 32 & 33 Vict. c. 71, s. 80, the entire section, *post*, Chap. X., § 5, subs. (6). APPEAL.

(*h*) 32 & 33 Vict. c. 71, s. 71. See

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of law or fact, arising in any case of bankruptcy coming within the cognizance of such court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case; and no such court as aforesaid shall be subject to be restrained in the execution of its powers under this act by the order of any other court, nor shall any appeal lie from its decisions except in manner directed by this act (i); and if in any proceeding in bankruptcy there arises any question of fact which the parties desire to be tried before a jury instead of by the court itself, or which the court thinks ought to be tried by a jury, the court may direct such trial to be had, and such trial may be had accordingly, in the London Court of Bankruptcy, in the same manner as if it were the trial of an issue in one of the superior courts of common law, and in the county court in the manner in which jury trials in ordinary cases are by law held in such court."

The effect of this section is that no other court can prohibit proceedings in the Court of Bankruptcy, from which the direct intention may be inferred that the Court of Bankruptcy should have power to prohibit proceedings in other courts (k). The county court has power, therefore, to restrain an action against a trustee in bankruptcy for taking possession of property claimed under a bill of sale, the validity of which is disputed by the trustee (l).

Courts in England to be auxiliary to other courts, &c.

Sect. 74. "The London bankruptcy court, the local bankruptcy court, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions" (m).

Delegation of Powers.]—"The Bankruptcy Act, 1869," enacts that—

Powers of court to delegate authority to registrar.

Sect. 67. "The chief judge in bankruptcy and every judge of a local court of bankruptcy may, subject and in accordance with the rules of court for the time being in force, delegate to the registrar or to any

(i) As to appeals see *post*, Chap. X., § 5.

(k) Mellish, L. J., *Ex parte Cohen, Re Sparke*, 41 L. J. (N. S.) Bank. 17.

(l) *Ex parte Cohen*, *supra*; see also the observations of Giffard, L. J., on the powers of the County Court in Bankruptcy under s. 72; *In re Anderson*, 39 L. J. (N. S.) Bank. 54; see also *Ex parte Rumboli, re Taylor*, 40 L. J. (N. S.) Bank. 82.

(m) See s. 2, *ante*, p. 201 (note),

by which the act does not, except so far as is expressly provided, apply to Scotland or Ireland. Even the London Court has no jurisdiction under s. 6 (*post*, p. 220), where the debtor resides in Scotland or Ireland. *Ex parte O'Loughlen*, 40 L. J. (N. S.) Bank. 28. See ss. 73, 74 and 75, *post*, p. 205, as to enforcing warrants in Scotland and Ireland. Every court has jurisdiction throughout England, s. 80, subs. (6), *ante*, p. 203.

other officer of his court such of the powers vested in him by this act as it may be expedient for the judge to delegate to him."

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"The Bankruptcy Rules, 1870," provide that—

2. "The chief judge in bankruptcy may delegate to the registrars of his court such of the powers vested in him by the act as such judge may deem expedient to delegate, except the power to make an order to commit a person for contempt." Sect. 67.

3. "The judge of a local court of bankruptcy may delegate to a registrar of his court, but to no other officer, such of the powers vested in him by the act as such judge may deem expedient to delegate, except the power to make an order to commit a person for contempt." Sect. 67.

4. "Every order made by a registrar while acting under any delegated power, shall have the same force and validity, and be subject to the same appeal, as an order made by the judge, but the registrar may adjourn any matter for the opinion of the judge if he shall think fit."

Questions of novelty and importance ought not to be heard by the registrar (*n*); and where the registrar has to report to the court, he ought not to receive his own report (*o*).

Enforcement of Orders and Warrants of Court.]—Under the head of "Orders and Warrants of Court" "The Bankruptcy Act, 1869," contains the following provisions:—

Sect. 73. "Any order made by a court having jurisdiction in bankruptcy in England under this act shall be enforced in Scotland and Ireland in the courts having jurisdiction in bankruptcy in such countries respectively, in the same manner in all respects as if such order had been made by the courts which are hereby required to enforce the same; and in like manner any order made by the court in Scotland having jurisdiction in bankruptcy shall be enforced in England and Ireland, and any order made by the court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the courts respectively having jurisdiction in bankruptcy in the division of the United Kingdom where the orders made require to be enforced, and in the same manner in all respects as if such order had been made by the court required to enforce the same in a case of bankruptcy within its own jurisdiction" (*p*). Enforcement of warrant and orders of courts.

Sect. 75. "Any court having jurisdiction in bankruptcy in England under this act may, if it thinks fit, order that a person named in the order being in Scotland or in Ireland shall be examined there." Examination in Scotland or Ireland.

Sect. 76. "Any warrant of a court having jurisdiction in bankruptcy in England under this act may be enforced in Scotland, Ireland, the Isle of Man, the Channel Islands, and elsewhere in her Majesty's dominions, in the same manner and subject to the same privileges in and subject to which a warrant issued by any justice of the peace against a person for an indictable offence against the laws of England may be executed in such countries respectively in pursuance of the acts of parliament in that behalf; and any search warrant issued by a court having jurisdiction in bankruptcy under this act for the discovery of any property of a bankrupt may be executed in manner prescribed or in the same" Warrants of bankruptcy courts.

(*n*) Per James, L. J., *Ex parte O'Loughlen*, 40 L. J. (N. S.) Bank. 31.

L. J. (N. S.) Bank. 43.

(*p*) Sect. 74 will be found *ante*, p. 204.

(*o*) See *Re Finncy*, *Ex parte English Joint Stock Company*, 40

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to prison.

manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law."

Sect. 77. "Where any court having jurisdiction in bankruptcy under this act commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient, and if the gaoler of any prison refuses to receive any prisoner so committed he shall be liable for every such refusal to a penalty not exceeding one hundred pounds."

§ 4.—RULES FOR REGULATING THE PRACTICE AND PROCEDURE IN
BANKRUPTCY.

Under the head of "General Rules" "The Bankruptcy Act, 1869," enacts that—

General
rules to be
made by
Lord Chan-
cellor, with
advice of
chief judge.

Sect. 78. "The Lord Chancellor, with the advice of the chief judge in bankruptcy, may from time to time make, and may from time to time revoke and alter, general rules, in this act described as rules of court, for the effectual execution of this act, and of the objects thereof, and the regulation of the practice and procedure of bankruptcy petitions and the proceedings thereon.

"Any general rules made as aforesaid may prescribe regulations as to the service of bankruptcy petitions, including provisions for substituted service; as to the valuing of any debts provable in a bankruptcy; as to the valuation of securities held by creditors; as to the giving or withholding interest or discount on or in respect of debts or dividends; as to the funds out of which costs are to be paid, the order of payment, and the amount and taxation thereof; and as to any other matter or thing, whether similar or not to those above enumerated, in respect to which it may be expedient to make rules for carrying into effect the objects of this act; and any rules so made shall be deemed to be within the powers conferred by this act, and shall be of the same force as if they were enacted in the body of this act.

"Any rules made in pursuance of the section shall be laid before parliament within three weeks after they are made, if parliament be then sitting; and if parliament be not then sitting, within three weeks after the beginning of the then next session of parliament, and any rules so made shall be judicially noticed.

"Until rules have been made in pursuance of this act, and so far as such rules do not extend, the principles, practice, and rules on which courts having jurisdiction in bankruptcy have heretofore acted in dealing with bankruptcy proceedings shall be observed by any court having jurisdiction in bankruptcy cases under this act."

General Rules dated 1st January, 1870, were made under the above provision, and are cited as "The Bankruptcy Rules, 1870," and subsequent Rules dated 7th July, 1871, are cited as "The Bankruptcy Rules, 1871." These Rules are to be read together. They will be found under the subjects to which they refer (*q*).

(*q*) See the Table of "Rules," prefixed to this volume. Rule 1 of "the Bankruptcy Rules, 1870," contains the following *definition of terms*:—

"1. In the construction of these rules and forms, words importing the singular number shall include the plural, and words importing the

§ 5.—RECORD AND FORM OF PROCEEDINGS.

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Seal of Court.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 109. “Every court having jurisdiction in bankruptcy under this act shall have a seal describing such court in such manner as may be directed by order of the lord chancellor, and judicial notice shall be taken of such seal, and of the signature of the judge or registrar of any such court, in all legal proceedings.”

Bankruptcy
courts to
have seals.

By order dated 1st January, 1870, “every county court shall have a seal describing such court, as it is now described by the seal hitherto used in every such court respectively.”

Record of Proceedings.—“The Bankruptcy Rules, 1870,” direct that—

Rule 9. “All proceedings of the court shall remain of record in the court, so as to form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the officers of the court or by special direction of the judge or registrar, but they may at all reasonable times be inspected by the trustee, the bankrupt, and any creditor who has proved, or any person on their behalf.”

plural number shall include the singular number, and words importing the masculine gender shall include females, and the following terms shall (if not inconsistent with the context or subject-matter) have the respective meanings hereinafter assigned to them, that is to say—

‘The Act’ shall mean the Bankruptcy Act, 1869:

‘Court’ shall mean the court having jurisdiction in the matter:

‘Judge’ shall mean the judge or a lawfully appointed deputy judge of any such court:

‘Registrar’ shall mean a registrar or any deputy registrar of any such court:

‘Creditor’ shall include a firm of creditors in partnership:

‘Debtor’ shall include a firm of debtors in partnership:

‘Attorney’ shall mean any attorney or solicitor entitled to practise in any such court:

‘Name’ of any person shall mean both the christian name or the initial letter or contraction of the christian name and the surname of such person:

‘Affidavit’ shall include statutory declarations, affirmations, and attestations upon honour, and the word ‘sworn’ shall include declaring and affirmed accord-

ing to statute and attested upon honour:

‘District’ shall, when used with reference to a county court, mean the district of such court for purposes of bankruptcy jurisdiction:

‘Gazetted’ shall mean that the notice or thing is to be published in the *London Gazette*:

‘Local paper’ shall mean a paper circulating in the locality of the court:

‘Sealed’ shall mean sealed with the seal of the court:

And, unless there be something in the context inconsistent therewith, the provisions of sects. 4 and 114 of the act shall apply to these rules.” (See s. 4, *ante*, p. 201, and s. 114, *post*, p. 210.)

Rule 319 provides that “the foregoing rules shall apply, in exclusion of all other rules and orders heretofore made, to all proceedings commenced under the act.”

“The Bankruptcy Rules, 1871,” by Rule 1, order that—

“1. The general rules in bankruptcy made on the 1st day of January, 1870, may be cited for all purposes as ‘the Bankruptcy Rules, 1870;’ and these rules as ‘the Bankruptcy Rules, 1871,’ and such rules shall be read and construed together.”

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Rule 10. "All summonses, petitions, notices, orders, warrants, and other process issued by the court shall be sealed."

Rule 240. "The chief registrar of the London Bankruptcy Court, and every registrar of a county court having jurisdiction in bankruptcy, shall keep books according to the forms in the schedule, and the particulars given under the different heads in such books shall be entered forthwith after the proceeding shall be had."

Rule 241. "The registrars shall make and transmit such extracts from such books as the comptroller may from time to time require to be made and transmitted to him."

Besides the record of proceedings in the local courts, returns are made to an officer in London appointed by the Lord Chancellor, called "THE COMPTROLLER IN BANKRUPTCY," and mentioned in the preceding rule (*q*).

"The Bankruptcy Act, 1869," enacts that—

Sect. 115. "The registrars and other officers of the courts acting in bankruptcy shall make to the comptroller in bankruptcy such returns of the business of their respective courts and offices, at such times and in such manner and form as may be prescribed by the rules of court, and from such returns the comptroller shall, in manner prescribed by the rules of court, frame books (which shall be, under the regulations of the rules of court, open for public information and searches), and also a general annual report to the Lord Chancellor, judicial and financial, respecting all matters within this act, which report shall be laid before both houses of parliament."

"The Bankruptcy Rules, 1871," provide that—

Rule 11. "The registrars shall in all cases of bankruptcy forward to the comptroller an office copy of the minutes of proceedings at first meeting of creditors, a memorandum of order of discharge, and of order annulling adjudication, or of closing bankruptcy, and shall supply the comptroller with such special information, or statistical returns, as he may from time to time require."

Forms of Proceedings.]—"The Bankruptcy Rules, 1870," provide that—

Rule 7. "In matters under the act the proceedings may be in the several forms set forth in the schedule attached to these rules, or as near thereto as possible, and where forms for any proceeding in such matters are not provided in the schedule, the forms required may be framed by the parties, using as guides those so provided, so far as they are applicable" (*r*).

Rule 8. "All proceedings in the court (except notices to creditors) shall be written or printed, or partly written or partly printed, on parchment or paper of the size hitherto used in bankruptcy, that is to say, on sheets of sixteen inches in length and ten inches in breadth, or thereabouts; but no objection shall be allowed to any proof of debt, affidavit, or proxy on account of its being written or printed on other sized paper."

(*q*) See further, as to the office and duties of the comptroller, ss. 55—58, and rules 237—251, *post*, Chap. VIII., § 7.

(*r*) Most of the forms will be found classed under various heads. A form

of register of bankruptcies in the county courts is not given, but a similar form is directed to be used to that given for the London Bankruptcy Court. See Form No. 101, appendix to Bankruptcy Rules, 1870.

Office Copies of Proceedings to be provided by the Registrar.]—“The Bankruptcy Rules, 1870,” provide that—

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CHAP. I.

Rule 12. “All office copies of petitions, proceedings, books, papers, and writings, or any parts thereof required by any trustee, or by any person being a bankrupt or debtor who has instituted proceedings under sections 125 or 126 of the act, or by any creditor of any such person, or attorney of any such person, or creditor, shall be provided by the registrar, and shall, except as to figures, be fairly written at length, and be sealed with the seal of the court, and delivered out without any unnecessary delay, and in the order in which they shall have been bespoken, and be charged and paid for at the rate of twopence per folio of seventy-two words.”

Advertisements in London Gazette.]—

Rule 13. “In lieu of attaching a copy of the London Gazette to the proceedings in each bankruptcy or other matter, the registrar shall file with the proceedings the page of the gazette in which the advertisement occurs, and in case of an advertisement in a local paper, he shall file the advertisement with a memorandum of the name of the paper and date of its publication; and for this purpose one copy of every London Gazette and of each local newspaper in which any notice in any matter of bankruptcy in such court is inserted shall be left with the registrar by the person inserting the notice.”

Validity of Proceedings.]—“The Bankruptcy Act, 1869,” enacts that—

Sect. 82. “No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such court.”

Formal defects not to invalidate proceedings.

Amendments.]—“The Bankruptcy Rules, 1870,” provide that—

Rule 208. “In any proceeding before the court, the court may allow any amendments which in the judgment of the court or registrar ought to be allowed on such terms as may be ordered.”

Exemption from Stamp Duty.]—“The Bankruptcy Act, 1869,” enacts that—

Sect. 113. “Every deed, conveyance, assignment, surrender, admission, or other assurance relating solely to freehold, leasehold, copyhold, or customary property, or to any mortgage, charge, or other incumbrance on, or any estate, right, or interest in any real or personal property which is part of the estate of any bankrupt, and which after the execution of such deed, conveyance, assignment, surrender, admission, or other assurance, either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond, or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty (except in respect of fees under this act)” (s).

Exemption of deeds, &c. from stamp duty.

(s) As to fees in bankruptcy, see *post*, Chap. XVII.

CHAPTER II.

GENERAL PROVISIONS AND RULES RELATING TO THE PRACTICE IN BANKRUPTCY.

- § 1.—COMPUTATION OF TIME.
- § 2.—SITTINGS OF THE COURT.
- § 3.—APPEARANCE OF PARTIES BY ATTORNEY OR AGENT.
- § 4.—MODE OF APPLYING TO THE COURT.
- § 5.—AFFIDAVITS.
- § 6.—MODE OF GIVING SECURITY WHEN REQUIRED.
- § 7.—SERVICE AND EXECUTION OF PROCESS.
- § 8.—EVIDENCE.
- § 9.—WITNESSES.

BEFORE proceeding to treat of the various steps in bankruptcy, it is desirable to bring together a variety of provisions and rules relating to the practice in bankruptcy, of general application, and not peculiar merely to one stage.

§ 1.—COMPUTATION OF TIME.

With respect to the computation of time, "The Bankruptcy Act, 1869," enacts that—

Sect. 114. "Where by this act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of such limited time the same shall be taken as exclusive of the day of such date or of the happening of such event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of such limited time according to such computation, unless such last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter Week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which, in pursuance of a notification by the lord chancellor under this act, the court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being one of the days in this section specified.

"Where by this act any act or proceeding is directed to be done or taken on a certain day, then if that day happens to be one of the days

in this section specified, such act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being one of the days in this section specified." PART VII.
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—◆—

§ 2.—SITTINGS OF THE COURT.

Under the head of "Sittings of a County Court," "The Bankruptcy Rules, 1870," provide that—

Rule 204. "The place of sitting of each county court in matters of bankruptcy shall be the town in which the court now holds or may hereafter hold its sittings for the common law business of the court, under the provisions of 'The County Courts Act, 1846'" (a).

Rule 205. "The times of the sitting of each county court in matters of bankruptcy, shall be those appointed for the transaction of the general business of the court, unless the judge of any such court shall otherwise order, and shall appoint a special day or days for a sitting of the court in matters of bankruptcy" (b).

Sittings in Chambers.]—"The Bankruptcy Rules, 1870," provide that—

Rule 5. "Any matter may be heard and disposed of in chambers by a judge or registrar, except the public examination of the bankrupt under section 19 of the act, and the granting an order of discharge."

Rule 6. "Where the judge or registrar shall be of opinion that any matter ought to be heard and disposed of in open court, or all the contending parties shall require any matter to be so heard and disposed of, such matter shall be so heard and disposed of, or if part heard shall be adjourned for the purpose of being further heard and disposed of in open court."

—◆—

§ 3.—APPEARANCE OF PARTIES BY ATTORNEY OR AGENT.

Right to appear by Attorney without Counsel.]—"The Bankruptcy Act, 1869," enacts that—

Sect. 70. "Every attorney and solicitor of the superior courts shall be, and may practise as a solicitor of, and in the Court of Bankruptcy, and in matters before the chief judge or registrars, in the London Court of Bankruptcy, in court or in chambers, may appear and be heard without being required to employ counsel; and if any person not being such attorney or solicitor practises in the Court of Bankruptcy as attorney or solicitor, he shall be deemed guilty of a contempt of the court." Solicitors of
Court of
Chancery
may practise
in Bank-
ruptcy Court.

Although parties are not compelled to employ counsel, motions by the bar have precedence over those by attorneys (c).

Agents of Corporations.]—A corporation may prove a debt,

(a) See *ante*, Vol. I. pp. 10—13.

(c) See Rule 57, *post*, p. 213.

(b) *Ibid*.

vote, and otherwise act in bankruptcy, by an agent duly authorized under the seal of the corporation (*d*).

Representation of Creditors.—“A creditor may in the prescribed manner, by instrument in writing, appoint a person to represent him in all matters relating to any debtor or his affairs in which a creditor is concerned in pursuance of this act, and such representative shall thereupon, for all the purposes of this act, stand in the same position as the creditor who appointed him” (*e*).

Voting by Proxy.—Votes at meetings of creditors may be given by proxy (*f*).

§ 4.—MODE OF APPLYING TO THE COURT.

“The Bankruptcy Rules, 1870,” contain the following rules under the general head of “Motions and Practice” :—

Applications to be by Motion supported by Affidavit.—

Rule 50. “All applications to the court in the exercise of its primary jurisdiction by virtue of the act, shall (unless otherwise provided or the court shall in any particular case otherwise permit) be by way of motion, supported by affidavit, upon hearing which the court shall make such order therein as shall be just; but in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall be made, unless upon the consent of such person or persons duly shown to the court; or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby four clear days at least before the day named in such notice as the day when the motion is to be made: provided, however, that the court may, if it shall think fit, in any case where the party or parties to be affected by the order, or any of them, shall not have been duly served with a notice of the motion for such order, make an order calling upon the party or parties to be affected thereby to show cause, at a day to be named by the court in such order, why such order should not be made.”

Service of Orders to show Cause and Notices of Motion.—

Rule 51. “Every order to show cause shall be served upon the party or parties to be affected thereby four clear days at the least before the day appointed for showing cause.”

52. “In cases in which personal service of any notice of motion, or of any rule or order of the court, is required, the same shall be effected, in the case of a notice of motion, by delivering at any time to the party or parties to be served, and each of them, a duplicate of the notice of motion; and in the case of a rule or order by delivering to the party

(*d*) 32 & 33 Vict. c. 71, s. 80, subs. (7). See the entire section, *post*, p. 244, note.

(*e*) 32 & 33 Vict. c. 71, s. 80, subs.

(8). See the entire section, *post*, p. 244, note.

(*f*) 32 & 33 Vict. c. 71, s. 16. See *post*, Chap. VII.

or parties to be served, and each of them, a sealed copy of the order or rule."

53. "Notices of which substituted service may be made (otherwise than by post or advertisement) shall be served between the hours of eight o'clock in the forenoon and nine o'clock in the afternoon."

Filing Affidavits.—

Rule 54. "Every affidavit to be used in obtaining, supporting, or opposing any motion or order for showing cause for or against any order or rule of court, shall be filed with the registrar two days before the day appointed for the hearing; and no affidavit in reply or in rejoinder is to be used except by leave of the court."

55. "The registrar, upon any affidavit being left with him to be filed, shall indorse the same with the day of the month and year when the same was so left, and forthwith file the same, with the proceedings to which the same relates, and any affidavit left with a registrar to be filed, shall on no account be delivered to any person whatever, except by order of the court."

Notes of Motions.—

Rule 56. "A short note of every motion shall be delivered to the registrar previous to the public sitting of the court, specifying the bankruptcy or other matter to which the same relates, the name of the party on whose behalf the same is made, the name and residence of the attorney of such party and of the counsel, if the same be made by counsel, and the name of any party, and the name and residence of his attorney, on whom any notice of such motion has been served."

Order in which Motions are heard.—

Rule 57. "Except in cases of emergency all motions shall be made and heard in the order in which they are set down, at the sitting of the court, but motions by the bar shall be heard in precedence to those by attorneys."



§ 5.—AFFIDAVITS.

The rules requiring applications to the court to be supported by affidavit has been given under the preceding head (§ 4). "The Bankruptcy Rules, 1870," comprise the following rules under the head of "Affidavits."

Form of Affidavits.—

Rule 151. "All affidavits to be used in evidence on motions to the court shall be divided into short paragraphs, numbered consecutively, and shall be in the first person."

152. "Every such affidavit shall state the deponent's name, address, and description, and also what facts or circumstances deposed to are within his knowledge."

153. "Where any such affidavit is made by more than one person, the names of all the persons making the affidavit, and the dates when and the places where it is sworn shall be inserted in the jurat."

154. "Any such affidavit not in conformity with the last three preceding rules may be rejected by the court."

155. "An affidavit in which there is any erasure, or which is blotted so as to obliterate any word, or which is illegibly written, or so altered as to cause it to be illegible, or in which there is any interlineation, not duly authenticated by the person before whom it was sworn, may be rejected by the court."

156. "Where an affidavit is made by any person who is blind, or who from his signature or otherwise appears to be illiterate, the person before whom the affidavit is sworn shall state in the jurat that the affidavit was read over to the deponent, and that the deponent appeared to understand the same, and made his mark or wrote his signature thereto in the presence of the person before whom the affidavit is sworn."

Before whom Affidavits to be sworn.]—

Rule 157. "Any affidavit used in any matter of bankruptcy may be sworn as follows:—

- (1.) In the United Kingdom, before a court having jurisdiction in bankruptcy or a judge thereof or an officer thereof authorized to administer oaths in that court, or before a person authorized to administer oaths in any of the superior courts of law or equity, or before a justice of the peace for the county or place where it is sworn or made, and in case of proof of debts, before the trustee of the property of the bankrupt.
- (2.) In any place in the British dominions out of the United Kingdom, before any court, judge, or justice of the peace, or any person authorized to administer oaths there in any court.
- (3.) In any place out of the British dominions, before a British minister, consul, vice-consul, or notary public, or before a judge or magistrate, his signature being authenticated by the official seal of the court to which such judge or magistrate is attached."

It is to be observed that "affidavit" includes statutory declarations, affirmations, &c.; see rule, *ante*, p. 207 (note).

§ 6.—MODE OF GIVING SECURITY WHEN REQUIRED.

Security to be by Bond.]—"The Bankruptcy Rules, 1870," give the following rules under the head of "Security."

Rule 158. "Where a person is required to give security, such security shall be in the form of a bond with one or more surety or sureties to the person proposed to be secured."

159. "The bond of any person other than a trustee shall be taken in a penal sum to the amount of double the sum in question up to the sum of 1,000*l.*; and where the sum in question exceeds 1,000*l.* in the sum of 1,000*l.* beyond such sum, unless, in either case, the opposite party consents to it being taken for a less sum."

Deposit in lieu of Bond.]—

Rule 160. "Where a person is required to give security he may, in lieu thereof, deposit with the registrar a sum equal to the sum in ques-

tion in respect of which security is to be given, and the probable costs of the trial of the question, together with a memorandum to be approved of by the registrar, and to be signed by such person, his attorney, or agent, setting forth the conditions on which the money is deposited."

161. "The security of a guarantee association or society may be given in lieu of a bond or a deposit."

Notice of proposed Sureties.]—

Rule 162. "In all cases where a person proposes to give a bond by way of security, he shall serve, by post or otherwise, on the opposite party, and on the registrar, at his office, notice of the proposed sureties, according to the form set forth in the schedule; and the registrar shall forthwith give notice to both parties of the time and place at which he proposes that the bond shall be executed, and shall state in the notice, that should the proposed obligee have any valid objection to make to the sureties, or either of them, it must then be made."

Justification.]—

Rule 163. "The sureties shall make an affidavit of their sufficiency according to the form in the schedule, unless the opposite party shall dispense with such affidavit, and such sureties shall attend the court to be cross-examined if required."

Execution of Bond.]—

Rule 164. "The bond shall be executed and attested in the presence of the registrar, or before a justice of the peace, or an attorney."

Notice of Deposit.]—

Rule 165. "Where a person makes a deposit of money in lieu of giving a bond, the registrar shall forthwith give notice to the person to whom the security is to be given of such deposit having been made."

§ 7.—SERVICE AND EXECUTION OF PROCESS.

Service in general.]—"The Bankruptcy Rules, 1870," comprise the following provisions:—

Rule 58. "Unless otherwise directed or permitted by these rules, it shall be the duty of a high bailiff to serve all orders, summonses, petitions and notices; to execute all warrants and processes; to attend all sittings of the court (except sittings in chambers); to prepare and cause to be inserted in the London Gazette and newspapers, all advertisements and notices, and to do and perform all such things as may be required of him by the court or trustee."

14. "All notices and other proceedings, for the delivery of which no special mode is prescribed, may be sent by prepaid post letter to the last known address of the person, to be served therewith."

Arrests, Commitments.]—

Rule 176. "A warrant of seizure, or a search warrant, or any other Sect. 99.

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warrant issued under the provisions of the act, shall be addressed to such officer of the London Court of Bankruptcy, or to such high bailiff of any county court, whether such county court has jurisdiction in bankruptcy or not, as the court may in each case direct" (g).

Committal for Contempt.—

Rule 178. "An application to the court to commit any person for contempt of court shall be supported by affidavit, and be filed in the court in which the proceedings are."

179. "Upon the filing of such application the registrar shall fix a time and place for the court to hear the application, and shall issue a notice to be served by an officer or high bailiff of the court personally on the person sought to be committed, three days at the least before the day of hearing the application, unless the court shall, by order upon good cause shown, direct service of the notice to be made in some other manner, in which case it shall be served together with a copy of the order in the manner so directed."

§ 8.—EVIDENCE.

"The Bankruptcy Act, 1869," enacts that—

Evidence of proceedings in bankruptcy.

Sect. 107. "Any petition or copy of a petition in bankruptcy, any order or copy of an order made by any court having jurisdiction in bankruptcy, any certificate or copy of a certificate made by any court having jurisdiction in bankruptcy, any deed or copy of a deed of arrangement in bankruptcy, and any other instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this act, may, if any such instrument as aforesaid or copy of an instrument appears to be sealed with the seal of any court having jurisdiction (h), or purports to be signed by any judge having jurisdiction in bankruptcy under this act, be receivable in evidence in all legal proceedings whatever."

Death of witness.

Sect. 108. "In case of the death of the bankrupt or his wife, or of a witness whose evidence has been received by any court in any proceeding under this act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to."

Mode of taking Evidence.—"The Bankruptcy Rules, 1870," provide that—

Rule 49. "The court may in any matter take the whole or any part of the evidence either *vivâ voce*, or by interrogatories, or upon affidavit, or by commission abroad."

See also s. 75 of "The Bankruptcy Act, 1869," *ante*, p. 205.

(g) As to enforcing orders and warrants out of England, see ss. 73 & 76 of "The Bankruptcy Act, 1869,"

ante, p. 205.

(h) See as to the seal of the court, sect. 109, *ante*, p. 207.

§ 9.—WITNESSES.

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“The Bankruptcy Rules, 1870,” contain the following provisions under the head of “Witnesses” :—

Rule 166. “A subpoena for the attendance of a witness capable of giving evidence concerning any matter in the court, before or after adjudication, shall be issued by the court at the instance of a trustee, a creditor, a debtor, or any respondent in any matter, with or without a clause requiring the production of books, deeds, papers and writings in his possession or control, and in such subpoena the name of only one witness shall be inserted. A subpoena may be issued in blank as at common law.” Sects. 65, 66
and 96.

167. “A sealed copy of the subpoena shall be served personally on the witness by the person at whose instance the same is issued, or by his attorney, or by an officer of the court, within a reasonable time before the time of the return thereof.”

168. “Service of the subpoena shall, where required, be proved by affidavit.”

169. “The court may in any matter limit the number of witnesses to be allowed on taxation of costs, and their allowance for attendance shall in no case exceed the highest rate of the allowances mentioned in the scale in the schedule” (i).

170. “The costs of witnesses, whether they have been examined or not, may, in the discretion of the court, be allowed.”

The following form of summons to a witness, is provided in the schedule to the rules :—

No. 75. *Subpœna or Summons to Witness in County Court.*

“The Bankruptcy Act, 1869.”

In the County Court of _____, holden at _____.

In the matter of a bankruptcy petition against *A. B.*, of _____,
[or in the matter of *A. B.*, of _____, a bankrupt].To *X. Y.*, of _____

You are hereby required to attend at the court house in _____ on the _____ day of _____, in the _____ noon to give evidence in the above matter [add where issued at instance of petitioning creditor on behalf of *C. D.*, of _____, by whom the said petition has been presented], and then and there to have and produce [state any particular documents required]; hereof fail not at your peril.

Dated this _____ day of _____, 187 _____.

Registrar.

(i) See *post*, Chap. XVIII.

CHAPTER III.

OF THE CIRCUMSTANCES UNDER WHICH A PERSON IS
LIABLE TO BE MADE A BANKRUPT.

- § 1.—THE PRINCIPLES OF THE LAW IN REFERENCE TO PERSONS
LIABLE TO BE ADJUDGED BANKRUPTS.
- § 2.—THE GENERAL CIRCUMSTANCES UNDER WHICH BANKRUPTCY
CAN BE ENFORCED.
- § 3.—OF TRADERS.
- § 4.—WHO MAY BE ADJUDICATED BANKRUPT.
- § 5.—WHO MAY PETITION.
- § 6.—THE PETITIONING CREDITOR'S DEBT.

§ 1.—THE PRINCIPLES OF THE LAW IN REFERENCE TO PERSONS
LIABLE TO BE ADJUDGED BANKRUPT.

FORMERLY a bankrupt was defined to be “a trader who secretes himself, or does certain other acts, tending to defraud his creditors” (*a*). Blackstone says, that the laws of bankruptcy were considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice, and to that end they conferred some privileges, not only on the creditors, but also on the bankrupt or debtor himself. “On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment; on the debtor, by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt; whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors” (*b*). And further the same writer says, that in order that prodigality and extravagance should not be encouraged by that indulgence to debtors, the benefit of the laws of bankruptcy was not allowed to any but actual *traders*, because trade cannot be carried on without mutual credit, and the contracting of debts in

(*a*) 2 Bla. Comm. 285, 471.(*b*) *Id.* 472.

trade is, therefore, not only justifiable but necessary ; “and if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault” (c).

This statement, however applicable to the theory of the bankruptcy laws in the days of Blackstone, does not represent the original legislation. The statute 34 & 35 Hen. 8, c. 4, which is the real foundation of the whole system of the bankrupt law (d), the chief provisions of it being copied into the subsequent statutes, had no special reference to traders ; every debtor who committed one of the acts of bankruptcy specified, was subject to its provisions. The act, moreover, had solely the interest of creditors, and not debtors in view, for it is wholly founded upon the recital that “divers and sundry persons, craftily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their duties, but at their own wills and pleasure consume debts and the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience.”

The next statute, however, 13 Eliz. c. 7, in declaring “who is and ought to be taken and deemed for a bankrupt,” confined bankruptcy to merchants and traders. And numerous other acts followed in the wake of that statute, which has been generally treated as the basis of the law as administered in this country.

In the course of time it was found necessary to extend the system of the administration of a debtor’s property among his creditors to other persons than traders, and also to allow debtors to obtain freedom from arrest by giving up their property to their creditors. This was first done by the Insolvent Debtors Acts, and establishing a court for the relief of insolvent debtors. It is unnecessary and out of place here to trace the various changes in the law ; it is sufficient to say that “The Bankruptcy Act, 1869” (coupled with other acts of the same year (e)), abolished the insolvent laws and introduced one system, only retaining the distinction between traders and non-traders in reference to certain acts or defaults, constituting “acts of bankruptcy” (and made conditions precedent in some cases to the right to take proceedings in bankruptcy (f)).

Under the present law, *proceedings in bankruptcy*, strictly speaking, can only be instituted by creditors, and not by debtors. Proceedings, however, may be taken by debtors of any description unable to pay their debts, by calling their creditors together in

(c) 2 Bla. Comm. 473, 474.

(d) See Christian’s Bankrupt Law, 2nd edition, p. 9.

(e) Viz. “The Debtors Act, 1869” (32 & 33 Vict. c. 69), and “The

Bankruptcy Repeal and Insolvent Court Act, 1869” (32 & 33 Vict. c. 83).

(f) See *post*, Chap. IV.

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order that their affairs may be liquidated by arrangement ; but this proceeding by arrangement is at the option of the creditors. On the other hand, the creditors of a debtor, unable to pay his debts, may, without actual bankruptcy, accept a composition in satisfaction of their debts.

Proceedings *in bankruptcy*, strictly speaking, that is to say, proceedings by creditors apart from the consent of the debtor, will be first considered, leaving "liquidation by arrangement," and "composition," to be subsequently dealt with (*g*).



§ 2.—THE GENERAL CIRCUMSTANCES UNDER WHICH BANKRUPTCY MAY BE ENFORCED.

The following provision of "The Bankruptcy Act, 1869" (32 & 33 Vict. c. 71), comprises the general circumstances under which compulsory proceedings in bankruptcy may be taken :—

Petition for
adjudication
in bank-
ruptcy.

Sect. 6. "A single creditor, or two or more creditors if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from any debtor, amount to a sum of not less than fifty pounds, may present a petition to the court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression 'acts of bankruptcy:'

- (1.) That the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally :
- (2.) That the debtor has, in England or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property or of any part thereof :
- (3.) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of England, or being out of England remained out of England ; or being a trader departed from his dwelling-house, or otherwise absented himself ; or begun to keep house ; or suffered himself to be outlawed :
- (4.) That the debtor has filed in the prescribed manner in the court a declaration admitting his inability to pay his debts :
- (5.) That execution issued against the debtor on any legal process for the purpose of obtaining payment of not less than fifty pounds has in the case of a trader been levied by seizure and sale of his goods :
- (6.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than fifty pounds, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such sum-

(*g*) As to LIQUIDATION BY ARRANGEMENT and COMPOSITION WITH CREDITORS, see *post*, Chap. XVI.

mons, neglected to pay such sum, or to secure or compound for the same.

But no person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication; moreover, the debt of the petitioning creditor must be a liquidated sum due at law or in equity, and must not be a secured debt, unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt, or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value."



§ 3.—OF TRADERS.

It will be observed that in sect. 6 of "The Bankruptcy Act, 1869," "traders" are mentioned, and distinctions in respect of certain acts of bankruptcy made between them and other debtors (*h*).

"Traders," for the purposes of the act, mean the several persons mentioned in the first schedule to the act (*i*). The following is the schedule:—

SCHEDULE I.

Description of Traders.

"Alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels, or coffee houses, lime-burners, livery stable keepers, market gardeners, millers, packers, printers, sharebrokers, shipowners, shipwrights, stockbrokers, stockjobbers, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody, persons insuring ships or their freight or other matters against perils of the sea, persons using the trade of merchandise by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and persons who, either for themselves or as agents or factors for others, seek their living by buying and selling or buying and letting for hire goods or commodities, or by the workmanship or the conversion of goods or commodities; but a farmer, grazier, common labourer, or workman for hire shall not, nor shall a member of any partnership, association, or company which cannot be adjudged bankrupt under this act (*k*), be deemed as such a trader for the purposes of this act."

In those cases where the fact of the debtor being a "trader" is essential, the trading must continue to be a trading down to the

(*h*) See the section, *ante*, p. 220.

ruptcy Act, 1869," *ante*, p. 201, note.

(*i*) See sect. 4 of "The Bank-

(*k*) See sect. 5, *post*, p. 222.

time of the proceedings in bankruptcy. It is not sufficient that the debt was contracted by the debtor while trading, if he has ceased to be a trader (*l*).

§ 4.—WHO MAY BE ADJUDICATED BANKRUPT.

Leaving the “acts of bankruptcy” mentioned in sect. 6 for subsequent consideration (*m*), the remainder of the present chapter will be confined to ascertaining who may be made a bankrupt, and who may petition, with reference to personal qualifications or disqualifications, and also in reference to the petitioning creditor’s debt.

Before taking proceedings in Bankruptcy, it is necessary to see clearly “who may be made a bankrupt.”

“The Bankruptcy Act, 1869,” s. 6 (*ante*, p. 220), it will be seen, empowers creditors of “any debtor” to take proceedings in bankruptcy. So far, therefore, as already stated, there is no distinction between traders and non-traders.

The only restriction in this respect expressed in the act is as follows:—

Exclusion of
companies
and large
partnerships.

Sect. 5. “A partnership, association, or company corporate, or registered under ‘The Companies Act, 1862,’ shall not be adjudged bankrupt under this act.”

The meaning of this provision appears to be that no corporate body can be proceeded against in bankruptcy (although in general when “person” is mentioned in the act, a body corporate is included) (*n*).

Partners.]—As regards ordinary partnerships, there is no doubt that a petition may be presented against any one or more or all of the members; for the act contains provisions on this subject and expressly provides, that “any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm, may present such petition against any one or more partners of such firm without including the others” (*o*).

Infants.]—“An infant, though a trader, cannot be made a bankrupt, for an infant can owe nothing but for necessaries; and

(*l*) This appears to be what the chief judge in bankruptcy intended to decide in *Ex parte Bailey, In re Jecks*, 41 L. J. (N. S.), Bankr. 1, although in the report of his judgment he is made to say: “I am of opinion that the existing statute has in this respect no retrospective operation, and that it speaks of and refers only to such persons as at the time of

its commencement were or should afterwards become traders.”

(*m*) See *post*, Chapter IV.

(*n*) See sect. 4, *ante*, p. 201, note.

(*o*) “The Bankruptcy Act, 1869,” s. 100, see *post*. See as to partnership (*inter alia*) the statute 28 & 29 Vict. c. 86, “to amend the law of partnership.”

the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due; and no person can be made a bankrupt for debts, which he is not liable at law to pay" (*p*).

Married Women.—Married women are not in general liable to be adjudged bankrupt, but a wife who is a sole trader, according to the custom of London, is liable (*q*).

Privilege.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 120. “If a person having privilege of parliament commits an act of bankruptcy he may be dealt with under this act in like manner as if he had not such privilege” (*r*).

Privilege of parliament not to prevent adjudication in bankruptcy.

(*p*) 2 Bla. Comm. 477, citing *R. v. Cole*, Ld. Raym. 443; 12 Mod. 243; Holt, 360; *Ex parte Sydebotham*, 1 Atk. 146.

(*q*) See Christian's Bankrupt Law, vol. 1, 2nd edition, pp. 69—74, and cases there cited. See the Married Women's Property Act, *ante*, Vol. I. pp. 509, 890.

(*r*) It was held under the now repealed “Bankruptcy Act, 1861,” that a peer of the realm enjoying the privilege of parliament and a non-trader, was subject to an adjudication in bankruptcy, *Duke of Newcastle v. Morris* (House of Lords), 40 L. J. (N. S.) Bank. 4. The following sections of the “Bankruptcy Act, 1869,” relate to the effect of bankruptcy on members of the House of Commons.

121. “If a person, being a member of the Commons House of Parliament, is adjudged bankrupt, he shall be and remain during one year from the date of the order of adjudication incapable of sitting and voting in that house, unless within that time either the order is annulled or the creditors who prove debts under the bankruptcy are fully paid or satisfied.

“Provided that such debts (if any) as are disputed by the bankrupt shall be considered, for the purpose of this section, as paid or satisfied if within the time aforesaid he enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning such debts, together with any costs to be given in such proceedings.”

122. “If within the time aforesaid the order of adjudication is not annulled, and the debts of the bankrupt are not fully paid or satisfied as aforesaid, then the court shall, immediately after the expiration of that time, certify the same to the speaker of the House of Commons, and thereupon the seat of such member shall be vacant.”

123. “Where the seat of a member so becomes vacant the speaker during a recess of the house, whether by prorogation or by adjournment, shall forthwith, after receiving such certificate, cause notice thereof to be published in the London Gazette; and after the expiration of six days after such publication shall (unless the House has met before that day, or will meet on the day of the issue) issue his warrant to the clerk of the crown to make out a new writ for electing another member in the room of the member whose seat has so become vacant.”

124. “The powers of the Act of the twenty-fourth year of the reign of King George the Third, chapter twenty-six, ‘to repeal so much of two acts made in the tenth and fifteenth years of the reign of his present majesty as authorizes the speaker of the House of Commons to issue his warrant to the clerk of the crown for making out writs for the election of members to serve in parliament in the manner therein mentioned; and for substituting other provisions for the like purposes,’ so far as such powers enable the speaker to nominate and appoint other persons, being members of the House of Commons, to issue

§ 5.—WHO MAY PETITION.

As a general rule any creditor to whom a debt of the requisite amount and quality is due may present a petition for adjudication against the debtor. As has been already stated, the debtor cannot now apply to be adjudicated a bankrupt (*s*).

§ 6.—THE PETITIONING CREDITOR'S DEBT.

The Amount of the Petitioning Creditor's Debt.—“The Bankruptcy Act, 1869,” enacts, that “a single creditor, or two or more creditors, if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors from any debtor, amount to a sum of not less than fifty pounds, may present a petition to the court” (*t*).

The Nature of the Petitioning Creditor's Debt.—“The Bankruptcy Act, 1869,” enacts, that “the debt of the petitioning creditor must be a liquidated sum due at law or in equity” (*u*).

It must be a debt presently recoverable, for which an action or bill in equity would then lie; and if not recoverable by reason of the stipulated credit not having expired at the time of the petition being filed, it is not a debt upon which to found the petition (*x*).

Secured Debt.—The petitioning creditor's debt “must not be a secured debt, unless the petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors, in the event of the debtor being adjudicated a bankrupt, or unless the petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors, upon payment of such estimated value” (*y*).

warrants for the making out of new writs during the vacancy of the office of speaker, or during his absence out of the realm, shall extend to enable him to make the like nomination and appointment for issuing warrants, under the like circumstances and conditions, for the election of a member in the room of any bankrupt member whose seat becomes vacant under this act.”

The Bankruptcy Rules, 1870, give a form (No. 97) of “certificate to

speaker of the House of Commons under sect. 122,” but it is unnecessary to encumber this work with it for the sake of the rare cases in which it can be required in the county courts.

(*s*) See *ante*, p. 219.

(*t*) See sect. 6, *ante*, p. 220.

(*u*) *Id.* p. 221.

(*x*) *Ex parte Sturt, In re Pearcey*, 41 L. J. (N. S.), Bankr. 12.

(*y*) “The Bankruptcy Act, 1869,” s. 6. See the entire section, *ante*, p. 220; see also rule 117, *post*, Chap. XII.

The Date of the Petitioning Creditor's Debt.—It has always been the law in bankruptcy, that the petitioning creditor's debt must have an existence at the time of the commission of the act of bankruptcy, and "The Bankruptcy Act, 1869," made no alteration in the law in this respect (z).

This doctrine is founded upon the manifest injustice and absurdity that would follow if a man who did any one of the acts which are called acts of bankruptcy, and who subsequently satisfied all his then creditors, should, on account of that act, be made a bankrupt by a subsequent creditor (a).

In the case of a debt consisting of a bill of exchange or promissory note, it must be proved that the acceptance, or the issue in fact of the instrument, took place before the act of bankruptcy, and the instruments themselves do not show the period of indorsement or acceptance (b).

Where a bill was accepted by the bankrupt before the act of bankruptcy, but the drawer's name was in blank, and no name of a drawer was inserted or value given for the bill until after the act of bankruptcy; it was held, that there was no debt in existence capable of supporting the adjudication (c).

"The Bankruptcy Act, 1869," enacts that—

Sect. 118. "No person, not being a trader, shall be adjudged a bankrupt in respect of a debt contracted before the date of the passing of 'The Bankruptcy Act, 1861.'"

(z) *Ex parte Hayward & Batten, In re Hayward*, 40 L. J. (N. S.) Bankr. 49. Although always the law, there was a clear misapprehension of it for some time, the House of Lords (acting, however, on the opinion of the judges), having erroneously decided in the teeth of it, in *De Gols v. Ward*, 4 Brown's Par. Ca. 327; but the law was set right in *Beardmore v. Shan*, 1 N. R. 266, and other cases; a statement that *De Gols v. Ward* was decided in reference to repealed statutes, being seized hold of to avoid the necessity for regarding it as an authority. Mr. Christian says, "The case of *De Gols v. Ward* has many a day perplexed me when a student, as I was not then so presumptuous as to conclude that

the eleven judges could have fallen into such an error." See Christian's Bankrupt Laws, 2nd edition, Vol. I. pp. 403—415.

(a) Judgment of Mellish, L. J., in *Ex parte Hayward, supra*.

(b) Judgment of James, L. J., in *Ex parte Hayward & Batten, In re Hayward & Co.*, 40 L. J. (N. S.) Bankr. 49.

(c) *Ex parte Hayward & Batten, supra*. It was argued that after the drawing was completed the bill had relation back to the time when the acceptance was written, and *Macartney v. Barrow* cited in *Stacey v. Barns*, 7 East, 437; and *Snaith v. Mingay*, 1 M. & Sel. 87, were referred to, but the court said the cases were no authority for such a proposition.

CHAPTER IV.

OF THE ACTS OF BANKRUPTCY.

- § 1.—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.
 § 2.—FRAUDULENT CONVEYANCE.
 § 3.—ABSENTING AND BEGINNING TO KEEP HOUSE.
 § 4.—FILING A DECLARATION OF INABILITY TO PAY.
 § 5.—EXECUTION AGAINST A TRADER.
 § 6.—DEBTOR'S SUMMONS.
 § 7.—PROCEEDINGS UNDER "THE ABSCONDING DEBTORS ACT, 1870."
 § 8.—THE TIME WITHIN WHICH ACTS OF BANKRUPTCY MUST BE COMMITTED.



§ 1.—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

THE acts of bankruptcy rendering a debtor liable to be adjudicated a bankrupt have been mentioned in the preceding Chapter, as enumerated in section 6 of "The Bankruptcy Act, 1869" (see *ante*, p. 220).

It is necessary, however, to treat of the several acts of bankruptcy more specifically.

The first act of bankruptcy specified is "That the debtor has, in England or elsewhere, made a conveyance or assignment of his property (*a*) to a trustee or trustees for the benefit of his creditors generally" (*b*).

Although expressed in very different words this was an act of bankruptcy before the last statute. The words "with intent to defeat and delay his creditors" are left out, as the addition of them would be superfluous and misleading; because, if put in, it would seem to say it was possible that a debtor might make a conveyance or assignment of his property to a trustee for the benefit of creditors generally, without intending to defeat and delay, whereas the act makes it an act of bankruptcy, wholly independent of whether he had such an express intention as matter of fact.

The reason why this particular act of bankruptcy is now separated from the act of bankruptcy respecting a fraudulent convey-

(*a*) As to the meaning of property, see sect. 4, *ante*, p. 201, note.

(*b*) See sect. 6, *ante*, p. 220.

ance or transfer (in which it is included in all previous acts), seems to be this, that although it was an undoubted rule of law that a transfer or conveyance for the benefit of creditors, generally, was to be deemed to be fraudulent; yet really it was absurd to call it fraudulent in fact, for in the majority of cases it had no taint of fraud at all about it, and, therefore, it was not for the sake of altering the law (for it left the law exactly as it was), but for the purpose of making a reasonable sentence and framing the act rationally (*e*).

§ 2.—FRAUDULENT CONVEYANCE.

The second act of bankruptcy specified is “That the debtor has in England, or elsewhere, made a fraudulent conveyance, gift, delivery or transfer of his property (*d*), or of any part thereof” (*e*).

“Fraudulent” in this sub-section means fraudulent as against the creditors, or some of them. It cannot mean that a conveyance or transfer, or gift, may be fraudulent without being fraudulent against a creditor. It would be absurd, for instance, to suppose that it would be an act of bankruptcy if a man who was selling property, real or personal, were to commit a gross fraud on the purchaser in the transfer. A man who sells horses, whether as a matter of trade or not as a matter of trade, may commit a fraud in the sale of his horse such as would be set aside as fraudulent by any competent court, but it would be absurd to hold it an act of bankruptcy, because, to be an act of bankruptcy, it is perfectly plain, looking at the scope and object of the Bankruptcy Act, it must mean fraudulent as against his creditors or some of them, and, therefore, these words, “as against his creditors,” must be inserted in the section by construction, after the word fraudulent.

In this second sub-section, as in the first, the words “with intent to defeat and delay creditors,” appear to have been left out of the present law, simply because they were unnecessary before, and it would now be superfluous and misleading to include them (*f*).

As regards the nature of the fraud against the creditors, the word fraudulent is to be interpreted as it was in the former acts, and it is not confined to actual frauds. Although this rule of law is well established, not merely with respect to bankruptcy cases, but with respect to many other cases, it compels the court to put a very artificial construction upon acts, and to say that they are fraudulent, and necessarily involve the defeat and delay of credi-

(*e*) Judgment of Mellish, L. J., *Ex parte Lückes, In re Wood*, 41 L. J. (N. S.) Bankr. 21. The whole of this judgment is very instructive as showing the relation of the old law to the present, in reference to acts of bankruptcy by transfer of prop-

erty.

(*d*) As to the meaning of property, see sect. 4, *ante*, p. 201, note.

(*e*) See sect. 6, *ante*, p. 220.

(*f*) Mellish, L. J., judgment in *Ex parte Lückes, In re Wood*, 41 L. J. (N. S.) Bankr. 21.

tors, when, to an ordinary person, not a lawyer, they probably do not appear to have that effect (*g*).

The following three rules have been laid down on this subject in a work of high authority (*h*):—

First. Any transfer which is fraudulent within the meaning of 13 Eliz. c. 5 (*i*), is also fraudulent and an act of bankruptcy under the Bankrupt Act (*k*).

Secondly. Any conveyance to a creditor by a trader (*l*) of his whole property, or of the whole with an exception merely nominal, in consideration of a bygone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent under the Bankrupt Act, and an act of bankruptcy (*m*).

Thirdly. A transfer by a trader of part of his property to a creditor, in consideration of a bygone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent, and an act of bankruptcy under the Bankrupt Act, if made *voluntarily*, and *in contemplation of bankruptcy*: or if it otherwise have the effect of defeating or delaying creditors (*n*).

A conveyance of the whole of a bankrupt's property, or all with an immaterial exception, is an act of bankruptcy, because either it is concealed, and thus it is necessarily a fraud upon the other creditors who go on dealing with the debtor as if he had the control over the business, whereas there is a person in the back ground who can put an end to it altogether; or else it is known, and then the effect is necessarily to deprive the debtor of credit, and the means of carrying on his business. It is obvious, in this state of the law, that a deed with such a substantial exception out of the debtor's property as might enable him to carry on his trade with advantage, does not necessarily amount to an act of bankruptcy. In

(*g*) Mellish, L. J., judgment in *Ex parte Lückes, In re Wood*, 41 L. J. (N. S.) Bankr. 21.

(*h*) 1 Smith's Leading Cases, note to *Twyne's Case*. Although these rules were laid down in reference to a former Bankruptcy Act, they are equally applicable to the present, see the text, *ante*, p. 227.

(*i*) See this statute, *ante*, Vol. 1, p. 891.

(*k*) See *Doe d. Grimsby v. Ball*, 11 M. & W. 531; and the judgment of Lord Wensleydale in *Billiter v. Young*, 6 E. & B. 17.

(*l*) Although the particular act of bankruptcy under consideration, as defined by sect. 6 of the act, subs. (2), is not confined to traders, yet because (as stated in the text) the fraud is not confined to actual fraud, it is not safe to leave out the element of trade altogether, as constructive fraud may to some extent be said to

depend on a delay to and misleading of traders creditors, not applicable to non-traders.

(*m*) This rule was first laid down by Lord Mansfield in *Worsley v. Demattos*, 1 Burr. 467 (*Law v. Skinner*, 2 W. Bla. 996, is erroneously stated in 12 C. B. Rep. 94, to be the first case. See judgment of Willes, J., in *Lomax v. Fisher*, 40 L. J. (N. S.) C. P. 152, and the note to *Twyne's Case*, 1 Smith's L. C., 5th edit., pp. 19, 20). As late cases on the rule in the text, see *Lindon v. Sharp*, 6 M. & G. 895; 7 Scott, N. R. 730; *Hutton v. Cruttwell*, 1 E. & B. 15; 22 L. J. (N. S.) Q. B. 78; *Young v. Waud*, 8 Ex. Rep. 221; *Bittlestone v. Cooke*, 6 E. & B. 296; *Hale v. Allnut*, 18 C. B. Rep. 505; *Bell v. Simpson*, 2 H. & N. 410; *Harris v. Rickett*, 4 H. & N. 1.

(*n*) *Smith v. Cannan*, 2 E. & B. 35.

such a case the party seeking to make it an act of bankruptcy must prove some other fact besides the mere deed, which would satisfy a jury that the deed was intended to be a fraud on the creditors. Further: inasmuch as money is the measure of all things, or, as it may be put in other words, inasmuch as a person having money can purchase with it other things, when a trader assigns all his property, not for a past debt but for a present advance of money which he can apply to his own use, it has been considered that the transaction stands on the same footing as if there were a substantial exception of property from the assignment, and, therefore, it is not necessarily an act of bankruptcy (*o*).

A conveyance of all a man's property for a past debt to one creditor has, however, always been held to be a fraudulent conveyance within the bankruptcy laws, and is so still, even although pressed by the particular creditor to make the transfer, and there is no distinction in this respect between a trader and a non-trader (*p*).

But a bill of sale of all the debtor's property, with a substantial exception of some farming stock, in consideration partly of a past debt, and partly of a fresh advance to pay off an importunate creditor (no part of the money reaching the debtor's hands), was held not to be an act of bankruptcy (*q*).

§ 3.—ABSENTING AND BEGINNING TO KEEP HOUSE.

The third class of acts constituting acts of bankruptcy is thus described in sect. 6, sub-sect. (3). "That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of England, or being out of England remained out of England; or, being a trader (*r*), departed from his dwelling-house, or otherwise absented himself; or begun to keep house; or suffered himself to be outlawed" (*s*).

(*o*) Judgment of Willes, J., *Lomax v. Buxton*, 40 L. J. (N. S.) C. P. 151, 152.

(*p*) *Ex parte Lückes, In re Wood*, 41 L. J. (N. S.) Bankr. 21; see also *Ex parte Cohen, Re Sparke*, 41 L. J. (N. S.) Bankr. 17; where James, L. J., and Mellish, L. J., treated a bill of sale, which was clearly invalid under sect. 91, as an act of bankruptcy. See sects. 91 and 92, *post*, Chap. XI. § 7 & § 8. See also *Jones v. Harper*, 40 L. J. (N. S.) Q. B. 59, which, although decided under the former acts, was considered as applicable to sect. 6, subsect. (2) of the present act, and where, although the transaction was not void as against the assignees,

it was held that it was clearly an act of bankruptcy.

(*q*) *Lomax v. Buxton*, 40 L. J. (N. S.) C. P. 150. The principle of *Hutton v. Cruttwell*, 1 E. & B. 15; 22 L. J. (N. S.) Q. B. 78, acted upon, and *Graham v. Chapman*, 12 C. B. Rep. 85; 21 L. J. (N. S.) C. P. 173, impugned.

(*r*) For the definition of "trader," see *ante*, p. 221.

(*s*) See sect. 6, *ante*, p. 220. These acts of bankruptcy were those comprised in the 34 & 35 Hen. 8, c. 4, the earliest statute of bankruptcy, and have been continued in every act since, see *ante*, p. 219.

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As the departing or remaining out of England, or departing or being absent from a dwelling-house, are in themselves perfectly innocent matters, it is necessary, in order to make them acts of bankruptcy, to prove by other evidence beyond the acts themselves, that they were done with an actual intent to defeat or delay creditors; so that if a case were tried by a jury as to whether a trader had committed an act of bankruptcy or not, the judge would leave to the jury, first—Had he done the acts? Had he departed from his dwelling-house? Had he remained abroad, or had he begun to keep house? And secondly, had he done the act with intent to defeat or delay his creditors? And if the jury found that he had not done the act to defeat or delay his creditors, then there was no act of bankruptcy.

This class of cases, therefore, differs from the conveyance or transfer of property falling within the first and second classes of acts of bankruptcy, where the act involves or assumes the intent to defeat or delay the creditors (*t*).



§ 4.—FILING A DECLARATION OF INABILITY TO PAY.

The fourth act of bankruptcy specified is, “That the debtor has filed in the prescribed manner in the court a declaration admitting his inability to pay his debts” (*u*).

The following rule of the “Bankruptcy Rules, 1870,” prescribes the manner:—

Sect. 6.

Rule 16. “A declaration by a debtor admitting his inability to pay his debts shall be dated, signed, and witnessed according to the form in the schedule, and shall be filed in the London Bankruptcy Court, if the debtor shall reside or carry on business within the district of that court; and where the debtor neither resides nor carries on business within the district of that court, it shall be filed in the court within the district of which the debtor resides or carries on business.”

Sect. 59.

The following is the form of declaration of inability to pay:—

No. 1.

“The Bankruptcy Act, 1869.”

Sect. 6.

In the London Bankruptcy Court [*or* the county court of holden
at].

Rule 16.

I, the undersigned A. B. of , do hereby declare that I reside [*or* carry on business] within the district of the above-mentioned court [*or* where filed in a county court, that I do not reside or carry on business within the district of the London Bankruptcy Court, but that I reside

(*t*) See the judgment of Mellish, *Wood*, 41 L. J. (N. S.) Bankr. 23.
L. J., in *Ex parte Lückes*, *In re* (*u*) See sect. 6, *ante*, p. 220.

[or carry on business] within the district of the above-mentioned court], and that I admit that I am unable to pay my debts.

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Dated this day of 187 .

Witness,

(Signed) A. B.

G. H., Registrar of the court,
or L. M., attorney [adding address].

It is to be observed that filing a petition for arrangement by liquidation under section 125, the petition involving a declaration of inability to pay (*x*), is an act of bankruptcy within this fourth definition (*y*).

§ 5.—EXECUTION AGAINST A TRADER.

The fifth act of bankruptcy specified is “That execution issued against the debtor or any legal process for the purpose of obtaining payment of not less than fifty pounds has in the case of a trader (*z*) been levied by seizure and sale of his goods” (*a*).

See sect. 87, and its bearing on this act of bankruptcy, *post*, Chap. XI. § 10.

§ 6.—DEBTOR'S SUMMONS.

The following is the sixth and last of the acts of bankruptcy specified in the statute:—

“That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due of an amount of not less than fifty pounds, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same” (*b*).

In respect of this act of bankruptcy “The Bankruptcy Act, 1869,” enacts that—

Sect. 7. “A debtor's summons may be granted by the court on a creditor proving to its satisfaction that a debt sufficient to support a petition in bankruptcy is due to him from the person against whom the summons is sought, and that the creditor has failed to obtain payment of his debt, after using reasonable efforts to do so. The summons shall be in the prescribed form, resembling, as nearly as circumstances admit, a writ issued by one of her Majesty's superior courts. It shall state that in the event of the debtor failing to pay the sum specified in the sum-

Proceedings
in relation to
a debtor's
summons.

(*x*) See the form, *post*, Chap. XVI.
§ 5.

(*y*) *Ex parte Duignan, Re Bis-*
sell, 40 L. J. (N. S.) Bankr. 33;
affirmed on appeal, *Id.* 68.

(*z*) For the definition of trader see
ante, p. 221.

(*a*) See sect. 6, *ante*, p. 220.

(*b*) See “The Bankruptcy Act,
1869,” s. 6, *ante*, p. 220. The act of
bankruptcy dates from the expiration
of the seven days or three weeks.
See *Ex parte Weir, In re Weir*, 41
L. J. (N. S.) Bankr. 14, noticed *post*,
p. 240. As to the computation of
time, see *ante*, p. 210.

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mons, or to compound for the same to the satisfaction of the creditor, a petition may be presented against him, praying that he may be adjudged a bankrupt. The summons shall have an indorsement thereon to the like effect, or such other prescribed indorsement as may be best calculated to indicate to the debtor the nature of the document served upon him, and the consequences of inattention to the requisitions therein made.

“Any debtor served with a debtor’s summons may apply to the court, in the prescribed manner and within the prescribed time, to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted to such amount as will justify such creditor in presenting a bankruptcy petition against him; and the court may dismiss the summons, with or without costs, if satisfied with the allegations made by the debtor, or it may, upon such security (if any) being given as the court may require for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt: provided that when the summons shall have issued from the London Court of Bankruptcy, such trial shall be had either before such court or before any other court of competent jurisdiction, and when the summons shall have issued from a county court, before such court in all cases in which it has now jurisdiction, and in all other cases before some competent tribunal.”

A secured creditor may obtain a debtor’s summons, and he is not obliged to give up the securities in the first instance. That question does not arise until the petition for adjudication in bankruptcy. Therefore the fact that the creditor has issued writs of attachment against persons holding property of the debtor, does not disentitle the creditor to the debtor’s summons (c).

The following “Bankruptcy Rules, 1870,” relate to a debtor’s summons:—

Sect. 7. Rule 17. “A debtor’s summons, according to the form in the schedule, Sect. 59. may be granted by the London Bankruptcy Court if the debtor resides or carries on business within the district of that court, and where the debtor neither resides nor carries on business within the district of that court, it may be granted by the court within the district of which the debtor resides or carries on business.”

Rule 18. “A creditor desirous that a debtor’s summons may be granted must file an affidavit of the truth of his debt, and lodge the summons, together with two copies thereof and three copies of his particulars of demand.”

Rule 19. “The particulars of demand shall be expressed with reasonable and convenient certainty as to dates and all other matters, but no objection shall be allowed to the particulars unless the court shall consider that the debtor has been misled by them.”

Rule 20. “The registrar shall seal such particulars, and such particulars

(c) *In re Giles, Ex parte Mauritz*, 39 L. J. (N. S.) Bankr. 56. James, L. J., said, “The effect of an adjudi-

cation in bankruptcy would be to discharge the attachments.”

shall then be deemed part of the summons, and the original summons shall be filed and the copies be sealed and issued to the creditor."

Rule 21. "Every debtor's summons shall be indorsed with the name and place of business of the attorney actually suing out the same, but in case no attorney shall be employed for the purpose, then with a memorandum expressing that the same has been sued out by the creditor in person."

Rule 22. "There shall be indorsed on the debtor's summons, in addition to an intimation of the consequences of neglect to comply with the requisitions of the summons, a notice to the debtor that if he disputes the debt and desires to obtain the dismissal of the summons he must file an affidavit with the registrar within seven days in the case of a trader, and three weeks in the case of a non-trader, stating that he is not so indebted, or only so to a less amount than 50*l.*"

Sect. 7.

Rule 23. "Where a debtor files the above-mentioned affidavit the registrar shall fix the time and place at which the application for the dismissal of the summons will be heard by the court, and give notice thereof to the creditor and debtor three days before the day so fixed."

Rule 24. "Where proceedings on a debtor's summons have been stayed for the trial of the question of the validity of the debt claimed therein, and such question has been decided against the validity of the debt, the debtor on production of the judgment of the court, or an office copy thereof, shall be entitled to have the debtor's summons dismissed and, if the court thinks fit, with costs, but the order for costs shall not be enforced for seven days, or where the creditor has lodged a notice showing that he has taken the necessary steps to set aside the judgment, until after the final decision thereon."

Sect. 7.

Rule 25. "Where proceedings on a debtor's summons are stayed upon security being given, the creditor shall take or continue proceedings for the payment of the debt within twenty-one days of the date on which the security was completed, and shall prosecute the same with effect and without delay, and if he fail so to do the debtor shall be entitled to have the summons dismissed with costs."

As to a debtor's summons by a public officer or by an agent of a co-partnership, see Rule 15, *post*, p. 242.

See also Rule 41, *post*, p. 255, postponing adjudication in the case of a disputed debtor's summons.

No. 2. *Affidavit for summoning a Debtor.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 7.

I, C. D. of make oath and say,

1. That A. B. is justly and truly indebted to me in the sum of [*the amount of the debt*] for [*§c., stating the nature of the debt with certainty and precision*].

Rule 18.

2. That the said A. B. [*where application to a county court, does not reside or carry on business within the district of the London Bankruptcy Court, but*] resides [*or carries on business*] at ; within the district of this court [*and where debtor is a trader, carries on the trade of at*].

3. That an account in writing of the particulars of my demand was,

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on or about the day of 187 , sent by post [*or as the case may be*] to the said A. B., and that payment of the same has been on more than one occasion required to be made of the said A. B.

4. That I did, on the day of instant [*or last*], apply [*or cause application to be made*] to the said A. B. personally [*or otherwise, according to the fact*], for payment of the said debt.

Sworn, &c.

NOTE.—*If the application was made by any other person than the creditor it must be deposed to by such person.*

No. 3. Affidavit for summoning Debtors in Partnership.

“The Bankruptcy Act, 1869.”

Sect. 7.

In the London Bankruptcy Court [*or the county court of*]
holden at].

Rule 18.

I, C. D. of make oath and say,

1. That A. B. and C. D. are justly and truly indebted to me in the sum of [*the amount of the debt*] for [*&c., stating the nature of the debt with certainty and precision*].

2. That the said A. B. and C. D. [*where application to a county court, do not reside or carry on business within the district of the London Bankruptcy Court, but*] reside [*or carry on business*] at , within the district of this court [*and where debtors are traders, carry on the trade of* at].

3. That an account in writing of the particulars of my demand was, on or about the day of 187 , sent by post, [*or as the case may be*] to the said A. B. and C. D., and that payment of the same has been on more than one occasion required of them.

4. That I did, on the day of instant [*or last*], apply [*or cause application to be made*] to the said A. B. and C. D. [*or one of them*] personally [*or otherwise, according to the fact*], for payment of the said debt.

Sworn, &c.

NOTE.—*If the application was made by any other person than the creditor it must be deposed to by such person.*

No. 4. Debtor's Summons.

“The Bankruptcy Act, 1869.”

Sect. 7.

In the London Bankruptcy Court [*or the county court of*]
holden at].

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To A. B. [*or A. B. and C. D.*] of .

Rule 17.

We warn you that unless within seven days [*if a trader, or three weeks if a non-trader*] after the service of this summons on you, exclusive of the day of such service, you do pay to C. D. of , the sum of pounds, shillings, and pence [*and to F. K. of* , in the county of , the sum of pounds, shillings, and pence, and so on if more than two creditors], being the sum [*or sums*] claimed of you by him [*or them*], according to the particulars hereunto annexed, for [*state consideration*], or shall compound for the same to his [*or their*] satisfaction, you will have committed an

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case of a petition, the court may order that a notice, according to the form in the schedule, be gazetted, requiring the debtor to appear at the hearing of the petition on the day named, being not less than fourteen days after the publication of the notice, and that such notice shall be deemed to be served on the debtor."

Rule 62. "Notice of the publication in the Gazette of the order of the court shall be given in one local paper according to the form in the schedule."

Rule 63. "Service of the summons or petition shall be proved by affidavit with a sealed copy of summons or petition attached and filed in court forthwith after the service."

Rule 64. "An application for extension of time for service of a debtor's summons or a petition shall be in writing, and need not be supported by affidavit, unless in any case the court shall otherwise require."

Service out of the Jurisdiction of the Local District Court.—Service out of the jurisdiction of the local court issuing the summons is not expressly provided for. Nevertheless, the act contains the following regulation with respect to proceedings in bankruptcy: "Subject to the provisions of this act every court having original jurisdiction in bankruptcy shall be deemed to be the same court, and to have jurisdiction throughout England" (e).

Service must be in England.—Neither the act nor the rules have expressly or by necessary implication enabled service to be made out of England either by the London or local courts; and, therefore, the true construction is they were only intended to authorize service within it. Service, therefore, cannot be made in Ireland. No great injustice can result from this construction, for if a debtor, with intent to defeat or delay his creditors, has departed from England, or being out of England has remained out of England, that is an act of bankruptcy, and there is no occasion to resort to a debtor's summons. But if, on the other hand, the debtor's residence is out of England, the act intends to except such a case from its operation, as being one which ought to be dealt with by the courts of the country where the debtor resides (f).

Questions of this kind, however, are not likely to arise often in local bankruptcy courts.

No. 5. *Affidavit of Service of Debtor's Summons.*

"The Bankruptcy Act, 1869."

Rule 63.

In the London Bankruptcy Court [or the county court of
holden at]

In the matter of a debtor's summons by C. D. of
[and F. K. of , &c.] against A. B. of

I, L. M. of , make oath and say:—

1. That I did, on the day of 187 , serve the
above-mentioned A. B. with a copy of the above-mentioned summons,

(e) See sect. 80, *post*, p. 244, note, *O'Loughlen*, 40 L. J. (N. S.) Bankr. and *ante*, p. 203. 28.

(f) *Ex parte O'Loughlen, In re*

duly sealed with the seal of the court, by delivering the same personally to the said A. B.

Sworn at, &c.

L. M.

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No. 6. *Substituted Service of Debtor's Summons. Notice in Gazette.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 7.

To A. B. of .

In the matter of a debtor's summons issued against you by C. D. of
of [and F. K. of , &c.]

Rule 61.

Take notice, that a debtor's summons having been granted against you by this court, the court has ordered that the publication of this notice in the London Gazette shall be deemed to be service of such summons on you on the seventh day after such publication.

The summons can be inspected by you on application to this court.

Dated this day of 187 .

Registrar.

No. 7. *Substituted Service of Debtor's Summons. Notice in Local Paper.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 7.

To A. B. of .

In the matter of a debtor's summons issued against you by C. D. of
of [and F. K. of , &c.]

Rule 61.

Take notice, that a debtor's summons having been granted against you by this court, the court has ordered that the publication of a notice of the granting of the summons in the London Gazette shall be deemed to be service on you of such summons on the seventh day after such publication.

The summons can be inspected by you on application to this court.

Dated this day of 187 .

Registrar.

Application to dismiss the Summons.—It will be seen that the debtor may apply to the court to have the summons dismissed on two grounds, and those only, viz., that he is not indebted at all, or that he is not indebted to the amount required. On such application the court, however, may allow the debtor to ask that, on his giving security, the proceedings may be stayed pending the trial of the question whether the debt is really due.

Under the above provisions, therefore, proceedings cannot be stayed on any other ground, as that there is some supposed equity interfering with the creditors setting up the debt; although any such equity, if existing, may be available when the application for an adjudication comes to be considered (g).

(g) *Ex parte Ellis, Re Kain*, 40 L. J. (N. S.) Bankr. 77.

PART VII.
CHAP. IV.No. 8. *Affidavit on Application to dismiss Debtor's Summons.*

In the matter of a debtor's summons by C. D. [F. K., &c.] against

A. B.

Sect. 7.

I, A. B. of _____, make oath and say:—

Rule 19.

That I am not indebted to C. D. [and F. K., &c.] in the [aggregate] amount of the sum claimed in the summons [or that I am only indebted to C. D. [or F. K. or G. H.] in the sum of _____ being part of the sum claimed in the summons, or that I am not indebted to C. D. [and F. K., &c.] in such an [aggregate] amount as will justify him [or them] in presenting a bankruptcy petition against me].

Sworn, &c.

(Signed) A. B.

No. 9. *Order on Application to dismiss Debtor's Summons.*

"The Bankruptcy Act, 1869."

Sect. 7.

In the London Bankruptcy Court [or the county court of _____ holden at _____].

In the matter of a debtor summons by C. D. against A. B.

Upon the application of A. B. to dismiss this summons and upon reading the affidavit of A. B., and upon hearing C. D. (*if present*), it is ordered that this summons be dismissed [and that the said C. D. (*or as the case may be*) shall pay to the said A. B. the sum of _____ for costs], [or that the said A. B. enter into a bond in the penal sum of [*double the alleged debt*] with such two sufficient sureties as the court shall approve of to pay [or deposit with the registrar the sum of _____ as security for the payment of] such sum or sums as shall be recovered by C. D. [*or as the case may be*] against the said A. B. in any proceedings taken or continued against him for the recovery of the demand mentioned in such summons, together with such costs as shall be given by the court in which such proceedings are had.

And it is further ordered that all proceedings on this summons shall be stayed until the court in which the proceedings shall be taken shall have come to a decision thereon].

Given under the seal of the court this _____ day of _____ 187 .

By the court,
Registrar.

When the debt is paid although after the seven days or three weeks, the act of bankruptcy committed at the expiration of the time mentioned in the debtor's summons, ceases to be an act of bankruptcy on which the debtor can be adjudicated a bankrupt, and therefore the creditor may safely receive payment of his debt, for although he necessarily had notice of the act of bankruptcy committed by nonpayment, the consequence of receiving the amount afterwards, does not place him in the dilemma of receiving the amount, and having to refund it in the event of a subsequent adjudication by another creditor (on the ground that the title of the trustee relates back to the prior act of bankruptcy); for on the debt ceasing by the act of payment, the act of bankruptcy also ceases (*h*).

(*h*) See judgment of Mellish, L. J., *Ex parte Weir, In re Weir*, 41 L. J. (N. S.) Bankr. 14.

§ 7.—PROCEEDINGS UNDER “THE ABSCONDING DEBTORS ACT, 1870.”

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The provisions of “The Absconding Debtors Act, 1870” (33 & 34 Vict. c. 76), although intimately and essentially connected with the act of bankruptcy by debtors summons, require to be noticed under a distinct head.

That act reciting that “the laws now in force for the arrest of debtors absconding from England are insufficient for that purpose, and whereas frauds may be perpetrated upon creditors by insolvent debtors departing for distant countries before the necessary proceedings can be taken to make them bankrupt,” enacts—

Sect. 1. “That the provisions of the ‘Bankruptcy Act, 1869,’ be extended in manner following: the court may, by warrant addressed to any constable or prescribed officer of the court, cause a debtor to be arrested and safely kept as prescribed until such time as the court may order, if, after a debtor’s summons has been granted in the manner prescribed by the said act, and before a petition of bankruptcy can be presented against him, it appears to the court that there is probable reason for believing that he is about to go abroad, with a view of avoiding payment of the debt for which the summons has been granted, or of avoiding service of a petition of bankruptcy, or of avoiding appearing to such petition, or of avoiding examination in respect of his affairs, or otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy: provided always, that nothing herein contained shall be construed to alter or qualify the right of the debtor to apply to the court in the prescribed manner to dismiss the said summons as in the said act is provided, or to pay, secure or compound for the said debt within the time by the said act provided without being deemed to have committed an act of bankruptcy; and provided also, that upon any such payment or composition being made for such security offered as the court shall think reasonable, the said debtor shall be discharged out of custody, unless the court shall otherwise order.”

Provisions of
Bankruptcy
Act, 1869,
extended.

Sect. 2. “No arrest shall be valid or protected under this act unless the debtor before or at the time of his arrest shall be served with the debtor’s summons.”

When arrest
not valid.

Sect. 3. “No payment or composition of a debt made or security for the same given after an arrest made under the provisions of this act shall be exempted from the provisions of the said act, relating to fraudulent preferences.”

Security for
debt given
after arrest.

Sect. 4. “The terms used in this act shall have the same meaning as they have in the said recited act, and this act shall be read and construed therewith.”

Construction
of terms.

Sect. 5. “The costs and fees to be charged in respect of any proceedings authorized shall be prescribed in the like manner in which costs and fees to be charged in respect of proceedings under the ‘Bankruptcy Act, 1869,’ are respectively directed by that act to be prescribed.”

Costs and
fees.



§ 8.—THE TIME WITHIN WHICH ACTS OF BANKRUPTCY MUST BE COMMITTED.

“The Bankruptcy Act, 1869,” s. 6, enacts, that no person shall be adjudged a bankrupt on any of the grounds mentioned in the act “unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication” (*i*).

Where the alleged act of bankruptcy is a debtor’s summons and neglect to pay under sub-sect. (6) of sect. 6 of the act, the act of bankruptcy dates from the expiration of the time (seven days or three weeks as the case may be), although proceedings on the summons have been stayed under sect. 7, beyond that time (*k*).

(*i*) See the section, *ante*, p. 220.

(*k*) *Ex parte Weir, In re Weir*,
41 L. J. (N. S.) Bankr. 14. As to

the computation of time, see *ante*,
p. 210.

CHAPTER V.

THE PETITION IN BANKRUPTCY.

§ 1.—THE PRESENTATION OF THE PETITION.

§ 2.—VERIFICATION OF PETITION.

§ 3.—SERVICE OF PETITION.

§ 4.—NOTICE BY DEBTOR OF INTENTION TO DISPUTE PETITION.

§ 5.—RESTRAINT OF ACTIONS AND LEGAL PROCEEDINGS AFTER PETITION.

§ 6.—APPOINTMENT OF RECEIVER OR MANAGER AFTER PETITION.

◆

§ 1.—THE PRESENTATION OF THE PETITION.

THE mode of proceeding to obtain an adjudication of bankruptcy is by presenting a petition to the court, praying that the debtor be adjudged a bankrupt, and alleging one or more "acts of bankruptcy" as the ground for such adjudication (*a*).

Cost of Proceedings in the first instance.]—"The Bankruptcy Rules, 1870," direct that—

Rule 31. "The petitioning creditor shall, at his own costs, file and prosecute his petition and the proceedings under any order of adjudication made thereon, until the appointment of a creditors' trustee; and the court shall make order for the payment of such costs out of the first net proceeds of the estate of the bankrupt."

Where to be filed.]—"The Bankruptcy Rules, 1870," direct that—

Rule 26. "A bankruptcy petition shall be filed in the London Bankruptcy Court if the debtor resides or carries on business within the district of that court, and where the debtor neither resides nor carries on business within the district of that court, it shall be filed in the court within the district of which the debtor resides or carries on business."

This rule is in accordance with sect. 59 of the act, which enacts, with respect to the court having jurisdiction in bankruptcy, that "if the person sought to be adjudged a bankrupt, being resident in England, do not reside or carry on business within the London Bankruptcy District Court, 'the court' shall, subject to the provi-

(*a*) See "The Bankruptcy Act, 1869," s. 6, *ante*, p. 220.

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CHAP. V.

sions hereinafter contained for removing the proceedings, mean the county court of the district in which such person resides or carries on business, hereinafter referred to as the local bankruptcy court" (b).

As to what constitutes a residence or carrying on business, see *ante*, Vol. I., p. 131.

The Time for Presentation.—The petition must be presented within six months of the occurrence of the act of bankruptcy, on which it is grounded (c).

Presentation in the case of Partnerships.—“The Bankruptcy Act, 1869,” enacts that—

Power to
present peti-
tion against
one partner.

Sect. 100. “Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present such petition against any one or more partners of such firm without including the others.”

Property of
partners to be
vested in
same trustee.

Sect. 102. “Where one member of a partnership has been adjudicated a bankrupt, any other petition for adjudication against a member of the same partnership shall be filed in or transferred to the court in which the first-mentioned petition is in course of prosecution, and, unless the court otherwise directs, the property of such last-mentioned member shall vest in the trustee appointed in respect of the property of the first-mentioned member of the partnership, and the court may give such directions for amalgamating the proceedings in respect of the properties of the members of the same partnership as it thinks just.”

By Company or Co-partnership.—“The Bankruptcy Rules, 1870,” direct that—

Rule 15. “A bankruptcy petition or debtor’s summons, against any debtor to any copartnership duly authorized to sue and be sued in the name of a public officer or agent of such co-partnership, may be presented by or sued out by such public officer or agent as the nominal petitioner or plaintiff for and on behalf of such co-partnership, on such public officer or agent filing an affidavit, according to the form in the schedule (d), stating that he is such public officer or agent, and that he is authorized to present or sue out such petition or debtor’s summons. Where a corporate body is petitioner or plaintiff, any affidavit in support of such petition or debtor’s summons may be made by a director or other officer on its behalf.”

Identification of Petitioner.—“The Bankruptcy Rules, 1870,” provide that—

Rule 28. “Where a petitioning creditor is not known to the registrar of the court, or the petition shall not be attested by an attorney, the petition shall not be filed until the petitioner shall be identified to the satisfaction of the registrar.”

(b) See sect. 59, *ante*, p. 201.

(d) No form of affidavit is given

(c) See sect. 6 of “The Bankruptcy Act, 1869,” *ante*, p. 220.

expressly for this purpose.

*Appointment of Time and Place for hearing the Petition.]—*PART VII.
CRAP. V.

Rule 34. "The registrar shall appoint the time and place on which the petition will be heard, and notice thereof shall be written on the petition and sealed copies, and where the petition has not been served the registrar may from time to time alter the first day so appointed, and appoint another day and hour."

Form of Petition.]—

Rule 27. "Every petition shall be fairly written or printed, or partly written and partly printed, on parchment or paper according to the form in the schedule, and no alterations, interlineations, or erasures shall be permitted without leave of the registrar, except so far as the same may be necessary in order to adapt the printed form to the circumstances of the particular case; and every petition must be lodged, with two copies to be sealed and issued to the petitioner."

SECT. 27.

The rules provide a form of bankruptcy petition book, to be kept by the registrars of county courts (e).

No. 10. *Petition.*

"The Bankruptcy Act, 1869."

To the London Bankruptcy Court [or the county court of
holden at]

SECT. 4.

The humble petition of C. D. of
Showeth.

RULE 26.

That A. B., [or where petition filed in other court than the London Court, That A. B. does not reside or carry on business within the district of the London Bankruptcy Court, but] resides [or carries on business] within the district of this court, that is to say, at [insert the name of the place].

That the said A. B. is indebted to your petitioner [or petitioners in the aggregate] in the sum of [set out the amount of the debt [or debts] and the consideration].

That your petitioner doth not nor doth any person or persons in his behalf hold any security on the bankrupt's estate, or on any part thereof for the payment of the said sum [or, That your petitioner holds security for the payment of [or part of] the said sum, or that C. D., one of your petitioners, holds security for the payment of the sum of , and E. F., another of your petitioners, holds security for the payment of the sum of], but that he [or they] will give up such security [or securities] for the benefit of the creditors of A. B., in the event of his being adjudged a bankrupt.

[Or That your petitioner holds security for the payment of [or part of] the said sum, and that he estimates the value of such security at the sum of pounds.]

That the said A. B. has committed an act [or acts] of bankruptcy within six months before the presentation of this petition.

That the act [or acts] of bankruptcy committed by him was or were that [here set out separately the acts of bankruptcy].

(c) "Bankruptcy Rules, 1870," Form, No. 102.

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Your petitioner therefore humbly prays that on proof of the requisites in that behalf, on the hearing of this petition, the said A. B. may be adjudicated a bankrupt.
And your petitioner shall ever pray, &c.

C. D.

Signed on the _____ day of _____, 187____, in the presence of G. H.,
Registrar of the court, or L. M. _____ attorney, &c.

N.B.—*Where necessary add an allegation that debtor is a trader. Where the petitioners are partners, one may sign it on behalf of himself and co-partners.*

Rule 33.

The above petition having been presented to this court, on the _____ day of _____, 187____, it is ordered that this petition shall be heard at _____ on the _____ day of _____, 187____, at _____ o'clock in the _____ noon.

And you the said A. B. are to take notice, that should you intend to dispute the truth of any of the statements contained in the petition, you must file with the registrar of this court a notice, showing the grounds upon which you intend to dispute the same, and send by post a copy of the affidavit to the petitioner three days before the day fixed for the hearing.

◆

§ 2.—VERIFICATION OF PETITION.

“The Bankruptcy Act, 1869,” enacts that every bankruptcy petition shall be accompanied by an affidavit of the petitioner in the prescribed form, verifying the statements contained in such petition (*f*).

(*f*) 32 & 33 Vict. c. 71, s. 80. The section which relates to various matters is given here in its entirety:

Sect. 80. “The following regulations shall be made with respect to proceedings in bankruptcy; namely,

- (1.) Every bankruptcy petition shall be accompanied by an affidavit of the petitioner in the prescribed form, verifying the statements contained in such petition:
- (2.) Where two or more bankruptcy petitions are presented against the same debtor or against debtors being members of the same partnership, the court may consolidate the proceedings, or any of them, upon such terms as the court thinks fit:
- (3.) Where proceedings against the debtor are instituted in more courts than one the London

Court of Bankruptcy may, on the application of any creditor, direct the transfer of such proceedings to the London Court of Bankruptcy, or to any local bankruptcy court:

- (4.) Where the petitioner does not proceed with due diligence on his petition the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this act in the case of a petitioning creditor:
- (5.) Where the creditors resolve by a special resolution that it will be more convenient that the proceedings in any local bankruptcy court should be transferred to the London court or to some other local court, or where the judge of

“The Bankruptcy Rules, 1870,” direct that—

Rule 32. “After the presentation of the petition, and before sealing the copies of the petition for service, the statements in the petition shall be carefully investigated, and where some of the statements in the petition cannot be sworn to, witnesses may be summoned to prove the same.”

Rule 29. “When the petitioning creditor cannot himself verify all the statements contained in the petition, he must file in support of the petition the affidavit of any person who can depose to them.”

Rule 30. “Where a petition is presented by two or more creditors not in partnership, each creditor must depose to the truth of such of the statements in the petition as are within his own knowledge, either in a joint or separate affidavit.”

No. 11. *Affidavit of Truth of Statements in Petition.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at]].

Sect. 80.

In the matter of a bankruptcy petition against A. B. of .

I, the petitioner named in the petition hereunto annexed, make oath [if the petitioner declare or affirm, alter the form accordingly] and say,

a local court certifies that in his opinion the bankruptcy would be more advantageously conducted in the London court or in some other local court, and the creditors do not by resolution object to the transfer, the petition shall be transferred to and all subsequent proceedings thereon had in the London court or such other local court:

- (6.) Subject to the provisions of this act, every court having original jurisdiction in bankruptcy shall be deemed to be the same court, and to have jurisdiction throughout England; and cases may be transferred from one court to another in such manner as may be prescribed:
- (7.) A corporation may prove a debt, vote, and otherwise act in bankruptcy, by an agent duly authorized under the seal of the corporation:
- (8.) A creditor may, in the prescribed manner, by instrument in writing, appoint a person to represent him in all matters relating to any debtor or his affairs in which

a creditor is concerned in pursuance of this act, and such representative shall thereupon, for all the purposes of this act, stand in the same position as the creditor who appointed him:

- (9.) When a debtor who has been adjudicated a bankrupt dies, the court may order that the proceedings in the matter be continued as if he were alive:
- (10.) The court may, at any time, on proof to its satisfaction that proceedings in bankruptcy ought to be stayed, by reason that negotiations are pending for the liquidation of the affairs of the bankrupt by arrangement or for the acceptance of a composition by the creditors in pursuance of the provisions hereinafter contained, or on proof to its satisfaction of any other sufficient reason for staying the same, make an order for staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.

1. That the several statements in the said petition are within my own knowledge true.

Sworn at, &c.

C. D.

NOTE.—*If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge he must set forth the statements the truth of which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the remaining statements.*

No. 12. *Affidavit of Truth of Statements in Petition.*

“The Bankruptcy Act, 1869.”

Sect. 60.

In the London Bankruptcy Court [or the county court of
holden at]

In the matter of a bankruptcy petition against A. B. of

We, C. D., E. F., G. H., &c., the petitioners named in the petition hereunto annexed, severally make oath and say,

And first I the said C. D. for myself say,

1. That A. B. is justly and truly indebted to me in the sum of pounds, as stated in the said before-mentioned petition.

2. That the said A. B. committed the act of bankruptcy stated to have been committed by him in the said before-mentioned petition.

And I the said E. F. for myself say,

3. That A. B. is justly and truly indebted to me in the sum of pounds, as stated in the said before-mentioned petition.

And I the said G. H. for myself say,

4. That A. B. is, &c.

C. D.

E. F.

G. H.

Sworn by the deponents C. D., E. F., and G. H., &c.

See note to last form.

§ 3.—SERVICE OF PETITION.

A petition praying that a debtor may be adjudged a bankrupt must be served in the prescribed manner (*g*).

The rules prescribe that “a bankruptcy petition shall be personally served seven days before the day of its hearing by delivering to the debtor a sealed copy of the filed petition” (*h*). It may be served upon the debtor by an officer or a bailiff of the court, or by the creditor or his attorney. If personal service cannot be effected, the court may grant extension of the time for service, or if the court is satisfied by affidavit that the debtor is keeping out of the way to avoid service, it may order service to be made by delivery of the petition to some adult inmate at his usual or last known place of residence or business, or it may order that a notice (*i*) be gazetted requiring the debtor to appear at the hearing

(*g*) “The Bankruptcy Act, 1869,” s. 8. See the entire section, *post*, p. 254; as to computation of time, see *ante*, p. 210.

(*h*) “The Bankruptcy Rules, 1870,” Rule 60, *ante*, p. 235.

(*i*) See the Form, *post*, No. 15.

of the petition on the day named, being not less than fourteen days after the publication of the notice, and that such notice shall be deemed to be served on the debtor (*k*).

Notice of the publication in the gazette of the order of the court must be given in one local paper (*l*).

Service of the petition is proved by affidavit, with a sealed copy of the petition attached and filed in court forthwith after the summons (*m*).

An application for extension of time for service of a petition must be in writing, but need not be supported by affidavit, unless in any case the court requires otherwise (*n*).

“The Bankruptcy Rules, 1870,” provide that—

Rule 65. “Where the act of bankruptcy alleged in a petition to have been committed by the debtor is that the debtor, being a trader, has departed from his dwelling-house, or otherwise absented himself, the petition may be heard forthwith on a sealed copy of the petition being left at the usual or last known place of residence or business of the debtor.”

Rule 66. “Where a debtor petitioned against is not in England, the court upon such evidence as shall satisfy it that the service will be effectual or sufficient, may order service to be made within such time and in such manner and form as it shall deem fit.”

Rule 35. “Where there are more respondents than one to a petition the rules as to service shall be observed with respect to each respondent, but where all the respondents have not been served, the petition may be heard separately or collectively as to the respondent or such of the respondents as has or have been served, and separately or collectively as to the respondents not then served according as service upon them is effected.”

No. 14. *Affidavit of Service of Petition.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at]

Rule 63.

In the matter of a bankruptcy petition against A. B.

I, L. M. of , make oath and say—

1. That I did, on the day of 187 , serve the above-mentioned A. B. with a copy of the above-mentioned petition, duly sealed with the seal of the court, by delivering the same personally to the said A. B.

Sworn at, &c.

L. M., bailiff, creditor, attorney
or his clerk.

No. 15. *Substituted Service of Petition. Notice in Gazette.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at]

Rule 61.

To A. B.

Take notice, that a bankruptcy petition has been presented against

(*k*) “The Bankruptcy Rules, (*m*) *Id.* Rule 63, *ante*, p. 236.
1870,” Rule 61, *ante*, p. 235. (*n*) *Id.* Rule 64, *ante*, p. 236.

(*l*) *Id.* Rule 62, *ante*, p. 236.

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you to this court, by C. D., of _____, and the court has ordered that the publication of this notice in the London Gazette shall be deemed to be service of the petition upon you; and further take notice, that the said petition will be heard at this court on the _____ day of _____ at _____ o'clock in the _____ noon, on which day you are required to appear, and if you do not appear the court may adjudge you bankrupt in your absence.

The petition can be inspected by you on application at this court.

Dated this _____ day of _____ 187 .

Registrar.

No. 16. *Substituted Service of Petition. Notice in Local Paper.*

“The Bankruptcy Act, 1869.”

Rule 61.

In the London Bankruptcy Court [or the county court of _____ holden at _____].

To A. B. of _____.

Take notice, that a bankruptcy petition has been presented to this court by C. D. of _____ and the court has ordered that the publication of a notice of the petition in the London Gazette shall be deemed to be service of the petition upon you. The petition will be heard at this court on the _____ day of _____ at _____ o'clock in the _____ noon, on which day you are required to appear; and if you do not the court may adjudge you bankrupt in your absence.

The petition can be inspected by you on application at this court.

Dated this _____ day of _____ 187 .

Registrar.



§ 4.—NOTICE BY DEBTOR OF INTENTION TO DISPUTE PETITION.

“The Bankruptcy Rules, 1870,” direct that—

Sect. 9.

Rule 36. “Where a debtor intends to show cause against a petition he shall file a notice with the registrar showing the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor a copy of the notice three days before the day on which the petition is to be heard.”

No. 17. *Notice by Debtor disputing the Truth of Statements on Petition.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of _____ holden at _____].

In the matter of a bankruptcy petition presented against me on the _____ day of _____ 187 , by C. D. of _____ [or and E. F. of _____ G. H. of _____ &c.]

Rule 36.

I, the above A. B., do hereby give you notice that I intend to dispute that adjudication should be made as prayed on the hearing of the petition, at which time I intend to dispute the petitioning creditor's debt [or the trading or the act of bankruptcy].

Dated this _____ day of _____ 187 .

To C. D., of _____, and to _____, A. B.
Registrar of the said court.

§ 5.—RESTRAINT OF ACTIONS AND LEGAL PROCESS, AFTER
PRESENTATION OF PETITION.

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“The Bankruptcy Act, 1869,” enacts that—

Sect. 13. “The court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt proveable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy or commenced during its continuance, to proceed upon such terms as the court may think just. The court may also, at any time after the presentation of such petition, appoint a receiver or manager of the property or business of the debtor against whom the petition is presented, or of any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof.”

Power of court after presentation of petition, to restrain suits, &c., and appoint receiver.

It is scarcely necessary to observe that there is a judicial discretion in exercising the power given by this section (o).

The object of this section is to preserve the property pending the petition. It in fact gives the Court of Bankruptcy power to intervene, although there may not be before it a person who could, in the ordinary sense of the term, be plaintiff in an action at law or in a suit in equity. Further, its object is, that the moment the petition is presented there may be, if desirable, a receiver or manager at the instance of the creditor or bankrupt presenting the petition, so that there may be some *interim* management under which the property may be preserved down to the time when there shall be an adjudication in bankruptcy; and the section does not cut down the extent of jurisdiction given by other sections (p).

It has been subsequently said that “The true meaning of the 13th section was probably this, that as there might be all sorts of questions to be tried between various judgment creditors as to whether the property should be sold or not, it was intended to give the judge a discretion to stay the sale in order to the better administration of the estate and the protection of the property, but it was not intended to alter any rights of the creditors *inter se*, and still less to give the judge a discretion to alter them” (q).

(o) See *Ex parte Mills, Re Manning*, 40 L. J. (N. S.) Bankr. 89, where it was held that parties should apply promptly, and the injunction was consequently only granted in a limited form. As to staying the bankruptcy proceedings, see s. 80, subs. (10), *ante*, p. 245, note, and *post*, p. 256.

(p) Giffard, L. J., *In re Anderson*, 39 L. J. (N. S.) Bankr. 52.

(q) Lord Chancellor Hatherley, in *Ex parte Roche, In re Hall*, 40 L. J. (N. S.) Bankr. 72. Was not some such power as is conferred by s. 13 necessary for other reasons? Property may be taken in execution

before or after adjudication. By the construction put upon other provisions of the statute, in ordinary cases (i. e. except in the case of judgments above £50 against traders) seizure before the act of bankruptcy on which the petition is founded is protected, but seizure after is not, but it is impossible to say whether either rule applies in any particular case until all the facts are ascertained; for instance, there may be a prior act of bankruptcy within the terms of sect. 11, so that the bankruptcy may have relation back to an earlier period, or the judgment debt may be impeached

It is to be observed that the power given is to restrain proceedings against the debtor. It has been held, that there is no power under sect. 13 to restrain proceedings in a joint action against the debtor and another, even his partner, although there might be power to restrain execution being sued out against the debtor (*r*); but in another case it was said that an injunction might be properly granted to restrain the action, because by sect. 112 (*post*), proceedings at law may be taken against a joint contractor without the joinder of the bankrupt (*s*), and clearly an injunction will lie in such a case to restrain execution against the bankrupt (*t*).

A writ of sequestration issued to enforce an order in a chancery suit for payment of money, is "legal process" within sect. 13 (*u*).

A landlord's distress for rent is not an "execution or other legal process," capable of being restrained under sect. 13 (*x*).

No. 31. *Restraining Action, &c., after Bankruptcy.*

"The Bankruptcy Act, 1869."

Sect. 13.

In the London Bankruptcy Court [*or* the county court of holden at]].

In the matter of a bankruptcy petition against A. B. of . . .
Upon the application of . . . and upon reading his affidavit it is ordered that L. M. of . . . shall be restrained from taking any further proceedings in the action [*or* suit] brought by him [*or* upon the judgment [*or* decree] recovered or obtained by him] against the said A. B. in [*here state the court in which proceedings are*] [*or* it is ordered that the proceedings in the action [*or* suit] brought by him against the said A. B. in [*here state the court in which proceedings are*] may be proceeded with on [*here insert the terms fixed by the court*]].

Given under the seal of the court this . . . day of . . . 187 .

By the court,
Registrar.

as a fraudulent preference. On the other hand, a seizure after the act of bankruptcy alleged in the petition may eventually prove to be valid, for the petition may be dismissed on the ground of failure to prove the act of bankruptcy or the petitioning creditor's debt. So that it is most desirable, if not essential, that the court should have power to regulate all proceedings, so that the best course may be adopted to meet any state of circumstances and the rights of the parties as they may be eventually established or disproved as the case may be. It will be seen, therefore, that the power may be exercised, as observed by Lord Justice Giffard, at any time after the petition is presented and before even an adjudication is certain.

(*r*) *In re De Vecchj, Ex parte Isaac*, 40 L. J. (N. S.) Bankr. 19.

(*s*) James, L. J., *Ex parte Mills, Re Manning*, 40 L. J. (N. S.) Bankr. 89. Semble there is such a power under sects. 66 and 72, if a case is made out for its exercise. See the judgment of Giffard, L. J., *In re Anderson*, 39 L. J. (N. S.) Bankr. 49.

(*t*) *Ex parte Mills*, supra.

(*u*) *In re Browne*, 40 L. J. (N. S.) Bankr. 46. This case is still an authority on this point, but it may be doubted whether after *Slater v. Pinder*, and *Ex parte Roche, Re Hall*, *post*, Chap. VII., it can be relied on as an authority that the trustee was entitled to the property, the seizure having been apparently before the act of bankruptcy.

(*x*) *Ex parte Birmingham and Staffordshire Gas Light Co., Re Faushaw*, 40 L. J. (N. S.) Bankr. 52. As to distress for rent, see sect. 34, *post*, Chap. XI., § 13.

§ 6.—APPOINTMENT OF RECEIVER AND MANAGER AFTER PETITION.

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“The Bankruptcy Act, 1869,” empowers the court at any time after the presentation of the petition to appoint a receiver and manager of the property or business of the debtor, and to direct immediate possession to be taken of such property or business (*y*).

“The Bankruptcy Rules, 1870,” provide that—

Rule 33. “After the presentation of a petition, upon the application of a creditor and upon proof by affidavit of sufficient grounds for the appointment of a receiver or manager of the property, or business of the debtor, or any part thereof, the court may, if he think fit, make such appointment; and where the petition is dismissed the creditor shall pay such costs of the receiver or manager as the court may direct, and the court shall, if required, adjudicate with respect to any damages, or claim thereto arising out of his appointment, or make such order thereon as it thinks fit, and such order shall be final and conclusive between the parties, and between them or either of them and the receiver or manager, unless the decision be appealed from.” Sect. 13.

“The Bankruptcy Rules, 1871,” provide that—

Rule 2. “Where a receiver or manager of the property or business of a bankrupt shall have been appointed, he shall, upon the appointment of a trustee, deliver to such trustee all money and property which may have come to his hands, unless the court shall otherwise order.”

Rule 3. “A receiver or manager, in cases either of bankruptcy or liquidation, shall not have any lien whatever for his remuneration on any money or property which may have come into his hands.”

No. 13. *Application for Appointment of a Receiver, or Manager, and Order thereon.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [*or the county court of* Sect. 13.
holden at].

In the matter of a bankruptcy petition against A. B. of Rule 31.
I, C. D. of], the petitioner in this matter, do, on the grounds set forth in the annexed affidavit, apply to the court for the appointment of a receiver of the property of the said A. B. [*or the appointment of a manager of the business of*], carried on by the said A. B. at], and that such receiver [*or manager*] be directed to take immediate possession thereof.

C. D.

Order thereon.

Upon reading this application and the affidavit therein referred to, it is ordered that L. M. of]. be appointed to collect, get in, and receive the property [*and [or or] to manage the business*] of the said A. B. And it is ordered that the said] do take immediate possession of such property [*or business*], and that he do pass his accounts at such times as may be directed by the registrar of this court.

Given under the seal of the court this] day of 187 .

By the court,
Registrar.

(*y*) See sect. 13, *ante*, p. 249.

§ 7.—ARREST OF BANKRUPT AFTER THE PRESENTATION OF THE PETITION.

“The Bankruptcy Act, 1869,” enacts that—

Arrest of
bankrupt
under certain
circum-
stances.

Sect. 86. “The court may, by warrant addressed to any constable or prescribed officer of the court, cause a debtor to be arrested, and any books, papers, monies, goods, and chattels in his possession to be seized, and him and them to be safely kept as prescribed until such time as the court may order, under the following circumstances :

- (1.) If, after a petition of bankruptcy is presented against such debtor, it appear to the court that there is probable reason for believing that he is about to go abroad or to quit his place of residence with a view of avoiding service of the petition, or of avoiding appearing to the petition, or of avoiding examination in respect of his affairs, or otherwise delaying or embarrassing the proceedings in bankruptcy :
- (2.) If, after a petition in bankruptcy has been presented against such debtor, it appear to the court that there is probable cause for believing that he is about to remove his goods or chattels with a view of preventing or delaying such goods or chattels being taken possession of by the trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods or chattels, or any books, documents, or writings which might be of use to his creditors in the course of his bankruptcy :
- (3.) If after the service of the petition on such debtor, or after an adjudication in bankruptcy against him, he remove any goods or chattels in his possession above the value of five pounds, without the leave of the trustee ; or if, without good cause shown, he fails to attend any examination ordered by the court.”

“The Bankruptcy Rules, 1870,” provide that—

Sect. 86.

Rule 177. “Where a bankrupt is arrested under a warrant issued under section 86 of the act, he shall be safely kept by being lodged within the prison, to the keeper of which the warrant is, amongst others, addressed ; and any books, papers, monies, goods, and chattels in the possession of the bankrupt, which may be seized, shall be lodged with the trustee of the property of the bankrupt forthwith.”

No. 73. *Warrant against Debtor about to quit England, &c.*

“The Bankruptcy Act, 1869.”

Sect. 86.

In the London Bankruptcy Court [*or the county court of* _____, holden at _____].

Rule 177.

In the matter of a bankruptcy petition against A. B. of _____ [*or in the matter of A. B. of* _____, a bankrupt].

To the X. Y. officer of this court [*or where warrant issues from a county court,* To the high bailiff and others the bailiffs of the said court] and all peace officers within the jurisdiction of the said court, and to the governor or keeper of the (*here insert the prison*).

Whereas, by evidence taken upon oath, it hath been made to appear to the satisfaction of the court, that there is probable reason to suspect

and believe that the said A. B. is about to go abroad [or quit his place of residence] with a view of avoiding service of this petition [or of avoiding appearing to this petition], [or of avoiding examination in respect of his affairs, or otherwise delaying or embarrassing the proceedings in bankruptcy].

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[Or that there is probable cause to suspect and believe that the said A. B. is about to remove his goods or chattels with a view of preventing or delaying such goods or chattels being taken possession of by the trustee of the property of the bankrupt [or that the said A. B. has concealed [or is about to conceal or destroy his goods or chattels, or some of them, or his books, documents or writings, or some or one of them, which books, documents or writings, or some or one of them, may be of use to the creditors in the course of the bankruptcy of the said A. B.

[Or whereas by evidence taken upon oath it hath been made to appear to the satisfaction of this court that the said A. B. has removed certain of his goods and chattels in his possession, above the value of five pounds, without the leave of the trustees, that is to say [*here describe the goods or chattels*].

[Or that the said A. B. did without good cause fail to attend at this court on the day of , 187 , for the purpose of being examined, according to the requirements of an order of this court, made on the day of , 187 , directing him so to attend.]

These are, therefore, to require you the said [*or high bailiff, bailiffs*], and others, to take the said A. B. and to deliver him to the governor or keeper of the above-named prison, and you the said governor or keeper to receive the said A. B., and him safely to keep in the said prison until such time as this court may order.

Given under the seal of the court this day of ,
187 .

By the court,
Registrar.

CHAPTER VI.

THE HEARING AND ADJUDICATION.

§ 1.—THE HEARING.

§ 2.—STAYING PROCEEDINGS.

§ 3.—THE ADJUDICATION.

§ 4.—DISMISSAL OF THE PETITION.



§ 1.—THE HEARING.

“The Bankruptcy Act, 1869,” enacts that—

Proceedings
on petition.

Sect. 8. “A petition praying that a debtor may be adjudged a bankrupt, in this act referred to as a bankruptcy petition, shall be served in the prescribed manner (*a*). At the hearing the court shall require proof of the debt of the petitioning creditor, and of the trading, if necessary, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with such proof, shall adjudge the debtor to be bankrupt. The court may adjourn the petition, either conditionally or unconditionally, for the procurement of further evidence, or for any other just cause, or may dismiss the petition, with or without costs, as the court thinks just.”

“The Bankruptcy Rules, 1870,” provide that—

Rule 37. “If the debtor does not appear at the hearing, the court may make adjudication without further proof of the statements in the petition, if it shall think fit.”

Rule 38. “On the appearance of the debtor to show cause against the petition, the petitioning creditor’s debt, trading, and act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute (*b*), shall again be proved, and if any new evidence of those matters, or any of them, shall be given, or any witness or witnesses to such matter shall not be present for cross-examination, and further time shall be desired to show cause, the court shall, if it think the application reasonable, grant such further time as it may think fit.”

Rule 39. “If any creditor shall neglect to appear on his petition, no subsequent petition against the same debtor or debtors, or any of them, either alone or jointly with any other person or persons, shall be presented by the same creditor without the special leave of the court to which the previous petition was presented.”

(*a*) See *ante*, p. 246.

(*b*) As to notice by debtor of his intention to dispute, see *ante*, p. 248.

Rule 40. "The personal attendance of the petitioning creditor and of the witness or witnesses to prove the debt, the trading, and act of bankruptcy, upon the hearing of the petition, may if the court shall think fit, be dispensed with."

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Rule 41. "A debtor shall not be adjudged bankrupt on a petition in which the act of bankruptcy stated to have been committed by him is that the debtor has neglected to pay, secure, or compound with the petitioner a sum mentioned in a debtor's summons within seven days or three weeks, as the case may be, where such debtor shall have applied for the dismissal of such summons until after the hearing of the application, or where the summons has been dismissed, or during a stay of the proceedings thereon."

Sect. 6, par. 6.

Rule 42. "Where a petition is presented, and the act of bankruptcy stated to have been committed is that the debtor has filed in the court to which the petition is presented a declaration admitting his inability to pay his debts, the court may, if the debtor consents in writing thereto, hear and adjudicate upon the petition forthwith."

Sects. 6 & 8.

Rule 48. "Where two or more petitions are presented to the same court against the same debtor, or against debtors being members of the same partnership, the petition which was first presented shall be first heard; and where such first petition shall not have been served, or where the debtor shows cause against the petition, or where delay will be avoided, any other petition which has been served may be heard, and if the court make adjudication thereon, the court shall, after the expiration of the time allowed for appeal against the adjudication, dismiss all the other petitions upon such terms as to costs as it shall deem just."

Sect. 80,
par. 2.

Adjournment of Hearing.—“The court may adjourn the petition, either conditionally or unconditionally, for the procurement of further evidence, or for any other just cause” (c).

No. 25. *Adjournment of Petition.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at]

Sect. 8.

In the matter of a bankruptcy petition against A. B. of .

Upon the hearing of this petition this day, it is ordered that the further hearing of this petition be adjourned until the . day of
, 18 , at . o'clock in the . noon.

Given under the seal of the court this . day of
187 .

By the court,
Registrar.

§ 2.—STAYING PROCEEDINGS ON THE PETITION.

Staying Proceedings where Petitioner's Debt denied.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 9. “Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such amount

Proceedings
if debt of
petitioning

(c) See sect. 8, *ante*, p. 254.

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CHAP. VI.
creditor is
contested.

as would justify the petitioner in presenting a bankruptcy petition against him, the court, upon such security (if any) being given as the court may require, for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing such debt, may stay all proceedings on the petition for such time as may be required for trial of the question relating to such debt, and such trial shall be had in manner hereinbefore provided with respect to disputed debts under debtors' summonses.

"Where proceedings are stayed the court may, if by reason of the delay caused by such stay of proceedings or for any other cause it thinks just, adjudge the debtor a bankrupt on the petition of some other creditor and shall thereupon dismiss, upon such terms as it thinks just, the petition proceedings in which have been stayed as aforesaid."

"The Bankruptcy Rules, 1870," provide that—

Sect. 9.

Rule 43. "Where proceedings on a petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and such question has been decided in favour of the validity of the debt, the petitioning creditor may apply to the registrar to fix a day on which further proceedings on the petition may be had, and the registrar on production of the judgment of the court in which the question was tried, or an office copy thereof, shall give notice to the petitioner by post of the time and place fixed for the hearing of the petition, and a like notice to the debtor at the address given in his notice to dispute."

Rule 44. "Where proceedings on a petition have been stayed for the trial of the question of the validity of the petitioning creditor's debt, and such question has been decided against the validity of the debt, the debtor may apply to the registrar to fix a day on which he may apply to the court for the dismissal of the petition with costs, and the registrar on the production of a copy of the judgment of the court in which the question was tried, or an office copy thereof, shall give notice to both the petitioner and debtor by post of the time and place fixed for the hearing of the application."

Sect. 9.

Rule 47. "Where proceedings on a petition are stayed upon security being given, the creditor shall take or continue proceedings for the payment of the debt within twenty-one days of the date on which the security was completed, and shall prosecute the same with effect and without delay, and if he fail so to do the debtor shall be entitled to have the petition dismissed with costs."

Staying Proceedings where Proceedings for Liquidation by Arrangement or Composition pending.]—"The court may at any time, on proof to its satisfaction that proceedings in bankruptcy ought to be stayed, by reason that negotiations are pending for the liquidation of the affairs of the bankrupt by arrangement, or for the acceptance of a composition by the creditors in pursuance of the provisions hereinafter contained, or on proof to its satisfaction of any other sufficient reason for staying the same, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just" (d).

(d) See sect. 80, subs. (10), *ante*, p. 245, note.

Where the debtor on the day appointed for the hearing of a petition against him, himself filed a petition for liquidation by arrangement, it was held that the creditor who had presented the first petition was entitled to an adjudication, and an *ex parte* injunction against his proceeding, obtained by the debtor, was dissolved (*e*).

No. 18. *Order to stay Proceedings on Petition.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 9.

In the matter of a bankruptcy petition against A. B. of .
Upon the hearing of this petition this day, and the said A. B. appearing and denying that he is indebted to the petitioner [*where petition presented by more than one creditor, add the name of the creditor whose debt is denied*] in the sum stated in the petition [or that he is indebted to the petitioner in a sum of a less amount than fifty pounds], [or that he is indebted to C. D. one of the petitioners, in a sum less than the sum stated to be due from him in the petition], it is ordered that the said A. B. shall within days enter into a bond in the penal sum of [*double the alleged debt*] with such two sufficient sureties as the court shall approve of to pay [or deposit with the registrar the sum of as security for the payment of] such sum or sums as shall be recovered against the said A. B. by C. D. the petitioner [or one of the petitioners] in any proceeding taken or continued by him against the said A. B., together with such costs as shall be given by the court in which the proceedings are had.

And it is further ordered, that upon the said A. B. entering into the bond aforesaid, all proceedings on this petition shall be stayed until after the court in which the proceedings shall be taken shall have come to a decision thereon.

Given under the seal of the court this day of 187 .

By the court,

Registrar.

No. 19. *Bond on stay of Proceedings.*

“The Bankruptcy Act, 1869.”

Know all men by these presents, that we, A. B. of, &c., and C. D. of, &c., and E. F. of, &c., are jointly and severally held and firmly bound to L. M. of, &c., in pounds to be paid to the said L. M., or his certain attorney, executors, administrators or assigns. For which payment to be made we bind ourselves and each and every of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sects. 7 and 9.

Sealed with our seals, and dated this day of one thousand eight hundred and .

Whereas a bankruptcy petition against the said A. B. having been presented to the London Court of Bankruptcy [or county court], he did appear at the hearing of the said petition and deny that he was indebted to the petitioner [or to one or more of the petitioners], [or allege that he was indebted to the petitioner in the sum of pounds only].

Sect. 9.

(*e*) *In re Williams, Ex parte Dimond*, 39 L. J. (N. S.) Bankr. 47.

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Sect. 7.

[*or* Whereas the said A. B. having been duly served with a debtor's summons by L. M. of _____ in accordance with provisions of the Bankruptcy Act, 1869, issued out of the London Bankruptcy Court [*or* the county court of _____ holden at _____], applied to the said court to dismiss such summons on the ground that he was not indebted to the said L. M. [*or* that he was not indebted to him to such an amount as would support a petition in bankruptcy].

Now, therefore, the condition of this obligation is such that if the above-bounden A. B., or the said C. D. or E. F., shall on demand well and truly pay or cause to be paid to L. M., his attorney or agent, such sum or sums as shall be recovered against the said A. B. by any proceedings taken or continued within twenty-one days from the date hereof in any competent court by the said L. M. for the payment of the debt claimed by him in the said petition or debtor's summons, together with such costs as shall be given to the said L. M. by such court, this obligation shall be void, otherwise shall remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by the above-bounden _____ in the presence of _____.

NOTE.—*If a deposit of money be made the memorandum should follow the terms of the conditions of the bond.*

No. 20. Notice of Sureties.

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [*or* the county court of _____ holden at _____].

In the matter of a bankruptcy petition against A. B. of _____ [*or* In the matter of a debtor's summons by C. D. of _____, against A. B. of _____].

Take notice, that the sureties whom I propose as my security in the above matter [*here state the proceeding which has rendered the sureties necessary*] are [*here state the full names and additions of the sureties, and their residences for the last six months, therein mentioning the county or city, places, streets, and numbers, if any*].

Dated this _____ day of _____ 187 _____. A. B.
To the registrar of the court and L. M. of _____.

No. 21.—Affidavit of Justification.

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [*or* the county court of _____ holden at _____].

In the matter of a bankruptcy petition against A. B. of _____ [*or* In the matter of a debtor's summons by L. M. against A. B. of _____].

I, E. F. of _____, one of the sureties for _____ make oath and say:—

1. That I am a housekeeper [*or as the case may be*], residing [*describing particularly the county or city, the street or place, and the number of the house, if any*].

2. That I am worth property to the amount of £ _____ [*the amount required*] over and above what will pay my just debts [*if security in*

any other action or for any other purpose, add, and every other sum for which I am now security].

3. That I am not bail or security in any other matter, action, or proceeding, or for any other person [or if security in any other action or actions, add, except for C. D., at the suit of E. F., in the court of in the sum of £ ; for G. H., at the suit of I. K., in the court of in the sum of £ , specifying the several actions with the courts in which they are brought and the sums in which he has become bound].

4. That my property, to the amount of the said sum of £ [and if security in any other action, &c., over and above all other sums for which I am now security as aforesaid] consists, of [here specify the nature and value of the property in respect of which the deponent proposes to become bondsman as follows, stock in trade, in my business of carried on by me at of the value of £ , of good book debts owing to me to the amount of £ , of furniture in my house at of the value of £ , of a freehold [or leasehold] farm of the value of £ situate at , occupied by , or of a dwelling-house of the value of £ situate at , occupied by , or of other property, particularizing each description of property, with the value thereof].

5. That I have for the last six months resided at [describing the place of such residence, or if he has had more than one residence during that period, state it in the same manner as above directed].

Sworn at, &c.

E. F.

§ 3.—ADJUDICATION OF BANKRUPTCY.

On the hearing (original or adjournment), the court may either adjudge the debtor to be bankrupt or dismiss it (f).

Immediately upon the order of adjudication being made, the property of the bankrupt vests in the registrar, who, until a trustee is appointed by the creditors, is the trustee for the purposes of the act (g).

“The Bankruptcy Rules, 1870,” provide that—

Rule 103. “After adjudication and before the appointment of a trustee by the creditors, the registrar in his capacity of trustee may, on the application of the petitioning creditor, sell or otherwise dispose of any property of the bankrupt which shall be of a perishable nature.”

The following is the form of adjudication:—

No. 26. *Adjudication.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of holden at]

Sects. 8, 10.

In the matter of a bankruptcy petition against A. B. of .

Upon the hearing of this petition this day, and upon proof, satisfactory to the court, of the debt of the petitioner [and of the trading], and of

(f) See sect. 8, ante, p. 254.

(g) See sect. 17, post, p. 274.

the act or acts of the bankruptcy alleged to have been committed by the said A. B. having been given, it is ordered that the said A. B. be and he is hereby adjudged bankrupt.

Given under the seal of the court this day of 187 .
By the court,
Registrar.

[*To be added for publication in Gazette.*]

The first general meeting of the creditors of the said A. B. is hereby summoned to be held at this [*or at the office of the*] court on the day of 187 , at o'clock of the noon, and that the court has ordered the bankrupt to attend thereat for examination, and to produce thereat a statement of his affairs as required by the statute.

Until the appointment of a trustee all persons having in their possession any of the effects of the bankrupt must deliver them, and all debts due to the bankrupt must be paid, to the registrar. Creditors must forward their proofs of debts to the registrar.

Publication of Adjudication.].—"The Bankruptcy Act, 1869," enacts that—

Advertise-
ment of order
of adjudica-
tion.

Sect. 10. "A copy of an order of the court adjudging the debtor to be bankrupt shall be published in the London Gazette, and be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this act, and the production of a copy of the Gazette containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt, and of the date of the adjudication.

"The Bankruptcy Rules, 1870," provide that—

Sect. 10.

Rule 45. "Notice of the making an order of adjudication shall be advertised in one local paper according to the form in the schedule."

The following is the form of notice of the order of adjudication and also of the first meeting of the creditors (*h*):—

No. 27. *Notice of First Meeting in Local Paper.*

In the London Bankruptcy Court [*or the county court of*
holden at].

A. B. of was adjudged a bankrupt on the day of ,
187 .

The first meeting of creditors will be held at , on the day
of 187 .

Until the appointment of a trustee, all persons having in their possession any of the effects of the bankrupt, must deliver them, and all debts due to the bankrupt must be paid to the registrar. Creditors must forward their proofs of debts to the registrar.

Certificate that Registrar Trustee.].—"The Bankruptcy Act, 1869," enacts that when the registrar holds the office of trustee, a

(*h*) See *post*, Chap. VII.

certificate of the court may be made declaring him trustee (*i*).
 “The Bankruptcy Rules, 1870,” provide that—

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Rule 46. “Upon adjudication being made, a certificate declaring the registrar to be the trustee must be put on the file of the proceedings in accordance with sect. 18 of the act” (*i*).

No. 28. *Certificate declaring Registrar Trustee.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of holden Sect. 18.
 at].

In the matter of A. B. of , a bankrupt.

Until such time as the appointment of a trustee by the creditors shall have been certified by this court, it is hereby certified and declared that the registrar [or L. M., one of the registrars] of this court is the trustee of the property of the said bankrupt [add where so ordered, and the said registrar is hereby ordered to take possession of the said property forthwith]. Rule 43.

Given under the seal of the court this day of 187 .

By the court,
 Registrar.

Appeal from Adjudication of Bankruptcy.—The bankrupt or petitioner may appeal from the adjudication of bankruptcy (*k*).

Where the debtor appealed from the adjudication, on the ground that he was not resident in England, but in Ireland, and that the service of the debtor-summons (the alleged act of bankruptcy) made under a special order, was void for want of jurisdiction, the adjudication was annulled; and it was held, that the debtor was not precluded from raising the question on the adjudication by reason of his having previously made an unsuccessful application to dismiss the summons, and by not then appealing (*l*).



§ 4.—DISMISSAL OF THE PETITION.

The court “may dismiss the petition, with or without costs, as the court thinks just” (*m*).

Dismissal where Adjudication on another Petition.—“Where proceedings are stayed, the court may, if by reason of the delay caused by such stay of proceedings or for any other cause it thinks

See Rule 33
 and sect. 9.

(*i*) See sect. 18, *post*, p. 274.

(*k*) See the general power of appeal given by sect. 71 and rules, *post*, pp. 303, 304. When on a joint adjudication of bankruptcy against three partners, two appealed within the twenty-one days allowed by Rule 143 (*post*, pp. 303, 304), it was held that the third partner might and ought to be let in to appeal afterwards, on terms, such as giving the

usual security for costs in the form of a deposit. *Ex parte Jones, In re Hayward*, 40 L. J. (N. S.) Bankr. 49.

(*l*) *Ex parte O'Loughlen, In re O'Loughlen*, 40 L. J. (N. S.) Bankr. 28.

(*m*) See sect. 8, *ante*, p. 254. As to an action for falsely and maliciously causing an adjudication of bankruptcy, see *Farley v. Danks*, 4 E. & B. 493.

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just, adjudge the debtor a bankrupt on the petition of some other creditor, and shall thereupon dismiss, upon such terms as it thinks just, the petition proceedings in which have been stayed as aforesaid (*n*).

Costs of Receiver or Manager on Dismissal.—Where a receiver or manager has been appointed on the application of a creditor (*o*), and the petition is dismissed, the creditor shall pay such costs of the receiver or manager, as the court may direct (*p*).

“The Bankruptcy Act, 1869,” enacts that—

Power to
dismiss pe-
tition against
some respon-
dents only.

Sect. 101. “Where there are more respondents than one to a petition, the court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them.”

No. 23. *Dismissal of Petition.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [*or* the county court of holden
at].

Sect. 9.

In the matter of a bankruptcy petition against A. B. of .

Upon the hearing of this petition this day, the court being satisfied that the debt [*or* debts] of the petitioning creditor [*or* creditors] is [*or* are] not sufficient to support a petition in bankruptcy [*or* that the debtor did not commit the act of bankruptcy stated to have been committed], it is ordered that this petition be dismissed [and that the petitioner do pay to the said A. B. the taxed costs thereof].

Given under the seal of the court this day of 187 .
By the court,
 Registrar.

No. 24. *Dismissal of Petition upon which Proceedings are stayed where Adjudication made on a subsequent Petition.*

“The Bankruptcy Act, 1869.”

Sect. 9.

In the London Court of Bankruptcy [*or* the county court of holden at].

In the matter of a bankruptcy petition against A. B. of , presented by C. D. of .

Whereas A. B. has been adjudged a bankrupt upon a petition presented to this court by O. P. of , it is ordered that the bankruptcy petition against the said A. B., presented to this court by C. D. of , the proceedings in which were stayed by order of court of the day of , 187 , be dismissed [*add terms if any*].

Given under the seal of the court this day of , 187 .
By the court,
 Registrar.

Appeal from Dismissal.—It is clear there may be an appeal from the dismissal of a petition as well as from an adjudication of bankruptcy (*q*).

(*n*) See sect. 9, *ante*, pp. 255, 256.

(*o*) See *ante*, p. 251.

(*p*) See Rule 33, *ante*, p. 251.

(*q*) See APPEAL, *post*, p. 303.

CHAPTER VII.

THE FIRST MEETING OF CREDITORS.

§ 1.—GENERAL PROVISIONS.

§ 2.—PROCEEDINGS PRELIMINARY TO THE MEETING.

§ 3.—THE PROCEEDINGS AT THE MEETING.

§ 4.—THE ATTENDANCE OF THE BANKRUPT.

§ 5.—THE RIGHT AND MODE OF VOTING.

§ 6.—MINUTES AND REPORT OF PROCEEDINGS.



§ 1.—GENERAL PROVISIONS.

A DEBTOR having been adjudged bankrupt, the next step is a general meeting of his creditors for the purpose of effecting a division of his property.

Section 14 of "The Bankruptcy Act, 1869," contains the following general provisions on the subject:—

Sect. 14. "When an order has been made adjudging a debtor bankrupt, herein referred to as an order of adjudication, the property of the bankrupt shall become divisible amongst his creditors in proportion to the debts proved by them in the bankruptcy; and for the purpose of effecting such division the court shall, as soon as may be, summon a general meeting of his creditors, and the creditors assembled at such meeting shall and may do as follows:

Meeting of creditors for appointment of persons to administer bankrupt's property.

1. They shall, by resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt, at such remuneration as they may from time to time determine, if any: or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned:
2. They shall, when they appoint a trustee, by resolution declare what security is to be given, and to whom, by the person so appointed, before he enters on the office of trustee:
3. They shall, by resolution, appoint some other fit persons, not exceeding five in number, and being creditors qualified to vote at such first meeting of creditors as in this act mentioned, or authorized in the prescribed form by creditors so qualified to vote, to form a committee of inspection for the purpose of superintending the administration by the trustee of the bankrupt's property:
4. They may, by resolution, give directions as to the manner in which the property is to be administered by the trustee, and it shall be the duty of the trustee to conform to such directions, unless the court for some just cause otherwise orders."

§ 2.—PROCEEDINGS PRELIMINARY TO THE MEETING.

Having in sect. 14 seen the object and general provisions respecting the first meeting of creditors, it is necessary to enter more minutely into the subject of this important stage in bankruptcy proceedings.

Section 14, it will be seen, requires the court to summon a meeting of creditors as soon as may be, that is, as soon as may be after the adjudication.

“The Bankruptcy Rules, 1870,” direct that—

Sect. 14.

Rule 89. “The first meeting of creditors shall be summoned immediately after making an order of adjudication, by the registrar appointing a day for the first meeting of creditors and by giving ten days’ notice thereof in the London Gazette, and in one local paper, according to the form in the schedule.”

Although the rule gives the registrar the power to appoint a day for the meeting, the following form of order for the first meeting treats the appointment as the act of the court.

Place of Meeting.]—The meeting of creditors is generally in the same town where the court sits. Still, for good cause shown, it may be held elsewhere. “The Bankruptcy Rules, 1870,” provide that—

Sect. 110.

Rule 87. “If the petitioning creditor or any other creditor desire that the first meeting of creditors should be held at any other town than the town where the court usually holds its sittings, application, supported by affidavit showing grounds for the application, must be made at the hearing of the petition. If such application be by any other person than the petitioning creditor, two days’ notice thereof must be given to the petitioning creditor, and if the court be reasonably satisfied that the circumstances of the estate and of the creditors require that the application should be granted the same shall be granted accordingly.”

Rule 88. “With every such application for a meeting to be held elsewhere than in the London Court of Bankruptcy, or in the town in which the county court holds its sittings, there shall be deposited in the office of the registrar the sum of three pounds to defray the reasonable expenses of the registrar and of his clerk in attending such meeting, to be afterwards allowed to the applicant out of the estate by the trustee.”

The Bankruptcy Act allows the registrar his travelling expenses to be paid out of the bankrupt’s property, if sufficient, otherwise they are deemed part of the expenses of the court (*a*). Rule 88, however, properly imposes those costs on the applicant in this case, in the first instance, so that under no circumstances are they paid by the country as part of the expenses of the court.

(*a*) See sect. 110, *post*, p. 297.

Order for the Attendance of the Bankrupt.]—"The Bankruptcy Rules, 1870," provide that—

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CHAP. VII.

Rule 90. "An order for the attendance of the bankrupt at the first meeting and the production of his statement of affairs shall be then made by the court, and a sealed copy of the order shall be served on the bankrupt personally, or by leaving the same with some adult inmate at his usual or last known place of residence or business."

Sect. 19.

The notice of the meeting required by Rule 89 to be given in the London Gazette, is added to the advertisement of the adjudication, the form of which is given, *ante*, p. 260 (Form, No. 26). See also the notice required by the same rule to be given in a local paper, *ante*, p. 260 (Form, No. 27).

No. 29. *Orders for First Meeting and for the Attendance of the Bankrupt thereat.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of holden at].

Sects. 16, 19.

In the matter of A. B. of , a bankrupt.

Rules 89, 90.

Whereas the said A. B. having been adjudged bankrupt, at a court holden this day, it is ordered that the first meeting of the creditors of the bankrupt shall be held at , on the day of , 187 , at o'clock in the noon, and that the said A. B. do personally attend such meeting for the purpose of being examined thereat, and to produce thereat a statement of his affairs as required by the statute.

Given under the seal of the court this day of , 187 .
By the court,
Registrar.

NOTE.—*This order is necessary to bring the bankrupt within the provisions of section 86 should he fail to attend (b).*

§ 3.—THE PROCEEDINGS AT THE MEETING.

"The Bankruptcy Act, 1869," enacts that—

Sect. 16. "The general meeting of creditors to be summoned as aforesaid by the court, and in this act referred to as the first meeting of creditors, shall be held in the prescribed manner and subject to the prescribed regulations as to the quorum, adjournment of meeting, and all other matters relating to the conduct of the meeting or the proceedings thereat.

Regulations as to first meeting of creditors.

Provided that,—

1. The meeting shall be presided over by the registrar, or, in the event of his being unable to attend through illness or any unavoidable cause, by such chairman as the meeting may elect :

(b) See sect. 86, *ante*, p. 252.

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CHAP. VII.

2. A person shall not be entitled to vote as a creditor unless at or previously to the meeting he has in the prescribed manner proved a debt proveable under the bankruptcy to be due to him :
3. A creditor shall not vote at the said meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained :
4. A secured creditor shall, for the purpose of voting, be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security ; and the amount of such balance shall, until the security be realized, be determined in the prescribed manner. He may, however, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him :
A "secured creditor" shall in this act mean any creditor holding any mortgage, charge or lien on the bankrupt's estate, or any part thereof, as security for a debt due to him :
6. Votes may be given either personally or by proxy :
7. An ordinary resolution shall be decided by a majority in value of the creditors present personally or by proxy at the meeting and voting on such resolution (c) :
8. A special resolution shall be decided by a majority in number, and three-fourths in value, of the creditors present personally or by proxy at the meeting and voting on such resolution."

The Business to be transacted at the First Meeting.—It will be noticed that sect. 14 of "The Bankruptcy Act, 1869," requires the creditors at the first meeting to appoint a trustee, and also a committee of selection, and they may give directions as to the manner in which the property is to be administered by the trustee (d).

"The Bankruptcy Rules, 1870," provide that the time and place for the bankrupt's examination may be appointed at the first meeting (e).

The rules also provide that—

Rule 127. "A creditor shall bear the cost of making proof of his debt, unless the court shall otherwise specially order, and no part of the expense of any competition for the office of trustee shall be paid out of the estate."

Adjournment.—"The Bankruptcy Act, 1869," enacts that—

Sect. 84. "The registrar may adjourn the first meeting of creditors from time to time and from place to place, subject to the directions of the court, but if, at such first meeting of creditors or at some adjournment thereof, no trustee is appointed by reason of the prescribed quorum not

Power of court, on failure of creditors, to appoint trustee.

(e) The various rules relating to resolutions and voting in reference to liquidation by arrangement under sect. 125, *post*, are not inconsistent with this provision. *Ex parte Orde*,

In re Horsley, 40 L. J. (N. S.) Bankr. 60.

(d) See more fully as to these matters, *post*, Chapter VIII.

(e) See Rule 96, *post*, p. 292.

being present, or for any other reason whatever, the court may annul the adjudication, unless it deems it expedient to carry on the bankruptcy with the aid of the registrar as trustee. Moreover, if at any time during the bankruptcy no new trustee is appointed to fill a vacancy in that office, the court may either carry on the bankruptcy with the aid of the registrar as trustee or annul the order of adjudication, as it thinks just.

The Bankruptcy Rules carry the first part of this provision out with greater precision.

Rule 94. "Where within half an hour from the time appointed for the first meeting a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the registrar or chairman may appoint, not being less than seven or more than twenty-one days; and if the meeting adjourned is the first meeting of creditors, or a meeting called to fill up a vacancy in the office of trustee, and a quorum is not present or represented at the adjourned meeting, the registrar shall report the fact to the court for its decision under section 84 of the act." Sect. 16.

Adjournment of Meetings by Creditors.]—A resolution to adjourn is an ordinary resolution, to be decided by a majority in value of the creditors present personally or by proxy at the meeting and voting on such resolution (*f*).



§ 4.—THE ATTENDANCE OF THE BANKRUPT.

In accordance with the order of the court the bankrupt must attend the meeting (*g*).

Production of Statement of Affairs.]—The bankrupt "shall produce a statement of his affairs to the first meeting of creditors, and shall be publicly examined thereon on a day to be named by the court and subject to such adjourned public examination as the court may direct" (*h*).

"The Bankruptcy Rules, 1870," direct that—

Rule 91. "In cases of partnership the bankrupts shall produce a statement of their partnership affairs, and each bankrupt shall produce a statement of his separate affairs."

Rule 92. "At the first meeting of the creditors the bankrupt shall produce in duplicate a statement of his affairs according to the form in the schedule, but the non-production of the statement shall not delay the appointment of a trustee or necessitate the adjournment of the meeting." Sect. 84.

(*f*) See *Ex parte Orde, In re Horsley*, 40 L. J. (N. S.) Bankr. 60.

(*g*) See *ante*, p. 265.

(*h*) Sect. 19; see the section containing other duties of the bankrupt, *post*, p. 289.

No. 39. *Bankrupt's Statement of Affairs for First Meeting.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B. of

Statement of the affairs of the above A. B. on the [here insert date of
institution of proceedings].

	£	s.	d.		£	s.	d.
Unsecured creditors as per list (A.) (i)				Stock in trade at [state name of place] estimated at			
	£	s.	d.	Book debts about £ , estimated to produce ..			
Creditors fully secured, as per list (B.)				Cash in hand			
Less estimated value of securities				Bills of exchange or other similar securities, estimated to produce ..			
Surplus to contra £				Furniture, fixtures, and fittings at , estimated to produce ..			
	£	s.	d.	Property, as per list (G.) ..			
Creditors partly secured as per list (C.)				Surplus from securities in the hands of creditors fully secured, see contra			
Estimated value of securities ..							
Other liabilities, as per list (D.)							
Creditors for rent, rates, taxes and wages, as per list (E.)							
Liabilities on bills discounted as per list (F.) ..							
£							
Of which it is expected will rank against the estate for dividend ..							
Total debts .. £				Total assets .. £			

A. B.

(i) Forms of lists mentioned under the letters of the alphabet (A to G) are provided, with instructions how to fill them up. The full particulars of every description of property as defined by sect. 4 of the "Bankruptcy

Act, 1869" (*ante*, p. 201, note), not otherwise scheduled in the statement of affairs, are to be set forth in list G. As these forms can be readily obtained it is unnecessary to incumber this work with them.

§ 5.—THE RIGHT AND MODE OF VOTING.

The Right of Voting.—It will be observed, that sect. 16 of “The Bankruptcy Act, 1869” (*ante*, pp. 265, 266), requires proof previously to or at the meeting, of a debt due; and further, that it is not every kind of debt which can be proved for the purpose of receiving a dividend that confers the right of voting, for no creditor can vote “in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained,” and the same section contains special provisions as to secured creditors.

The mode of proof is, at the meeting or before, by affidavit sent to the registrar (*j*).

Proxy.—Votes may be given either personally or by proxy (*k*), and “a corporation may prove a debt, vote, and otherwise act in bankruptcy, by an agent duly authorized under the seal of the corporation” (*l*). Further, “a creditor may, in the prescribed manner, by instrument in writing, appoint a person to represent him in all matters relating to any debtor or his affairs in which a creditor is concerned in pursuance of this act, and such representative shall thereupon, for all the purposes of this act, stand in the same position as the creditor who appointed him” (*m*).

“The Bankruptcy Rules, 1870,” direct that—

Rule 85. “The instrument appointing a proxy shall be in writing under the hand of the creditor, or if such creditor is a corporation or company under the hand of an agent, stating that he is duly authorized on its behalf; and such instrument shall be according to the form in the schedule (*n*), and shall, unless it is expressly stated otherwise therein, be deemed and allowed as an authority to the appointee of the creditor to vote for him and on his behalf at all meetings of creditors in the matter, or adjournments thereof, and generally to act for the creditor in all other matters under the act, of whatsoever kind, as fully as the creditor himself could act.”

Sects. 16 and 80, par. 8.

Rule 86. “The instrument must be produced at the first meeting at which the proxy attends and be filed.”

How Votes are estimated.—“An ordinary resolution shall be decided by a majority in value of the creditors present personally or by proxy at the meeting and voting on such resolution” (*o*).

“A special resolution shall be decided by a majority in number, and three-fourths in value, of the creditors present personally or by proxy at the meeting and voting on such resolution” (*p*).

(*j*) See more fully *post*, Chap. XIII., PROOF OF DEBTS. And as to right to prove for purpose of voting in the case of the bankruptcy of one partner, see sect. 103, *post*, Chap. XIII., § 16.

(*k*) See sect. 16, subs. (6), *ante*, p. 266.

(*l*) See sect. 80, subs. (7), *ante*,

p. 245, note.

(*m*) *Id.* subs. (8), *ante*, p. 245, note.

(*n*) See the form, *post*, Chap. XIII.

(*o*) Sect. 16, subs. (7), *ante*, p. 266.

(*p*) *Id.* subs. (8), *ante*, p. 266.

Quorum.]—"The Bankruptcy Rules, 1870," provide that—

Sect. 16.

Rule 93. "A meeting of creditors shall not be competent to act for any purpose under the act (except the election of a chairman, the proving of debts, and the adjournment of the meeting), unless there are present or represented thereat a quorum of at least three, or all the creditors if their number does not exceed three."

§ 6.—MINUTES AND REPORT OF PROCEEDINGS.

"The Bankruptcy Act, 1869," enacts that—

Evidence of proceedings at meeting of creditors.

Sect. 106. "The registrar, or any other person presiding at a meeting of creditors under this act, shall cause minutes to be kept and duly entered in a book of all resolutions and proceedings of such meeting, and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, shall be received as evidence in all legal proceedings; and, until the contrary is proved, every general meeting of the creditors in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had to have been duly passed and had."

Sect. 18 directs that the appointment of a trustee shall be reported to the court (*q*).

No. 35. *Minutes of Proceedings at First Meeting.*

"The Bankruptcy Act, 1869."

Sect. 14.

In the London Bankruptcy Court [*or the county court of*
holden at].

In the matter of A. B., of , a bankrupt.

Minutes of resolutions come to and proceedings had at the first meeting of creditors held at this day of 187 , chairman, the registrar of the court [*or the registrar of the court being absent, F. K. of was elected chairman.*]

We the undersigned creditors, being a majority in value of the creditors present, personally or by proxy, at this meeting, and voting on this resolution, do hereby resolve as follows:—

That G. H. of (*residence and occupation*) shall be the trustee of the property of the bankrupt at (*here state remuneration*) [*or such remuneration as the creditors may from time to time determine*] [*or that the appointment of a trustee in this bankruptcy be made by the committee of inspection*].

That I. K., L. M., N. O., P. Q., and R. S. be appointed the committee of inspection in this bankruptcy, for the purpose of superintending the administration of the property of the bankrupt by the trustee.

[*Where security is required add as follows:* that the trustee do give security by bond to in the amount of pounds himself and two sufficient sureties [*or that F. M. and K. L. be his sureties*], [*or by depositing the sum of pounds with the registrar*] [*or by giving*

(*q*) See sect. 18, *post*, p. 274.

the security of (*here insert the guarantee association or company resolved on*) in the sum of _____ pounds].

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(*Here add any other resolutions that may be come to as to the manner of the administration of the property by the trustee, the transfer of the proceedings to another court, the appointment of a bank, &c.*)

F. K., chairman.

[*Here follows creditors' signatures.*]

Creditors' signatures.	Amount of Debt.

No. 36. *List of Creditors assembled to be used at every Meeting.*

“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy [*or the county court of* _____, holden at _____].

In the matter of _____
Meeting held at _____ this _____ day of _____ 187 .

No. of Assents of Creditors.	Number.	Names of Creditors present or assembled.	Amount of Assent.	Amount of Proof.
1	1			
	2			
1	3			
1	4			
	5			
1	6			
1	7			
	7	Total number of creditors present or assembled.		
5	Total number of assents.			
		Totals . . . £		

No. 38. *Report and Certificate of Appointment of Trustee.*

"The Bankruptcy Act, 1869."

Sect. 14. In the London Bankruptcy Court [*or* the county court of
holden at].

Rule 68. In the matter of A. B. of , a bankrupt.

It is reported to the court as follows:—

1. That the first meeting of creditors in this bankruptcy was held at
on the day of at o'clock in the
noon, as ordered by this court.

2. That by resolution at such meeting G. H. of was appointed
to fill the office of trustee of the property of the bankrupt.

3. That by another resolution it was declared that the said G. H.
should give security for the due performance of the said office, by enter-
ing into a bond in the sum of with two sufficient sureties [*or as
the case may be*].

X. Y., registrar,
or
F. K., chairman.

CHAPTER VIII.

OF THE TRUSTEE IN BANKRUPTCY.

- § 1.—APPOINTMENT OF TRUSTEE.
- § 2.—COMMITTEE OF INSPECTION TO SUPERINTEND THE TRUSTEE.
- § 3.—REGULATIONS AS TO TRUSTEES AND COMMITTEE OF INSPECTION.
- § 4.—DEATH, RESIGNATION OR REMOVAL OF TRUSTEE.
- § 5.—DUTY OF THE TRUSTEE.
- § 6.—POWER OF THE TRUSTEE.
- § 7.—ACCOUNTS OF THE TRUSTEE.
- § 8.—COSTS OF TRUSTEE.



§ 1.—APPOINTMENT OF TRUSTEE.

THE creditors are required at the first meeting, by resolution, to "appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt, at such remuneration as they may from time to time determine, if any; or they may resolve to leave his appointment to the committee of selection" (a). Further, the creditors, when they appoint a trustee, should by resolution declare what security is to be given, and to whom, before he enters on the office (b).

"The Bankruptcy Rules, 1870," provide that—

Rule 106. "Omission to pass a resolution under sub-section two or three (c) of section fourteen of the act shall not invalidate the appointment of a trustee, and where no security has been specified to be given by the trustee, he shall be deemed to be personally responsible, in the performance of the duties of his office, to the extent of the value of the property of the bankrupt." Sect. 14.

Rule 107. "Where, at the first meeting or any adjournment thereof, the creditors shall resolve that one or more named persons shall be accepted as the sureties of the trustee, it shall not be necessary for the said persons to justify their sufficiency." Sect. 14.

The creditors may, if they think fit, appoint more persons than one to the office of trustee, and also may appoint persons to act as

(a) See sect. 14, sub-sect. 1, ante, p. 263.
 (b) *Id.* sub-sect. 2, ante, p. 263.
 D. VOL. II.

(c) Sub-sect. 3 (*ante*, p. 263) relates to the appointment of the committee of inspection; see *post*, p. 275.
 T

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trustees in succession in the event of one or more declining to accept the office (*d*).

“The Bankruptcy Act, 1869,” enacts that—

Devolution of
property on
trustee.

Sect. 17. “Until a trustee is appointed the registrar shall be the trustee for the purposes of this act, and immediately upon the order of adjudication being made the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

The expression ‘trustee,’ when used in this act, shall include the person for the time being filling the office of trustee, whether he be the registrar or not; but when the registrar holds the office of trustee he shall, unless the court otherwise orders, in the administration of the property of the bankrupt, apply to the court for directions as to the mode of administering such property, and shall not take possession thereof unless directed by the court.”

Evidence of
appointment of
trustee.

Sect. 18. “The appointment of a trustee shall be reported to the court, and the court, upon being satisfied that the requisite security has been entered into by him, shall give a certificate declaring him to be trustee of the bankruptcy named in the certificate, and such certificate shall be conclusive evidence of the appointment of the trustee, and such appointment shall date from the date of the certificate. When the registrar holds the office of trustee, or when the trustee is changed, a like certificate of the court may be made declaring the person therein named to be trustee, and such certificate shall be conclusive evidence of the person therein named being trustee.”

“The Bankruptcy Rules, 1870,” provide that—

Rule 104. “Upon the appointment of a creditor’s trustee, any receiver or manager of the property or business of the bankrupt shall submit his accounts for examination to such trustee, and for that purpose attend on the trustee, at such reasonable times as he may require.”

Rule 105. “Immediately upon the appointment of a trustee being reported, the court shall give to the trustee a certificate declaring him to be the trustee, provided he has given such security, if any, as may have been required by the creditors.”

No. 40. *Bond of Trustee.*

Sect. 14.

Know all men by these presents, that we, G. H. of, &c., and C. D. of, &c., and E. F. of, &c., are jointly and severally held and firmly bound to James Bacon, the Chief Judge in Bankruptcy, in £ to be paid to the said James Bacon, or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves and each and every of us, in the whole, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Scaled with our seals, and dated this day of , one thousand eight hundred and .

Whereas on the day of 187 , A. B. of , was adjudged bankrupt; and whereas at the first meeting of creditors under the said bankruptcy the said G. H. was appointed trustee of the property

(*d*) See sect. 83, sub-sect. (1), *post*, p. 276.

of the bankrupt; and whereas it was resolved that the said trustee should give security by bond to [here state to whom] in the sum of , with two sufficient sureties thereto.

Now, therefore, the condition of this bond or obligation is such that if the said G. H. shall and do from time to time well and sufficiently perform and execute all and singular the duties required of him as trustee of "The Bankruptcy Act, 1869," or any rule of court made or hereafter to be made under such act, this obligation shall be void or otherwise shall remain in full force and virtue.

Signed, sealed, and delivered by)	G. H. (L.S.)
the above bounden)	C. D. (L.S.)
in the presence of)	E. F. (L.S.)

NOTE.—If a deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond.

No. 41. *Certificate of Appointment of Trustee.*

"The Bankruptcy Act, 1869."

In the London Court of Bankruptcy [or the county court of holden at].

This is to certify that G. H. of has been duly appointed trustee of the property of A. B. of , adjudicated bankrupt on the day of 187 .

Given under the seal of the court this day of 187 .
Registrar.



§ 2.—COMMITTEE OF INSPECTION TO SUPERINTEND THE TRUSTEE.

The creditors are required by resolution to appoint some fit persons (other than the trustee) not exceeding five, and being creditors qualified, or authorized by creditors, to vote, to form a committee of inspection for the purpose of superintending the administration by the trustee of the bankrupt's property (e). The omission, however, to pass this resolution does not invalidate the appointment of a trustee (f).

"The Bankruptcy Rules, 1870," direct that—

Rule 129. "Where the creditors neglect by resolution to fix the quorum required to be present at a meeting of the committee of inspection, the quorum shall be three; or if the number of the committee be less than three, the quorum shall be the whole number."

Rule 130. "A resolution of the committee of inspection shall be passed unanimously or by a majority in number of the members present at the meeting."

(e) See sect. 14, sub-sect. 3, ante, accounts of the trustee, see post, p. 263. As to the duty of the committee of inspection to audit the p. 283.
(f) See Rule 106, ante, p. 273.

§ 3.—REGULATIONS AS TO TRUSTEES AND COMMITTEE OF INSPECTION.

“The Bankruptcy Act, 1869” contains the following provisions as to trustees and committee of inspection:—

Regulations
as to trust-
tees, &c.

Sect. 83. “The following regulations shall be made with respect to the trustee and committee of inspection:—

- (1.) The creditors may, if they think fit, appoint more persons than one to the office of trustee, and where more than one are appointed they shall declare whether any act required or authorized to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this act included under the term ‘trustee,’ and shall be joint tenants of the property of the bankrupt. The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee:
- (2.) If any vacancy occur in the office of trustee by death, resignation, or otherwise, the creditors in general meeting shall fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing trustee, if there be more than one, or by the registrar on the requisition of any creditor:
- (3.) If through any cause whatever, there is no trustee acting during the continuance of a bankruptcy, the registrar of the court for the time being having jurisdiction in the bankruptcy shall act as such trustee (*g*):
- (4.) The court may, upon cause shown, remove any trustee. The creditors may, by special resolution at a meeting specially called for that purpose, of which seven days’ notice has been given, remove the trustee and appoint another person to fill his office, and the court shall give a certificate declaring him to be the trustee:
- (5.) If a trustee be adjudged bankrupt, he shall cease to be trustee, and the registrar shall, if there be no other trustee, call a meeting of creditors for the appointment of another trustee in his place:
- (6.) The property of the bankrupt shall pass from trustee to trustee, including under that term the registrar when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever:
- (7.) The trustee of a bankrupt may sue and be sued by the official name of ‘the trustee of the property of a bankrupt,’ inserting the name of the bankrupt, and by that name may hold property of every description, make contracts, sue and be

Sect. 83.

(*g*) By Rule 128 of “The Bankruptcy Rules, 1870,” “where the registrar is trustee of the property of a bankrupt by reason of there being no trustee acting during the bankruptcy, he shall not be required to give security, but his accounts shall, if

there be no committee of inspection, be audited by the comptroller or treasurer of the court or other person acting as treasurer, according as the proceeding is in the London Bankruptcy Court or the county court.”

- sued, enter into any engagements binding upon himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office :
- (8.) The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly :
 - (9.) All acts and things by this act authorized or required to be done by or to the registrar may be done within the district of each court having jurisdiction in bankruptcy by or to the registrar of that court :
 - (10.) Any member of the committee of inspection may resign his office by notice in writing signed by him, and delivered to the trustee :
 - (11.) The creditors may by resolution fix the quorum required to be present at a meeting of the committee of inspection :
 - (12.) Any member of the committee of inspection may also be removed by a special resolution at any meeting of creditors of which the prescribed notice has been given, stating the object of the meeting :
 - (13.) On any vacancy occurring in the office of a member of the committee of inspection by removal, death, resignation, or otherwise, the trustees shall convene a meeting of creditors for the purpose of filling up such vacancy :
 - (14.) The continuing members of the committee of inspection may act, notwithstanding any vacancy in their body ; and where the number of members of the committee of inspection is for the time being less than five, the creditors may increase that number so that it do not exceed five :
 - (15.) No defect or irregularity in the election of a trustee or of a member of the committee of inspection shall vitiate any act *bonâ fide* done by him ; and no act or proceeding of the trustee or of the creditors shall be invalid by reason of any failure of the creditors to elect all or any members of the committee of inspection :
 - (16.) If a member of the committee of inspection become a bankrupt his office shall thereupon become vacant :
 - (17.) Where there is no committee of inspection, any act or thing or any direction or consent by this act authorized or required to be done or given by such committee may be done or given by the court on the application of the trustee" (*h*).

§ 4.—DEATH, RESIGNATION OR REMOVAL OF TRUSTEE.

The regulations, forming the preceding division of the present chapter, provide for the filling up any vacancy in the office of

(*h*) "The Bankruptcy Rules, 1871," provide (Rule 10) that "where a registrar of a county court having jurisdiction in bankruptcy acts as a trustee, the word 'court' in sub-sect.

17 of sect. 83 shall mean the judge of such court, and shall not include the registrar acting as judge under powers delegated by the judge."

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trustee by death, resignation or otherwise (*i*). The regulations also empower the court upon cause shown, and the creditors by special resolution, to remove the trustee and appoint another (*k*).

“The Bankruptcy Rules, 1870,” provide that—

Rule 115. “Where in consequence of a bankruptcy being closed, or of a vacancy in the office of trustee, the registrar becomes trustee, the attorney (if any) who has theretofore acted in the matter of the bankruptcy shall not be changed unless the court shall by order, setting forth the reasons for the change, otherwise direct.”

Sect. 83,
PAR. 4.

Rule 120. “Where a creditor desires a meeting of creditors to be held to remove a trustee or a member of the committee of inspection, he shall apply to some member of the committee of inspection to specially summon a meeting for that purpose, and for the purpose of appointing another person to fill the office, by sending a notice to each creditor seven days before the meeting is to be held; and where such member refuses to summon a meeting, or there is no committee of inspection, the creditor may apply to the court upon an affidavit stating specifically the facts which would appear to justify the removal of such trustee or a member of the committee of inspection, and the court may direct the registrar to summon a meeting accordingly, or if it think fit may direct notice to be given to the trustee to show cause why the court should not remove him.”

Rule 121. “Where a trustee resigns, dies, or is removed prior to obtaining his release, the creditors shall determine what, if any, remuneration shall be paid for the services which he may have rendered.”

Rule 126. “Where a trustee shall resign, or be removed from his office, he shall, within four days thereafter, render to the registrar, to be filed with the proceedings, an account in writing showing what he has done while trustee, and shall duly account for all monies or property of the bankrupt. If he do not comply with these requisitions within the prescribed time the court shall enforce obedience thereto.”

No. 46. *Notice of Meeting to be held on Resignation of Trustee.*

“The Bankruptcy Act, 1869.”

Sect. 83.

In the London Bankruptcy Court [or the county court of
holden at]].

In the matter of A. B. of , a bankrupt.

The committee of inspection hereby give you notice that a meeting of creditors will be held at on the day of 187 , at o'clock in the noon, for the purpose of appointing a trustee in the place of the late trustee, who has resigned the office [or who has died or has become bankrupt].

For the committee,
E. F.,

To X. Y.

One of the said committee.

(*i*) See sect. 83, sub-sect. (2), *ante*,
p. 276.

(*k*) *Id.* sub-sects. (3) & (4), *ante*,
p. 276.

No. 47. *Minutes at Meeting for receiving Resignation of Trustee, &c.*PART VII.
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"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 83.

In the matter of A. B. of , a bankrupt.

Minutes of proceedings had at a meeting of creditors of the said bankrupt, held at on the day of , 187 .

Chairman of the meeting, E. F. of

We the undersigned (*here should follow similar resolutions to those appointing the late trustee, &c., at the first meeting*).

E. F., chairman of this meeting.

No. 48. *Report and Certificate of Appointment of Trustee to fill a Vacancy caused by a Resignation.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B. of , a bankrupt.

It is reported to the court as follows:—

1. That a meeting of creditors in this bankruptcy was held at on the day of , at o'clock in the noon, for the purpose of receiving of G. H. his resignation of the office of trustee and of appointing a person to fill such office [or for the purpose of appointing a trustee, who is dead, or who has been adjudged bankrupt].

2. That the said G. H. resigned the office of trustee, and by resolution at such meeting N. O., of was appointed to fill the office of trustee of the property of the bankrupt.

3. That by another resolution it was declared that the said N. O. should give security for the due performance of the said office, by entering into a bond in the sum of with two sufficient securities [or as the case may be].

F. K., chairman.

 § 5.—DUTY OF THE TRUSTEE.

"The Bankruptcy Act, 1869," enacts that—

Sect. 20. "The trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall be deemed to override any directions given by the committee of inspection; the trustee shall call a meeting of the committee of inspection once at least every three months, when they shall audit his accounts, and determine whether any or what dividend is to be paid; he may also call special meetings of the said committee as he thinks necessary.

Conduct of
trustee, and
appeal to
court against
trustee.

Subject to the provisions of this act, and to such directions as aforesaid, the trustee shall exercise his own discretion in the management of

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the estate, and its distribution amongst the creditors. The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes; he may also apply to the court, in manner prescribed, for directions in relation to any particular matter arising under the bankruptcy.

The bankrupt, or any creditor, debtor, or other person aggrieved by any act of the trustee, may apply to the court, and the court may confirm, reverse, or modify the act complained of, and make such order in the premises as it thinks just. The court may from time to time, during the continuance of a bankruptcy, summon general meetings of the creditors for the purpose of ascertaining their wishes, and may, if the court thinks fit, direct the registrar to preside at such meetings.

The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position in all respects as if he were a receiver of such property appointed by the Court of Chancery, and the court may, on his application, enforce such acquisition or retention of property accordingly."

"The Bankruptcy Rules, 1870," provide that—

Sect. 20.

Rule 112. "Where a trustee desires to apply to the court for directions in relation to any particular matter arising under the bankruptcy, he shall file his application, according to the form in the schedule, and the court shall then hear the application, or fix a day for its hearing, and direct the trustee to apply by motion."

No. 53. *Application for Directions by Trustee.*

"The Bankruptcy Act, 1869."

Sect. 20.

In the London Bankruptcy Court [or the county court of
holden at].

Rule 112.

In the matter of A. B. of , a bankrupt.

I desire to make application to the court for its directions [*here state the particular matter in relation to which they are sought*].

Trustee.

Let this application be heard on the day of at
o'clock in the noon [and let the trustee give notice to
[*here insert the persons to whom it is to be given*].

Dated this day of 18 .

Registrar.

No. 54. *Order on Application of Trustee for Directions.*

"The Bankruptcy Act, 1869."

Sect. 20.

In the London Bankruptcy Court [or the county court of
holden at].

Rule 112.

In the matter of A. B. of , a bankrupt.

Whereas at a court held this day the trustee of the property of the bankrupt applied to this court for its directions [*here state the particular matter in relation to which they are sought*]. Now upon hearing of C. D. of , on the matter, it is ordered [*here set out the order*], and that the trustee do pay out of his own monies [or out of the property of the bankrupt] the sum of , the costs of this order, and the sum of to C. D. for his costs [or that C. D. do pay the sum of

for his costs]. , the costs of this order, and also the sum of to C. D.

Given under the seal of the court this day of , 187 .
By the court,
Registrar.

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“The Bankruptcy Act, 1869,” further enacts that—

Sect. 29. “A trustee shall not, without the consent of the committee of inspection, employ a solicitor or other agent, but where the trustee is himself a solicitor, he may contract to be paid a certain sum by way of per centage or otherwise as a remuneration for his services as trustee, including all professional services, and any such contract shall, notwithstanding any law to the contrary, be lawful.”

Trustee, if a solicitor, may be paid for services.

Sect. 30. “The trustee shall pay all sums from time to time received by him into such bank as the majority of the creditors in number and value at any general meeting shall appoint, and failing such appointment into the Bank of England; and if he at any time keep in his hands any sum exceeding fifty pounds for more than ten days he shall be subject to the following liabilities; that is to say,

Trustees to pay monies into bank.

(1.) He shall pay interest at the rate of twenty pounds per centum per annum on the excess of such sum above fifty pounds as he may retain in his hands:

(2.) Unless he can prove to the satisfaction of the court that his reason for retaining the money was sufficient, he shall, on the application of any creditor, be dismissed from his office by the court, and shall have no claim for remuneration, and be liable to any expenses to which the creditors may be put by or in consequence of his dismissal.”

“The Bankruptcy Rules, 1870,” direct that—

Rule 109. “Where the creditors shall have failed to appoint the bank into which the trustee is to pay all monies received by him, he shall pay them into such bank as the committee of inspection, or, where there is no committee, the court shall appoint.”

Sect. 30.

Duty of the Trustee to keep Books.—“The Bankruptcy Rules, 1870,” direct that—

Rule 242. “The trustee shall keep a book to be entitled ‘The Record,’ according to the form in the schedule, in which he shall record all minutes, all proceedings had, and resolutions passed at any meeting of creditors, or of the committee of inspection, statement of bankrupt’s affairs, reports and all proceedings necessary to give a correct view of the management of the bankrupt’s property, but he shall not be bound to insert in the record any document of a confidential nature (such as the opinion of counsel on any matter affecting the interest of the creditors), nor need he exhibit such document to any person other than the members of the committee of inspection.”

Rule 243. “The trustee shall also keep a book to be entitled the ‘Estate Book,’ according to the form in the schedule, in which he shall enter from day to day the receipts and payments made by him” (1).

Rule 244. “The record and the estate book may be inspected by the committee of inspection and the creditors or their agents.”

Rule 245. “The trustee shall submit the record and estate book, to-

(1) “The Bankruptcy Rules, 1871,” provide (Rule 13) that “the estate book referred to in Rule 243 of ‘The Bankruptcy Rules, 1870,’ may be kept

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gether with a copy of the latter, to the committee of inspection at the quarterly meeting required by section twenty of the act."

Rule 249. "Upon a trustee resigning, or being released or removed from, his office, he shall deliver over to the registrar of the court all books kept by him and all other books, documents, papers and accounts in his possession in any way relating to the office of trustee."

◆

§ 6.—POWER OF THE TRUSTEE.

Having in the preceding division of this chapter treated of the duties of the trustee, his powers for the most part of a discretionary kind, to be exercised as occasion arises, may be conveniently noticed separately and as dealt with by the Bankruptcy Act, 1869.

"The Bankruptcy Act, 1869," enacts that—

Sect. 25. "Subject to the provisions of this act, the trustee shall have power to do the following things:

- (1.) To receive and decide upon proof of debts in the prescribed manner, and for such purpose to administer oaths:
- (2.) To carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same:
- (3.) To bring or defend any action, suit or other legal proceeding relating to the property of the bankrupt:
- (4.) To deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same; and the sections fifty-six to seventy-three (both inclusive) of the act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), 'for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,' shall extend and apply to proceedings in bankruptcy under this act as if those sections were here re-enacted and made applicable in terms to such proceedings:
- (5.) To exercise any powers the capacity to exercise which is vested in him under this act, and to execute all powers of attorney, deeds, and other instruments expedient or necessary for the purpose of carrying into effect the provisions of this act:
- (6.) To sell all the property of the bankrupt (including the goodwill of the business, if any, and the book debt due or growing due to the bankrupt) by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels (*m*):
- (7.) To give receipts for any money received by him, which receipt shall effectually discharge the person paying such monies from all responsibility in respect of the application thereof:
- (8.) To prove, rank, claim, and draw a dividend in the matter of the bankruptcy or sequestration of any debtor of the bankrupt."

in the form of an ordinary debtor and creditor account in lien of the form prescribed by such rule." The form, therefore, is not given in this work.

(*m*) By Rule 119 of "the Bankruptcy Rules, 1870," "where the trustee

is an auctioneer he shall not by himself or any partner act as such in the sale of any of the property vested in him, except with the consent of the committee of inspection, and upon such terms as it may think fit."

Power of trustee to deal with property.

Sect. 25
par. 6.

Sect. 27. "The trustee may, with the sanction of the committee of inspection, do all or any of the following things:

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- (1.) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts:
- (2.) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon:
- (3.) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors in respect of any debts proveable under the bankruptcy:
- (4.) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person:
- (5.) To divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot advantageously be realized by sale.

Power of trustee to compromise, &c.

The sanction given for the purposes of this section may be a general permission to do all or any of the above-mentioned things, or a permission to do all or any of them in any specified case or cases."

It is to be observed that, subject to the provisions of the act and to the direction of the creditors or committee of inspection, the trustee may exercise his own discretion in the management of the estate, and its distribution amongst the creditors (see sect. 20, *ante*, pp. 279, 280).

By sect. 93 of "The Bankruptcy Act, 1869," any treasurer or other officer, or any banker, attorney or agent of the bankrupt is required to pay and deliver to the trustee all monies and securities in his possession or power if he is not entitled by law to retain them, and the non-compliance is a contempt of court (*n*).

Delivery of monies and securities to the trustee.

"The Bankruptcy Rules, 1870," provide that—

Rule 110. "No person shall be entitled as against the trustee to withhold possession of the books of account of the bankrupt, or to claim any lien thereon."

Books of account.

§ 7.—ACCOUNTS OF THE TRUSTEE.

The trustee is required to call a meeting of the committee of inspection once at least every three months when they shall audit his accounts (*o*).

(*n*) See the section and forms under it, *post*, Chap. XII. as to the trustee's books and their production, see *ante*, pp. 281, 282.

(*o*) See sect. 20, *ante*, p. 279. And

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of comp-
troller.*Audit.*—“The Bankruptcy Act, 1869,” enacts that—

Sect. 55. “The trustee having had his quarterly statement of accounts audited by the committee of inspection, shall, within the prescribed time, forward the certified statement in the prescribed form to an officer to be called the comptroller in bankruptcy, and if he fail to do so he shall be deemed guilty of a contempt of court to be punishable accordingly. The first and any subsequent comptroller shall be appointed by the lord chancellor, and hold office during his pleasure, and shall be paid such salary as the lord chancellor may, with the sanction of the treasury, direct. The comptroller shall be provided with such office in London, and with such officers, clerks, and servants, as may be directed by the lord chancellor, with the approval of the treasury. The officers, clerks, and servants in the office of the comptroller shall be appointed and dismissible by the comptroller, and there shall be allowed and paid to him such sum as the treasury may from time to time direct for the expenses of his office, and of such clerks and other persons as may be deemed necessary by the treasury” (*p*).

“The Bankruptcy Rules, 1870,” provide that—

Sect. 25.

Rule 246. “The committee of inspection shall audit the estate book, and certify therein under their hands the day on which the said book was audited, and shall in like manner certify the copy of the said book.”

Rule 247. “The trustee shall, forthwith after the said audit shall have been held, transmit to the comptroller in bankruptcy the copy so certified, adding thereto his certificate that it is the copy certified by the committee. He shall also forward therewith an office copy of the statement of affairs filed by the bankrupt, showing thereon in red ink the difference between the sums stated by the bankrupt and the sums realized or estimated by the trustee to be realized, and shall also state the reasons why any property not realized has not been realized.”

“The Bankruptcy Rules, 1871,” provide that—

Rule 14. “The trustee shall submit to the committee of inspection his bank pass book at the quarterly meeting required to be held by section 20 of the act, and shall forward to the comptroller a copy duly certified by the committee of all entries made therein since the previous audit.”

Rule 15. “Where the trustee has not since the date of his appointment, or since the last audit of his accounts, received or paid any sum of money

(*p*) “The Bankruptcy Rules, 1870,” contain the following rules:—

Rule 237. “The comptroller shall keep a book entitled ‘The Register of Bankruptcies in the London Court,’ according to the form in the schedule, and another book entitled ‘The Register of Bankruptcies in the County Courts,’ according to the form in the schedule, with such additional headings as he may find necessary.”

Rule 238. “The comptroller shall cause an entry to be made in the proper register of every gazetted notice appli-

cable or defined by the headings, and shall cause such registers to be examined on every Monday and Thursday with the then last published Gazette, so as to insure that all the notices published therein have been duly entered in such registers.”

Rule 239. “The registers shall be open for searches by the public at all hours that the office of the comptroller is open, upon a request in writing with a search stamp affixed thereon being lodged.”

on account of the bankrupt's estate, he shall at the quarterly meeting required by section 20 lay before the committee of inspection a statement to that effect, according to the form in the schedule; and such statement shall, if approved, be signed by the committee, and forthwith forwarded by the trustee to the comptroller."

Rule 16. "Where there is no committee of inspection, and the trustee has not for a period of three months from the date of his appointment or from the last audit of his accounts, received or paid any sum of money on account of the bankrupt's estate, he shall file with the registrar of the court an affidavit to that effect, according to the form in the schedule, and shall forthwith forward an office copy of such affidavit to the comptroller. Where the registrar is trustee he shall forward to the comptroller a certificate to the like effect."

The same rules also provide that—

Rule 12. "Where a receiver or manager has been appointed in a bankruptcy, the accounts of such receiver or manager shall be forwarded to the comptroller in bankruptcy by the trustee, with the first accounts rendered by him to the comptroller."

6. *Certificate of no Receipts or Payments by Trustee.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [*or county court of* _____], holden at _____.

In the matter of _____, of _____, a bankrupt.

I, _____ of _____, the trustee of the property of the above-named bankrupt, certify that since _____ as trustee I have not, nor has any person by my order or for my use, received or paid any sum of money on account of the bankrupt's estate.

"the date of my appointment" or "the last audit of my accounts," as the case may be. Reason to be shortly stated.

And I further certify that the reason why I have not received any sum of money on account of the said estate since the time aforesaid, is [*here state reason*].

Examined and approved this _____ day of _____, 187 _____.

Trustee.

} Committee of inspection.

7. *Affidavit of no Receipts or Payments by Trustee in cases where there is no Committee of Inspection.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [*or the county court of* _____], holden at _____.

In the matter of _____, of _____, a bankrupt.

I, _____ of _____, the trustee of the property of the above-named bankrupt make oath and say,

"the date of my appointment" or "the last audit of my accounts," as the case may be. Reason to be shortly stated.

1. That since _____ as trustee I have not, nor has any person by my order or for my use, received or paid any sum of money on account of the bankrupt's estate.

2. That the reason why I have not received any sum of money on account of the said estate since the time aforesaid is [*here state reason*].

Sworn at, &c.

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Return of
accounts to
comptroller.

Duty of
comptroller.

Powers of
comptroller.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 56. “Every trustee of a bankrupt shall from time to time, as may be prescribed, and not less than once in every year during the bankruptcy, transmit to the comptroller a statement showing the proceedings in such bankruptcy up to the date of the statement containing the prescribed particulars, and made out in the prescribed form; and any trustee failing to transmit accounts in compliance with this section shall be deemed guilty of a contempt of court, and be punishable accordingly.”

Sect. 57. “The comptroller shall examine the statements transmitted to him, and shall call the trustee to account for any misfeasance, neglect, or omission which may appear on such statements, and may require the trustee to make good any loss the estate of the bankrupt may have sustained by such misfeasance, neglect, or omission. If the trustee fail to comply with such requisition of the comptroller, the comptroller may report the same to the court; and the court, after hearing the explanation, if any, of the trustee, shall make such order in the premises as it thinks just.”

Sect. 58. “The comptroller may at any time require any trustee to answer any inquiry made by him in relation to any bankruptcy in which such trustee is engaged, and may, if he think fit, apply to the court to examine on oath such trustee or any other person concerning such bankruptcy; he may also direct a local investigation to be made of the books and vouchers of the trustees.”

“The Bankruptcy Rules, 1870,” provide that—

Sect. 56.

Rule 250. “Each trustee shall, within fourteen days after the 31st day of December in each year, transmit to the comptroller a statement according to the form in the schedule (g) of every bankruptcy in which he is a trustee, and the comptroller shall cause the returns so made to be regularly bound up and preserved, according to alphabetical order of the courts in which the proceedings were had, in volumes to be kept at all times in his office, with an index thereto framed by him, and which volumes may be searched by the public; and any trustee who shall fail to make such return may be removed from his office by the court at the instance of any one creditor, or of the comptroller, or be subject to such order and to such costs as the court may think proper to make.”

Rule 251. “The comptroller shall take cognizance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute, rules, or otherwise, relative to the performance of his duties, or in the event of any complaint being made to the comptroller by any creditor in regard thereto, he shall inquire into the same, and, if not satisfied with the explanation given, he shall report thereon to the court, which after hearing the trustee may remove him from his office, or otherwise make such order in the matter as the justice of the case may require.”

“The Bankruptcy Rules, 1871,” further provide that—

Rule 9. “Where the comptroller in bankruptcy shall report to a county court the failure of a trustee to comply with any requisition which may have been made on him by the comptroller under the provisions of sec-

(g) It is not deemed necessary to insert this form (No. 105). It can be obtained through the registrar or through a law stationer.

tion 57 of the act, the registrar of the court shall appoint a day for the trustee to attend the court, four days' notice whereof, according to the form in the schedule, shall be sent by post or otherwise by the registrar to the trustee, together with a copy of the comptroller's report, which copy shall be forwarded by the comptroller to the court with the original report."

1. Notice to Trustee at instance of Comptroller (r).

"The Bankruptcy Act, 1869."

In the county court of holden at
In the matter of A. B. of , a bankrupt.

Sect. 57.

Take notice, that you are required to attend at this court on the
day of , at o'clock in the noon, to explain
why you have failed to comply with the requisition of the comptroller in
bankruptcy, mentioned in a report of that officer to this court, a copy of
which is hereto annexed.

Take further notice that, should you not attend on that day, the court
will, in your absence, make such order in the premises, as it may think
just.

Dated this day of 187 .

Registrar.



§ 8.—COSTS OF TRUSTEE.

"The Bankruptcy Rules, 1870," provide that—

Rule 108. "Where no remuneration has been voted to a trustee, he shall be allowed out of the bankrupt's estate such proper costs and expenses as may be incurred by him in or about the proceedings of the bankruptcy as the taxing master or registrar shall allow."

When legal proceedings are taken by appeal and the trustees are successful, but their costs are not ordered to be paid by the opposite party, the trustees will in general be entitled to the costs out of the estate without any order of the court, for it is unnecessary and improper for the court, in such a case, to say or for the order to be drawn up that the costs are to be paid out of the estate (s).

Rule 108.

"The Bankruptcy Rules, 1870," direct that—

Rule 113. "In case any joint estate of any bankrupts shall be insufficient to pay any costs or charges necessarily incurred in respect of the same, the court on application of the trustee may order such costs to be paid out of the separate estates of such bankrupts, or one or any of them; and *vice versa* may order costs necessarily incurred for any separate

(r) "The Bankruptcy Rules, 1871,"
Form No. 1.

(s) *Ex parte Lückes, In re Wood*, 41 L. J. (N. S.) Bankr. 21.

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Sect. 25,
par. 3.

estate, if the same were incurred with reasonable probability of benefit to the joint estate, to be paid out of such joint estate."

Rule 114. "A trustee shall not be allowed in his accounts any sum paid by him to his attorney for his bill of costs, unless the same shall have been duly taxed as between attorney and client."

Sects. 55 &

Rule 116. "The taxing officer shall not allow to a trustee any charges for attorney or counsel in attending the court to make any application unless the sanction in writing of the committee of inspection to their being or having been employed is produced to him, or unless the same has been allowed by the court as necessary."

CHAPTER IX.

DUTY OF THE BANKRUPT ON ADJUDICATION.

§ 1.—THE BANKRUPT'S DUTY IN GENERAL.

§ 2.—THE BANKRUPT'S EXAMINATION.

§ 3.—MISCELLANEOUS PROVISIONS RELATING TO THE BANKRUPT'S DUTY IN ADMINISTERING THE PROPERTY.

—◆—

§ 1.—THE DUTY OF THE BANKRUPT IN GENERAL.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 19. “The bankrupt shall, to the utmost of his power, aid in the realization of his property, and the distribution of the proceeds amongst his creditors. He shall produce a statement of his affairs to the first meeting of creditors, and shall be publicly examined thereon on a day to be named by the court, and subject to such adjourned public examination as the court may direct. He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such meetings of his creditors, wait at such times on the trustee, execute such powers of attorney, conveyances, deeds and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the trustee, or may be prescribed by rules of court, or be directed by the court by any special order or orders made in reference to any particular bankruptcy, or made on the occasion of any special application by the trustee or any creditor.

Conduct of bankrupt.

“If the bankrupt wilfully fail to perform the duties imposed on him by this section, or if he fail to deliver up possession to the trustee of any part of his property, which is divisible amongst his creditors under this act, and which may for the time being be in the possession or under the control of such bankrupt, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.”

No. 87. *Notice of Application for Committal under Sect. 19.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of _____] holden Sect. 19.
at _____].

In the matter of A. B., of _____, a bankrupt.

To the said bankrupt.

Take notice that the trustee of the property of the said bankrupt will on the _____ day of _____ 187 _____, at _____ o'clock in the _____ noon, apply to

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this court for an order for your committal to prison for contempt of this court, you having failed to perform the duty imposed on you by the nineteenth section of the said act [*here set out the duty he has failed to perform*]. And further take notice that you are required to attend the court on such day at the hour before stated, to show cause why an order for your committal should not be made.

Dated this day of , 187 .

Registrar.

No. 83. *Application by Trustee for Committal of Bankrupt or other Person.*

“The Bankruptcy Act, 1869.”

Sect. 19. In the London Bankruptcy Court [or the county court of holden
at].

In the matter of A. B., of , a bankrupt.

I, the trustee of the property of the said bankrupt [*or as the case may be*], do apply to this court for an order of committal for contempt of this court against the said bankrupt [*or L. M.,*], on the ground set forth in the annexed affidavit.

Dated this day of , 187 .

G. H., trustee.

No. 84. *Affidavit in support of Application for Committal of Bankrupt for Contempt under Sect. 19.*

“The Bankruptcy Act, 1869.”

Sect. 19. In the London Bankruptcy Court [or the county court of holden
at].

In the matter of A. B., of , a bankrupt.

I, G. H., the trustee of the property of the said bankrupt, make oath, and say:—

Where bankrupt fails to produce statement of affairs. 1. That the said bankrupt did wilfully fail to produce to the first meeting of his creditors, held on the day of 187 , at , the statement of his affairs, the production of such statement being a duty imposed upon him by the nineteenth section of the said act, and by the rules of court.

Where bankrupt does not submit to examination. [or 1. That the said bankrupt did attend at the first meeting of his creditors held on the day of , 187 , at , and wilfully refused to submit to be examined at such meeting in respect of his property [*or his creditors*], the submitting to examination being a duty imposed upon him by the nineteenth section of the said act.]

Where bankrupt fails to attend a meeting other than the first. [1. That the said bankrupt did wilfully fail to attend a meeting of his creditors held on the day of , 187 , at [*or to wait on me at my office on the day of , 187*], the attending such meeting [*or waiting on me*] being a duty imposed upon him by the nineteenth section of the said act.

Where bankrupt fails to execute a deed. [or 1. That the said bankrupt has wilfully failed to execute [*here describe the deed, &c., that he has failed to execute*], the execution of such deed when required by me being a duty imposed upon him by the nineteenth section of the said act.

Where bankrupt fails to 2. [That the said bankrupt was on the day of , 187 , duly served with a notice, a copy of which is hereunto annexed, by leaving

the same at his usual place of residence, requiring him to attend the said meeting), [or to execute the above-mentioned deed, &c.]

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[or 1. That the said bankrupt has wilfully failed to perform the duty imposed upon him by the nineteenth section of the said act of [here insert any act he has been required to do by any special order of the court, stating the day on which the order was made].

attend a meeting other than the first; or to execute a deed.

2. That the said bankrupt was duly served with a copy of such order by leaving the same at his usual place of residence on the _____ day of _____ 187 .]

Where bankrupt falls to obey special orders of court.

[or 1. That the said bankrupt has failed to deliver up possession of [here state the property he has failed to deliver up,] which property is divisible amongst his creditors under the said act, and which said property was [or is] in his possession or control, he having been required by me to deliver up the said property by notice, a copy of which is hereunto annexed, and which notice was duly served upon him on the _____ day of _____ 187 , at his usual place of residence.]

Where bankrupt has failed to deliver up property.

Sworn at, &c.

G. H.

No. 90. Order of Committal under Sect. 19.

“ The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of _____], holden at _____].

In the matter of A. B., of _____, a bankrupt.

Upon the application of the trustee of the property of the bankrupt, and upon hearing the bankrupt [or if he does not appear, reading the affidavit of [here insert name and description of person by whom the notice to show cause was served] and upon reading the affidavit of [enter evidence], the court being of opinion that the bankrupt has been guilty of a contempt of this court by having failed to [here follow the notice], it is ordered that the said bankrupt do stand committed to [here insert prison] for his said contempt.

Given under the seal of the court this _____ day of _____, 187 .
By the court,
Registrar.

No. 93. Warrant of Committal for Contempt.

In the London Bankruptcy Court [or the county court of _____], holden at _____] Sects. 19, 28, 93, 126.

In the matter of A. B., of _____, a bankrupt.

To X. Y., officer of this court [or where warrant issues from a county court, to the high bailiff and others the bailiffs of the said court] and to the governor or keeper of the [here insert the prison].

Whereas by an order of this court bearing date the _____ day of _____ 187 , it was ordered that the said bankrupt [or L. M. of _____] should stand committed for contempt of this court.

These are therefore to require you the said X. Y. [or high bailiffs, bailiffs], and others, to take the said A. B. [or L. M.] and to deliver him to the governor or keeper of the above-named prison, and you the said governor or keeper to receive the said A. B., and him safely to keep in the said prison until such time as this court shall order.

Given under the seal of the court this _____ day of _____, 187 .
By the court,
Registrar.

No. 94. *Order for Discharge from Custody on Contempt.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of _____] holden at _____].

In the matter of A. B., of _____, a bankrupt.

Upon application made this _____ day of _____ for A. B. who was committed to prison for contempt by order of this court, dated the _____ day of _____ 187____, and upon reading his affidavit showing that he has cleared [or is desirous of clearing] his contempt and has paid the costs occasioned thereby, and upon hearing the trustee [or C. D. of _____], it is ordered that the governor or keeper of [here insert name of prison], do discharge the said A. B. out of his custody, as to the said contempt.

Given under the seal of the court this _____ day of _____ 187____.

By the court,
Registrar.

 § 2.—THE BANKRUPT'S EXAMINATION.

The bankrupt having attended and produced a statement of his affairs at the first meeting or an adjournment (*a*), is next required to attend and be publicly examined on a subsequent day and any adjournments on such statement of his affairs and generally in respect of his property or his creditors (*b*).

"The Bankruptcy Rules, 1870," provide that—

Rule 96. "At the first meeting, or some time thereafter, the registrar shall appoint the time and place for the bankrupt to attend for his public examination by the court, such time not being later than forty days from such first meeting, unless otherwise directed by the registrar."

Rule 111. "Notice of the appointment of the trustee, and of the day for the public examination of the bankrupt, shall be gazetted forthwith, and be inserted in one local paper by the trustee, and he shall send a copy of the notice to each creditor."

No. 42. *Notice in Gazette of the Appointment of Trustee and of Day for Public Examination of Bankrupt.*

Rule 70.

In the London Bankruptcy Court [or the county court of _____] holden at _____].

In the matter of A. B., of _____, a bankrupt.

G. H. of _____, has been appointed trustee of the property of the bankrupt. The court has appointed the public examination of the bankrupt to take place at _____ on the _____ day of _____ at _____ o'clock in the _____ noon.

All persons having in their possession any of the effects of the bankrupt must deliver them to the trustee, and all debts due to the bankrupt must be paid to the trustee.

(a) See *ante*, p. 266.

(b) Sect. 19, *ante*, p. 289.

Creditors who have not yet proved their debts must forward their proofs of debts to the trustee.

Dated this day of 187 .

Registrar.

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Examination of Bankrupt or Witness.—“The Bankruptcy Rules, 1870,” provide that—

Rule 207. “If the court shall in any case be of opinion that it would be desirable that a person should be appointed to take down the evidence of the bankrupt, or of any witness examined at any public sitting or private meeting under the act, in shorthand or otherwise, it shall be competent for the court to make such an appointment; and every person so appointed shall be paid a sum not exceeding one guinea per day, and where the court appoints a shorthand writer a sum not exceeding eightpence per folio of ninety words of any transcript of the evidence that may be required, and such sums shall be paid by the party at whose instance the appointment was made, or out of the estate, as may be directed by the court.” Sect. 19.

No. 45. *Memorandum of Public Examination of Bankrupt.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [*or* the county court of
holden at].

In the matter of A. B. of , a bankrupt.

Memorandum.—That I the above-named bankrupt being sworn and examined, upon my oath say, that the statement of accounts filed on the day of 187 , with the proceedings in the above matter containing sheets of paper, the first sheet whereof is marked with the letter A, is true, and that the said statement of accounts do contain and is a full and true disclosure and discovery of all my estate and effects both real and personal whatsoever and wheresoever. And I further say, that at the time of this my examination, I have delivered up to the trustee of my property, all such parts of my goods, wares, and merchandizes, money, estate and effects, and all books, papers, and writings relating thereto, as are now in my custody, possession, or power. And I further say that I have not removed, concealed, embezzled, or destroyed any part of my estate, real or personal, nor any books of accounts, papers or writings relating thereto, with an intent to defraud my creditors.

[*Here insert any special matter.*]

A. B.

§ 3.—MISCELLANEOUS PROVISIONS RELATING TO THE BANKRUPT'S DUTY IN ADMINISTERING THE PROPERTY.

Superintendence of the Property, &c.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 26. “The trustee may appoint the bankrupt himself to superintend the management of the property or of any part thereof, or to carry Power to
allow bank-
rupt to

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erty.

on the trade of the bankrupt (if any) for the benefit of the creditors, and in any other respect to aid in administering the property in such manner and on such terms as the creditors direct."

Letters addressed to the Bankrupt.—“The Bankruptcy Act, 1869,” enacts that—

Post letters
addressed to
bankrupt.

Sect. 85. “The court, upon the application of the trustee, may from time to time order that, for such time as the court thinks fit, not exceeding three months from the date of the order of adjudication, post letters addressed to the bankrupt at any place or any of the places mentioned in the order, shall be re-directed, sent, or delivered by the postmaster-general or the officers acting under him, to the trustee or otherwise as the court directs, and the same shall be done accordingly.”

No. 96. *Order to Postmaster-General.*

“The Bankruptcy Act, 1869.”

Sect. 52.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B. of , a bankrupt.

Upon the application of G. H. of , the trustee of the property of the above bankrupt, it is ordered that for a period of three months from [*here insert the date of the order of adjudication*] all post letters directed or addressed to the said bankrupt at [*here insert only the place or places of which the bankrupt is described in such order of adjudication*] shall be re-directed, sent or delivered by the postmaster-general or officers acting under him to the said trustee at , and that a sealed duplicate of this order be forthwith transmitted by the trustee to the postmaster-general, or officers acting under him.

Given under the seal of the court this day of 187 .

By the court,
Registrar.

Allowance to Bankrupt for Maintenance or for his Services.]
—“The Bankruptcy Act, 1869,” enacts that—

Allowance
to bankrupt
for mainte-
nance or
service.

Sect. 38. “The trustee, with the consent of the creditors, testified by a resolution passed in general meeting, may from time to time, during the continuance of the bankruptcy, make such allowance as may be approved by the creditors to the bankrupt out of his property for the support of the bankrupt and his family, or in consideration of his services if he is engaged in winding up his estate.”

Offences by Bankrupt.—As to offences by and criminal proceedings against a bankrupt, see *post*, Chapter XIX.; as to absconding debtor, see *ante*, p. 239; and as to warrants and committal for contempt, see *ante*, pp. 205, 214.

CHAPTER X.

VARIOUS PROCEEDINGS INCIDENTAL TO BANKRUPTCY.

- § 1.—MEETINGS OF CREDITORS SUBSEQUENT TO THE FIRST.
- § 2.—ACCEPTANCE OF COMPOSITION OR SETTLEMENT.
- § 3.—TRANSFER OF PROCEEDINGS.
- § 4.—TRIAL OF QUESTIONS OF FACT BY A JURY.
- § 5.—APPEAL IN BANKRUPTCY.
- § 6.—DEATH OF THE BANKRUPT.
- § 7.—ANNULLING THE ADJUDICATION.

—◆—

HAVING in previous chapters treated of the essential stages in bankruptcy proceedings from their commencement to the examination of the bankrupt, and also of the general duties of the trustee, and also those of the bankrupt, it will be convenient, before proceeding to treat in detail of the effect of bankruptcy on the property and its mode of distribution, to dispose of several matters, all of which may, and some frequently do, occur in the course of a bankruptcy between adjudication and the termination of the proceedings, but none of which are nevertheless absolutely necessary accompaniments. This chapter, therefore, will be devoted to these various incidental steps.

—◆—

§ 1.—MEETINGS OF CREDITORS SUBSEQUENT TO THE FIRST.

The directions of the act with respect to the first meeting of creditors have been already mentioned. Besides this first meeting provision is made for other meetings. The trustee is expressly authorized to summon from time to time general meetings of the creditors for the purpose of ascertaining their wishes. So also the court may from time to time during the continuance of a bankruptcy summon general meetings of the creditors for the purpose of ascertaining their wishes, and may, if the court thinks fit, direct the registrar to preside at such meetings (a).

(a) "The Bankruptcy Act, 1869," s. 20, *ante*, pp. 279, 280.

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With respect to such last-mentioned meeting, "The Bankruptcy Rules, 1870," provide that:—

Sect. 20.

Rule 11. "Where the court orders a general meeting of creditors to be summoned under section 20 of the act, it shall be summoned as the court directs, and in default of any direction the registrar shall transmit a sealed copy of the order to the trustee fourteen days at least before the time appointed for the meeting to take place, and the trustee shall ten days before such meeting, send a copy of the order to each creditor, at the address given in his proof, or when he shall not have proved, the address given in the list of creditors by the bankrupt, or such other address as may be known to the trustee."

No. 30. *Order of Court for General Meeting of Creditors.*

"The Bankruptcy Act, 1869."

Sect. 20.

In the London Bankruptcy Court [or the county court of
holden at].

Rule 11.

In the matter of A. B. of , a bankrupt.

Whereas upon the application of C. D. of [leave out these words if court order meeting without an application, and begin, At a court holden this day], it is ordered that the trustee of the property of the bankrupt do summon a meeting of the creditors of the bankrupt, to be held at on the day of 187 , at o'clock in the noon [here state the purpose for which meeting called], [and that the registrar [or E. F., one of the registrars] of this court do preside at such meeting].

Given under the seal of the court this day of 187 .

By the court,
Registrar.

"The Bankruptcy Act, 1869," enacts that—

Regulations
as to general
meetings of
creditors
subsequent
to first meet-
ing.

Sect. 21. "The provisions of this act with respect to the first general meeting of creditors shall apply to any subsequent general meeting of creditors in a bankruptcy, with this exception, that subsequent meetings of creditors may be summoned by the trustee, or by a member of the committee of inspection, and that such meetings may, unless otherwise directed by the court in the case of meetings summoned by the court, be presided over by any person chosen by the creditors assembled at such meeting, and that any creditor whose debt has been proved, or the value of whose debt has been ascertained at or subsequently to such first meeting, shall be allowed to be present and to vote thereat."

"The Bankruptcy Rules, 1870," provide that—

Sect. 21.

Rule 95. "Where a meeting of creditors is summoned by a trustee it shall be summoned by the trustee transmitting to each creditor at the address given in his proof, or when he shall not have proved, the address given in the list of creditors by the bankrupt, or such other address as may be known to the trustee, seven days before the meeting is to be held, a notice setting forth the time and place at which it is to be held and the purpose for which it is summoned."

Rule 97. "Wherever a meeting of creditors is called by notice, the proceedings had, and resolutions come to at such meeting, shall be valid, notwithstanding that some creditors shall not have received the notice sent to them, unless otherwise ordered by the court."

Rule 98. "An affidavit by a trustee, or an officer of the court, or by any clerk of either, that letters have been put into a post office, shall be sufficient evidence of such notices having been duly sent to the persons to whom the same purport to have been addressed."

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Rule 102. "The costs of summoning a meeting of creditors by any person other than the trustee shall be paid by the person at whose instance it is summoned, to be repaid to him out of the estate if the trustee, or the committee of inspection, or the court shall so direct."

"The Bankruptcy Act, 1869," enacts that—

Sect. 110. "Where a registrar under the authority of this act attends at any place for the purpose of presiding at a meeting of creditors, or of receiving proofs, or of otherwise acting under this act, his travelling and incidental expenses incurred in so doing, and those of any clerk or officer attending him, shall, after being settled by the court, be paid out of the bankrupt's property, if sufficient, and otherwise shall be deemed part of the expenses of the court."

Expenses of
registrar
attending
meetings, &c.

§ 2.—ACCEPTANCE OF COMPOSITION OR SETTLEMENT.

"The Bankruptcy Act, 1869," enacts that—

Sect. 28. "The trustee may, with the sanction of a special resolution of the creditors assembled at any meeting of which notice has been given specifying the object of such meeting, accept any composition offered by the bankrupt, or assent to any general scheme of settlement of the affairs of the bankrupt upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, subject nevertheless to the approval of the court, to be testified by the judge of the court signing the instrument containing the terms of such composition or scheme, or embodying such terms in an order of the court."

Power of
trustee to
accept com-
position or
general
scheme of
arrangement.

"Where the annulling the order of adjudication is made a condition of any composition with the bankrupt or of any general scheme for the liquidation of his affairs, the court, if it approves of such composition or general scheme, shall annul the adjudication on an application made by or on behalf of any person interested, and the adjudication shall be annulled from and after the date of the order annulling the same."

"The provisions of any composition or general scheme made in pursuance of this act may be enforced by the court on a motion made in a summary manner by any person interested, and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. The approval of the court shall be conclusive as to the validity of any such composition or scheme, and it shall be binding on all the creditors so far as relates to any debts due to them and provable under the bankruptcy."

No. 55. *Notice in Gazette of Meeting to authorize the Trustee to accept a Composition.*

In the London Bankruptcy Court [or the county court of
holden at _____].
A meeting of the creditors of A. B., of _____, adjudicated a bank-
rupt on the _____ day of _____, 187____, will be held at

Sect. 28.

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on the day of , 187 , at o'clock in the
noon, for the purpose of considering the propriety of sanctioning the
acceptance by the trustee of a composition offered by the bankrupt of
[or the assent by the trustee to a scheme of settlement of the
affairs of the bankrupt], [and for the annulling thereafter of the order
of adjudication made against the bankrupt].

G. H., trustee.

No. 57. *Application to annul Adjudication under Sect. 28.*

“The Bankruptcy Act, 1869.”

Sect. 28.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of , a bankrupt.

I, R. S., of , being interested in this matter do hereby make
application to the court that the order of adjudication against the said
bankrupt be annulled in accordance with the terms of a composition,
the acceptance of which by the trustee of the property of the bankrupt
was sanctioned by special resolution at a meeting of creditors held on
the day of at .

Dated this day of .

R. S.

No. 58. *Order annulling Adjudication under Sect. 28.*

“The Bankruptcy Act, 1869.”

Sect. 23.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of , a bankrupt.

Whereas at a meeting of creditors held under this bankruptcy on the
day of , pursuant to notice given in the Gazette, it was
resolved by a majority in number, and three-fourths in value of the
creditors then present or duly represented at the said meeting, that a
composition offered by the bankrupt for payment of the debts owing by
him was calculated to benefit the general body of the creditors under
the estate, and should be accepted by the trustee of the property of the
bankrupt.

And whereas the court approving of the composition offered did
testify such approval by the judge of this court signing the instrument
containing the terms of the composition.

And whereas it was made a condition of the composition that the
order of adjudication should be annulled; and whereas hath
applied to this court to annul the adjudication accordingly.

It is hereby ordered that the adjudication made against the said
bankrupt be and the same is hereby annulled. [Add any directions as to
vesting the property of the bankrupt.]

Given under the seal of the court this day of 187 .

By the court,
Registrar.

No. 86. *Affidavit of Person interested in a Composition for Committal.*

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CHAP. X.

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 23.

In the matter of a composition made by A. B., of

I, F. M., of , make oath and say:—

1. That was by an order of this court made on the day of , 187 , ordered to [here set out the order].
 2. That a copy of the said order was duly served on the said
 3. That the said has failed to obey such order.
- Sworn at, &c.

F. M.

No. 89. *Notice of Application for Committal under Sects. 28, 126.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sects. 28, 126.

In the matter of a composition made by A. B., of

To

Take notice that C. D., of , will on the day of 187 , at o'clock in the noon, apply to this court for an order for your committal to prison for contempt of this court, you having disobeyed the order of this court made on the day of 187 , [here set out order]. And further take notice that you are required to attend the court on such day at the hour before stated, to show cause why an order for your committal should not be made.

Dated this day of 187 .

Registrar.

No. 92. *Order of Committal under Sect. 28 or 126.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sects. 28, 126.

In the matter of A. B., of , a bankrupt [or where bankruptcy annulled or proceeding under sect. 126, In the matter of a composition made by A. B., of].

Whereas by an order of this court made on the day of 187 [here recite the order]. Now upon the application of C. D., of , and upon hearing A. B. (or as the case may be), [or if he does not appear] reading the affidavit of [here insert name and description of person by whom the order was served on A. B.], and upon reading the affidavit of [enter evidence], the court being of opinion that the said A. B. has been guilty of a contempt of this court by his disobedience of the said order, it is ordered that the said A. B. do stand committed to [here insert prison] for his said contempt.

Given under the seal of the court this

day of 187 .

By the court,

Registrar.

PART VII.
CHAP. X.No. 80. *Application for Enforcement of Provision in a Composition.*

"The Bankruptcy Act, 1869."

Sects. 28, 126.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of a composition made by A. B., of
I, F. M., of , do apply to this court for an order for the enforce-
ment of the provisions of the said composition against , on the
grounds set forth in the annexed affidavit.

Dated this day of 187 .

F. M.

No. 81. *Affidavit in support of Application for Enforcement of Provisions
of a Composition under Sect. 28 or 126.*

"The Bankruptcy Act, 1869."

Sects. 28, 126.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of a composition made by A. B., of
I, F. M., of , make oath and say:—

1. That I am interested in the said composition, having proved my
debt as a creditor of the said A. B. [or as the case may be].

2. That [one of] the provisions of the said composition is [or are]
that [here set it or them out].

3. That has failed to comply with the said provisions [or as the
case may be].

Sworn at, &c.

F. M.

No. 82. *Order for Enforcement of Provisions in a Composition.*

"The Bankruptcy Act, 1869."

Sects. 28, 126.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of a composition made by A. B., of

Upon hearing the application of F. M., of , a person interested
in the said composition, and reading the affidavit of [here insert evidence],
the court being of opinion that the provisions of the said composition
mentioned in the said affidavit should be enforced, it is ordered that
[here insert order].

Given under the seal of the court this day of 187 .

To

By the court,
Registrar.

Take notice that unless you obey the directions contained in this
order, you will be deemed to have committed a contempt of court.

§ 3.—TRANSFER OF PROCEEDINGS.

"The Bankruptcy Act, 1869," enacts, sect. 80, sub-s. (3), that
"where proceedings against the debtor are instituted in more
courts than one, the London Court of Bankruptcy may, on the
application of any creditor, direct the transfer of such proceedings
to the London Court of Bankruptcy or to any local bankruptcy

court" (b). And sub-sect. (5) of the same section further enacts, that "where the creditors resolve by a special resolution that it will be more convenient that the proceedings in any local bankruptcy court should be transferred to the London court or to some other local court, or where the judge of a local court certifies that in his opinion the bankruptcy would be more advantageously conducted in the London court or in some other local court, and the creditors do not by resolution object to the transfer, the petition shall be transferred to, and all subsequent proceedings thereon had in the London court or such other local court."

"The Bankruptcy Rules, 1870," provide that—

Rule 82. "Where the judge of a county court certifies that in his opinion the bankruptcy would be more advantageously conducted in the London Bankruptcy Court or some other county court, the registrar shall, if the opinion is certified before the first meeting of creditors, lay the same before such meeting, and if it has been certified after such meeting, he shall transmit a copy of such certified opinion to the trustee, who shall thereupon summon a meeting of creditors to consider the same." Sect. 80,
par. 5.

Rule 83. "If within fourteen days after transmitting such notice to the trustee, no resolution of the creditors objecting to such transfer shall be received by the court through the registrar, the transfer may be made accordingly."

Rule 84. "Where the proceedings in any bankruptcy are transferred from the court to which the petition was presented to any other court, the registrar of the first court shall send by book-post all the proceedings to the registrar of the court to which the proceedings are transferred; and the receipt of such proceedings shall be considered to authorize the latter court to continue such proceedings, without any further order for transferring them than is contained in the proceedings."

No. 37. *Certificate of Judge for Transfer of Proceedings.*

In the London Bankruptcy Court [or the county court of
holden at _____].

Sect. 80,
par. 8.

In the matter of A. B., of _____, a bankrupt.

I hereby certify for the following reasons that proceedings in this bankruptcy would in my opinion be more advantageously conducted in the London Bankruptcy Court [or the county court of _____ holden at _____]. (*Here set out reasons.*)

Dated this _____ day of _____, 187 .

F. H., judge.

§ 4.—TRIAL OF QUESTIONS OF FACT BY A JURY.

"The Bankruptcy Act, 1869," enacts, sect. 72, that "if in any proceeding in bankruptcy there arises any question of fact which the parties desire to be tried before a jury instead of by the court

(b) See the section, *ante*, p. 244 n. power given by subs. 3 applied to
In *Ex parte Wieland*, 39 L. J. (N. proceedings under the former law.
S.) Bankr. 46, it was held that the

PART VII.
CHAP. X.

itself, or which the court thinks ought to be tried by a jury, the court may direct such trial to be had, and such trial may be had accordingly in the London Court of Bankruptcy, in the same manner as if it were the trial of an issue in one of the superior courts of common law, and in the county court in the manner in which jury trials in ordinary cases are by law held in such court" (c).

As to the trial by jury in ordinary cases in the county courts, see *ante*, Vol. I. pp. 257—262.

"The Bankruptcy Rules, 1870," contain various provisions respecting trial by jury. The following are such of those Rules as relate to trials by jury in the county courts—

Sect. 72.

Rule 190. "Where upon any application to the court for its decision on any question, the court, either on its own motion or on the application of any person, shall have directed that a question of fact be tried by a jury, such question of fact shall be reduced into writing and submitted to the judge for his approval, and shall, when approved, be signed by the judge and filed, and shall be called the record for trial; but the court shall have power to allow any amendment thereof at any time upon such terms as it may think fit."

Rule 191. "Upon filing the record with the registrar within three days after the above approval has been given, the registrar shall fix the time and place at which the trial shall be had" (d).

Rule 202. "Where the jury retire from the court to consider their verdict, they shall be taken charge of by an officer of the court; but previously thereto the registrar of the court shall swear such officer according to the form in the schedule."

(c) See sect. 72, *ante*, pp. 203, 204. There is no appeal from an order by a county court for trial of questions of fact under this section. *Ex parte Anderson, Re Anderson*, 39 L. J. (N. S.) Bankr. 32. The word "parties," in the section, is not confined to parties to the bankruptcy, but includes parties to the litigation; per Giffard, L. J., *Id.* p. 54.

(d) Rules 192 to 201 relate to trials in the London Bankruptcy Court, and, except No. 201, are inapplicable to county courts. Rule 201, although on its face confined to the London court, will be a guide to the practice in the county courts, and is therefore given here.

Rule 201. "Upon every such trial in the London Bankruptcy Court the addresses to the jury or to the court, as the case may be, shall be regulated as follows:—The party who begins, or his counsel or attorney, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins, his in-

tention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present in force in the superior courts of common law at Westminster on trials at *Nisi Prius*."

The following "Form of Oath to be taken by the usher of the court on jury retiring to consider their verdict" (Form No. 100), will be a guide for the registrar or high bailiff who administers the oath in the county court. "You shall well and truly keep this jury in some private and convenient place, without meat, drink, or fire (candle-light excepted). You shall not suffer any person to speak to them, neither shall you speak to them yourself, without leave of the court, except to ask them if they are agreed on their verdict."

Rule 203. "The verdict or finding of the jury, as the case may be, shall be endorsed by the registrar on the record for trial, and with the jury panel and the names of the jurors, who were sworn, endorsed thereon."



§ 5.—APPEAL IN BANKRUPTCY.

"The Bankruptcy Act, 1869," enacts that—

Sect. 71. "Every court having jurisdiction in bankruptcy under this act may review, rescind, or vary any order made by it in pursuance of this act. Any person aggrieved by any order of a local bankruptcy court in respect of a matter of fact, or of law made in pursuance of this act, may appeal to the chief judge in bankruptcy, and it shall be lawful for such judge to alter, reverse, or confirm such order as he thinks just. Any order made by the chief judge in bankruptcy, whether in respect of a matter brought before him on appeal or not, shall be subject to an appeal to the Court of Appeal in Chancery (which court, for the purposes of this act, shall be and form a court of record, and shall have all the jurisdiction, powers and authorities of the court of bankruptcy, to be exercisable either originally or on appeal, and shall have all the powers and authorities of the Court of Chancery relative to the trial of questions of fact, by jury, issue or otherwise), and also, with the leave of the Court of Appeal, to the House of Lords, but no appeal shall be entertained under this act except in conformity to such rules of court as may for the time being be in force in relation to such appeal."

Appeal from courts.

Sect. 72 enacts that no appeal shall lie from the decisions of any court, except in manner directed by the act (*e*).

An order made by a county court for the trial of issues of fact by a jury in that court is not an order in respect of "a matter of fact or of law" subject to appeal, or which the chief judge has any power to alter or reverse. It is a matter on which the county court has complete jurisdiction under sect. 72 (*f*).

Costs of Appeal.—A successful appellant is not in general entitled to the costs of appeal. The exception is when the respondent has been guilty of misconduct (*g*).

Rules relating to Appeals.—The following "Bankruptcy Rules, 1870," relate to appeal.

Rule 143. "An appeal against a decision or order of the chief judge

Sects. 71, 72.

(*e*) See sect. 72, *ante*, pp. 203, 204.

(*f*) Bacon, C. J., *Ex parte Anderson, Re Anderson*, 39 L. J. (N. S.) Bankr. 32, citing the judgment of Giffard, L. J., in *Ex parte Anderson*, subsequently reported in 39 L. J. (N. S.) Bankr. 54. In the case before the chief judge in bankruptcy the object of the application was to get a trial by a special jury in the London court, on the ground of the import-

ance of the questions, and that it was impossible to obtain a fair trial in the local court.

(*g*) *In re Cherry, Ex parte Mathews*, 40 L. J. (N. S.) Bankr. 90, where Bacon, C. J., held that he was bound by the practice of the Court of Chancery as laid down in *Denny v. Hancock*, Law Rep., 6 Chanc. 138; 40 L. J. (N. S.) Ch. 193.

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in bankruptcy, or a judge of a county court, shall be entered with the registrar of appeals within and not later than twenty-one days from the said decision or order, by leaving with him a copy of the appeal notice of motion."

Rule 144. "Upon entering an appeal, a copy of the appeal notice shall be sent forthwith by the appellant to the registrar of the court appealed from, who shall forthwith file the same with the proceedings, and a similar notice shall be delivered by the appellant to each respondent four days before the day on which he intends to move."

Rule 145. "At or before the time of entering an appeal, the party intending to appeal shall deposit with the registrar of appeals such sum, not being less than ten pounds and not exceeding forty pounds, as the court appealed from shall direct, to satisfy, so far as the same may extend, any costs that the appellant may be ordered to pay, and in the absence of any such direction, the sum deposited shall be twenty pounds."

Rule 146. "Where there are several respondents in separate interests, the court may, if it shall think fit, direct a separate deposit to be made as to every such respondent."

Rule 147. "All appeals shall be brought on by motion, and no new evidence shall be received on any appeal unless the court of appeal shall so direct; but any of the parties shall be at liberty to bring before the court of appeal, by affidavit, the circumstances under which the decision or order appealed from was made."

Rule 148. "Every affidavit intended to be used upon the hearing of any appeal shall be filed with the registrar of appeals, and a copy thereof sent by the appellant to the respondent four clear days before the day appointed for hearing."

Rule 149. "The registrar of the court appealed from shall, upon the application of the registrar of appeals, transmit to him the file of proceedings in the matter under appeal."

Rule 150. "The office for entering bankruptcy appeals to be heard by the Court of Appeal in Chancery shall be closed during the ordinary vacations of the Court of Chancery, and the time during which such office shall be closed shall not be reckoned in the number of days ordered for the entering of appeals to be heard by such Court of Appeal in Chancery."

§ 6.—DEATH OF THE BANKRUPT.

"The Bankruptcy Act, 1869," enacts, that "when a debtor who has been adjudicated a bankrupt dies, the court may order that the proceedings in the matter be continued as if he were alive" (*h*).

§ 7.—ANNULING THE ADJUDICATION.

Annuling Adjudication where no Trustee appointed.]—If at the first meeting of creditors (or an adjournment of it) "no trustee is appointed by reason of the prescribed quorum not being present,

(*h*) See sect. 80, sub-sect. (9), *ante*, deceased bankrupt, see s. 108, *ante* p. 245 n; as to the deposition of a p. 216.

or for any other reason whatever, the court may annul the adjudication, unless it deems it expedient to carry on the bankruptcy with the aid of the registrar as trustee. Moreover, if at any time during the bankruptcy no new trustee is appointed to fill a vacancy in that office, the court may either carry on the bankruptcy with the aid of the registrar as trustee, or annul the order of adjudication, as it thinks just" (i).

Where there was a principal creditor of a large amount and only two other unsecured creditors of small amount, it was held that it was not a proper case to annul the bankruptcy under the above section, for one creditor may be properly entitled to have the affairs wound up in bankruptcy (k).

Annulling Adjudication on Acceptance of Composition or Arrangement.—The annulling the order of adjudication may be made a condition of any composition with the bankrupt or of any general scheme for the liquidation of his affairs (l), and where it is made a condition, the adjudication is "annulled from and after the date of the order annulling the same" (m).

Effect of annulling the Adjudication.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 81. “Whenever any adjudication in bankruptcy is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done by the trustee or any person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged a bankrupt shall, in such case, vest in such person as the court may appoint, or, in default of any such appointment, revert to the bankrupt for all his estate or interest therein upon such terms and subject to such conditions, if any, as the court may declare by order. A copy of the order of the court annulling the adjudication of a debtor as a bankrupt shall be forthwith published in the London Gazette, and advertised locally, in the prescribed manner, and the production of a copy of the Gazette containing such order shall be conclusive evidence of the fact of the adjudication having been annulled, and of the terms of the order annulling the same.”

Consequences
of annulling
of adjudica-
tion.

Sect. 81 was passed to provide for many possible cases, where, notwithstanding the annulling of the bankruptcy, various interests in the bankrupt's effects might have arisen; a portion of those effects might have been distributed and a portion not. In such cases it would be necessary to provide that the Court of Bankruptcy should have power to order possession to be taken of the bankrupt's estate. But where no such order is made, sect. 81 almost of necessity provides that the property shall revert to the bankrupt (n).

(i) See sect. 84, *ante*, pp. 266, 267.

(l) See sect. 28, *ante*, p. 297.

(k) *In re Finney, Ex parte English Joint Stock Bank*, 40 L. J. (N. S.) Bankr. 43.

(m) *Id.*

(n) *Kelly, C. B., Bailey v. Johnson*, 40 L. J. (N. S.) Exch. 192.

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CHAP. X.

No. 59. *Notice in Gazette and Paper of Bankruptcy having been annulled.*

“The Bankruptcy Act, 1869.”

Sect. 81.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of , a bankrupt.

Whereas under a bankruptcy petition presented to this court against
the said A. B., an order of adjudication was made on the day of
187 .

This is to give notice, that the said adjudication was by order of this
court annulled on the day of 187 .

Dated this day of 187 .

Registrar.

CHAPTER XI.

THE EFFECT OF ADJUDICATION ON THE BANKRUPT'S PROPERTY AND RIGHTS.

- § 1.—THE VESTING OF THE PROPERTY.
- § 2.—TIME OF COMMENCEMENT OF THE BANKRUPTCY.
- § 3.—DESCRIPTION OF THE PROPERTY DIVISIBLE AMONGST CREDITORS.
- § 4.—GOODS OF WHICH THE BANKRUPT IS REPUTED OWNER.
- § 5.—EFFECT OF ADJUDICATION ON CLAIMS AGAINST THE BANKRUPT.
- § 6.—STOPPAGE IN TRANSITU.
- § 7.—AVOIDANCE OF VOLUNTARY CONVEYANCES AND TRANSFERS.
- § 8.—AVOIDANCE OF FRAUDULENT PREFERENCES.
- § 9.—PROTECTION OF CERTAIN TRANSACTIONS.
- § 10.—EFFECT OF BANKRUPTCY ON PROPERTY TAKEN IN EXECUTION.
- § 11.—DISCLAIMER OF ONEROUS PROPERTY.
- § 12.—PROPERTY DEFEASIBLE ON BANKRUPTCY.
- § 13.—EFFECT OF BANKRUPTCY IN MISCELLANEOUS MATTERS.



§ 1.—THE VESTING OF THE PROPERTY.

IMMEDIATELY on an order of adjudication being made, the property of the bankrupt vests in the registrar (who is trustee until another is appointed) (*a*), and it becomes divisible amongst his creditors in proportion to the debts proved by them in the bankruptcy (*b*).

Property means and includes “money, goods, things in action, land and every description of property, whether real or personal; also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined” (*c*).

(*a*) See sect. 17, *ante*, p. 274, and see certificate of registrar being trustee, *ante*, p. 261.

(*b*) See sect. 14, *ante*, p. 263.

(*c*) See sect. 4, *ante*, p. 201 (note); see also sect. 15, *post*, pp. 308, 309.

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§ 2.—TIME OF COMMENCEMENT OF THE BANKRUPTCY.

Relation
back.

It is a clear principle in bankrupt law that, upon the commission of an act of bankruptcy, the title of the assignee (now "trustee") has relation back to the time of the act of bankruptcy, and the goods of the bankrupt become the goods of the assignee from that time (*d*).

"The Bankruptcy Act, 1869," recognizes and adopts the principle.

That act enacts that—

Definition of
commence-
ment of bank-
ruptcy.

Sect. 11. "The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication."

Although the doctrine of relation, as already stated, is not new, it is now put upon a plain and intelligible footing. It commences, in ordinary cases, at the time of the act of bankruptcy being *completed*, in which the order is made adjudging the debtor to be a bankrupt (*e*).

Prior Act of Bankruptcy.]—In the case of an act of bankruptcy committed under sect. 6, sub-sect. 6, *ante*, p. 220, by nonpayment of a debt after summons, if such debt is paid, the act of bankruptcy ceases, and therefore, on an adjudication on a subsequent petition of another creditor, such prior act of bankruptcy could not be applied under sect. 11 by way of relation back (*f*).

—◆—

§ 3.—DESCRIPTION OF THE PROPERTY DIVISIBLE AMONGST CREDITORS.

"The Bankruptcy Act, 1869," enacts that—

Descriptions
of bankrupt's
property
divisible
amongst
creditors.

Sect. 15. "The property of the bankrupt divisible amongst his creditors, and in this act referred to as the property of the bankrupt, shall not comprise the following particulars:

(1.) Property held by the bankrupt on trust for any other person (*g*):

(*d*) See *Cooper v. Chitty*, 1 Burr. 20; 1 Smith's Leading Cases, 5th ed. 417, and the notes and cases cited in the last-mentioned work.

(*e*) Judgment of Bacon, C. J., in

Ex parte Duignan, Re Bissell, 40 L. J. (N. S.) Bankr. 37.

(*f*) *Ex parte Weir, In re Weir*, 41 L. J. (N. S.) Bankr. 14.

(*g*) Sect. 117 enacts that "where a

- (2.) The tools (if any) of his trade, and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole:

But it shall comprise the following particulars:

- (3.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance:
- (4.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy, or during its continuance, except the right of nomination to a vacant ecclesiastical benefice:
- (5.) All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause."

As to the effect of a set-off against a debt due to the bankrupt, see *post*, Chap. XIII. § 2.

The words in sub-sect. (3), "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy," only passes to the trustee that which belonged to the bankrupt beneficially, and it is subject to all lawful charges and claims of third parties (*h*).

Although all property acquired by or devolving on the bankrupt during the continuance of the bankruptcy is divisible amongst his creditors, and although property expressly includes "money" (*i*), the trustee cannot in general compel the refunding of money by persons who in the ordinary course of business have received payment from the bankrupt of debts incurred after the bankruptcy, and who have been paid by the bankrupt out of money acquired by him after the bankruptcy (*k*).

Thus, where a bankrupt in a few months after his bankruptcy and before his discharge received 175*l.* as compensation for the loss of a situation as clerk, and paid 130*l.* of it to his landlord for six months' rent in advance (having previously agreed to do so if required, and the landlord so requiring him on hearing of the loss

bankrupt is a trustee within the Trustee Act, 1850, sect. 32 of that act shall have effect so as to authorize the court to appoint a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) if it appears to the court expedient to do so, and all provisions of that act, and of any other act relative thereto, shall have effect accordingly."

(*h*) *Martin, B., Slater v. Pinder*, 40 L. J. (N. S.) Ex. 151, where the question was as to the effect of seizure of the bankrupt's property in execution; see *post*, § 10, EFFECT OF BANKRUPTCY ON PROPERTY TAKEN IN EXECUTION.

(*i*) See *ante*, p. 201 (note).

(*k*) *Ex parte Dewhurst, In re Vanlohe*, 41 L. J. (N. S.) Bankr. 18.

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of his situation), it was held that the trustee could not compel the landlord (who knew of the bankruptcy) to refund the money (*l*), possibly if the trustee had taken any steps to intercept the money, had gone to the bankrupt's employer or given him notice not to part with the money, the case might have been different, but as it stood, it was the case of a person in the ordinary course of business paying his landlord his rent in advance. If such a payment could be upset because the person who made it was an undischarged bankrupt, a payment under similar circumstances to a baker or a butcher might be upset, and the baker or butcher ordered to refund (*m*).

Banking
accounts.

Property held in Trust.]—With regard to banking accounts, "If an account is in plain terms headed in such a way that a banker cannot fail to know it is a trust account, the monies of that account, if a failure of the person occurs, will belong to the trust" (*n*).



§ 4.—GOODS OF WHICH THE BANKRUPT IS REPUTED OWNER.

The effect of sub-section 5 of sect. 15 requires to be separately considered. It is confined to traders, and applies, as will be seen at once, to goods and chattels of third persons, being at the commencement of the bankruptcy "in the possession, order or disposition of the bankrupt," "by the consent and permission of the true owner." Something further, however, is necessary in order that the property should be divisible among the creditors. The bankrupt must either be the "reputed owner," or he must have "taken upon himself the sale or disposition as owner."

The questions raised under this clause are to a great extent questions of fact only, and therefore questions for a jury, if the assistance of a jury is obtained. Nevertheless the section and the corresponding provisions of former acts have been the subject of numerous decisions in the courts of law (*o*).

(*l*) *Ex parte Dewhurst, In re Vanlohe*, 41 L. J. (N. S.) Bankr. 18. Affirming judgment of Bacon, C. J., and discharging an order of the county court judge for payment.

(*m*) *Id.* Judgment of James, L. J. In the course of the argument, Mellish, L. J., put this question to the counsel, "Is there any case which shows that the law will follow money paid in discharge of a legal debt?" And James, L. J., in his judgment said, "The learned counsel with all his research had been unable to pro-

duce a single case where the court had held that money paid, owing by an uncertificated bankrupt, could be followed in the hands of the person who received it."

(*n*) Mellish, L. J., *Ex parte Kingston, Re Gross*, 40 L. J. (N. S.) Bankr. 97. See the facts of that case noticed, *post*, Chap. XIII.

(*o*) The earliest decisions were under the statute 21 Jac. 1, c. 19, s. 11, which corresponded closely with the present clause. Most of the cases will be found collected and discussed

In cases where the property in question once belonged to the bankrupt and has been transferred to another person, but has been allowed to remain in the ostensible ownership of the bankrupt, the statute applies; but there is another class of cases in which the bankrupt, although in the possession of the property, is not deemed to be the reputed owner, as where there is a custom or usage of trade or business under which the goods of one person are notoriously continued in the possession of another, and then the statute does not apply.

For example, in a leading case on this subject, where it was held that vats and utensils (part of the fittings of a distillery) which were not fixed to the freehold, passed to assignees as being left by the true owner in the possession and apparent disposition of the bankrupts as reputed owners, it was said that the case would have admitted of a different consideration if there had been a usage in the trade for the utensils of it to be let out to the traders, as that might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of them (*p*).

Books left in the hands of a bookseller, to be sold by him in the ordinary course of trade, are not in his possession as reputed owner, it being notorious that books are left with publishers or others in large quantities to be sold on account of the person who leaves them (*q*).

This notice of custom or usage has been recently carried very far, and applied to the custom of letting and hiring furniture. Where a trader bankrupt, tenant of an unfurnished private house, having no furniture of his own, hired furniture from a furniture dealer at a weekly rent, the bankrupt undertaking to insure it and not to remove it, and stipulating that in the event of non-payment of the rent or of bankruptcy, the owner should be at liberty to re-take it, it was held that the section did not apply (*r*). This case conflicts with one much earlier, where the distinction was laid down between a person renting furniture without the house, and where he is in possession of a ready-furnished house; in the former case the assignees being entitled, in the latter not (*s*).

Goods and Chattels.]—Besides the question whether property of another person is in the possession of the bankrupt as reputed

with the usual ability in the notes to *Horn v. Baker*, 2 Smith's Leading Cases, 5th edition, pp. 178—207.

(*p*) *Horn v. Baker*, 9 East, 215; 2 Smith's Leading Cases, 5th edition, p. 178.

(*q*) *Whitfield v. Brand*, 16 M. & W. 282.

(*r*) *Ex parte Emerson, Re Hawkins*, 41 L. J. (N. S.) Bankr. 20. In that case the reporter has made the chief judge express himself with less than his usual accuracy, and as if

possession, order and disposition were all essential requisites, instead of being in the disjunctive.

(*s*) *Lingham v. Biggs*, 1 B. & P. 82. The arguments in *Ex parte Emerson*, supra, are not reported, but there is no allusion to *Lingham v. Biggs* in the judgment. It may be that *Ex parte Emerson* will be upheld on the ground that a change of habit has taken place, and that the hiring of furniture is now a very common practice; *sed quære*.

owner, another point often arises, whether the nature of the property brings it within the definition of "goods and chattels."

Questions of this kind, but not wholly dependent on the property falling within the definition of "goods and chattels," arise in the case of so-called fixtures; of course, as all the property of a bankrupt, real and personal, of every description passes to the trustee, no question arises, under sub-sect. (5), as to fixtures any more than to any other description of property, if the real owner is in possession (*t*).

It is, as in other cases, where the supposed real owner is a different person from the apparent owner, that claims, under the clause in question, arise as to fixtures.

By "fixtures" for this purpose are to be understood such things as are ordinarily affixed to the freehold for the convenience of the occupier, but which may be removed without material injury to the freehold (*u*). Such fixtures include trade fixtures and machinery, and what may be termed domestic fixtures, such as grates and cupboards in dwelling-houses (*x*).

Questions under sect. 15, sub-sect. (5) of "The Bankruptcy Act, 1869," in regard to such fixtures, generally arise under leases, where the person in actual possession of the property, to which the fixtures are annexed, is not the real owner, either by reason that he never had a right to them, or having a right, had parted with that right. Of the former class is the leading case on this branch of the law, where it was held that stills in a distillery, which were fixed to the freehold, did not pass to the assignees of bankrupts who occupied the premises and carried on the business under an agreement with the lessee; and the ground of the decision was that the stills were not *goods and chattels*; distinguishing them from vats and other utensils of the trade which were held to pass as chattels to the assignees as being left by the true owner in the possession of the bankrupts (*y*).

Of the latter class (*i. e.*, where the person in possession had a right to the fixtures but had parted with the right), a more recent case serve as a good illustration. There the lessee of a public

(*t*) Using the word "fixture" in its natural and most obvious sense, viz., *anything annexed to the freehold* (and by the expression *annexed to the freehold*, fastened to, or connected with it, and not mere juxtaposition without annexation), questions as to the ownership or right to fixtures arise generally between persons occupying the following relative rights:—(1) Landlord and tenant. (2) The personal representatives of tenants for life or in tail, and the remainderman or reversioner. (3) Heir and executor. (4) Vendor and vendee. (5) Mortgagor and mortgagee (treated

as identical with the rights of vendor and vendee). As to these rights see the note to *Elwes v. Mace*, 2 Smith's Leading Cases, 5th edition, pp. 157—177, and the cases there cited. In all these cases the trustee of a bankrupt is generally entitled to whatever interest in the fixtures the bankrupt himself possessed.

(*u*) Lord Chancellor Cranworth, in *Ex parte Gavan*, *In re Barclay*, 25 L. J. (N. S.) Bankr. 3.

(*x*) *Id.*

(*y*) *Horn v. Baker*, 9 East, 215; and see the note to that case, 2 Smith's Leading Cases, 5th edition, p. 204.

house made an equitable mortgage by memorandum and deposit of his lease and premises and "of the fixtures and appurtenances to the said premises belonging" to brewers to whom he was indebted, but he remained in possession and carried on business until he was adjudicated bankrupt; and it was held that the assignees were not entitled to the fixtures (consisting of gas fittings, chandeliers, ornamental glass cases and things in the bar, and where the trade was carried on) (*z*). Lord Cranworth, in his judgment, said, "The question is, whether this is a possession and reputed ownership within the meaning of the clause of the statute (*a*). . . . The object of the clause is to prevent fictitious credit by an appearance of wealth. I confess it seems scarcely possible to suppose that credit is ever really given upon the faith of fixtures, as distinguished from a house. The statute does not apply to the house; that is admitted: the creditor is bound to take notice that the house is or may be mortgaged to another. If the house is mortgaged, the presumption is that all his interest would pass. If, indeed, the mortgage does not expressly or impliedly include the fixtures, then supposing them to be fixtures which the tenant has a right, as between himself and his landlord, to remove, they will belong to the assignees; not under the order and disposition clause, but because they were the property of the bankrupt (*b*). . . . But if the bankrupt has by his mortgage parted with his property in the fixtures, his subsequent possession is not a possession of them as goods and chattels, but as part of the house. . . . In truth the whole provision is one little adapted to the actual state of society, even if it is applied to the case of stock in a shop. Credit is, I believe, given, generally at least, not upon such appearances, but upon the general character of the person trusted." . . . The court held, upon the proper construction of the clause, and also upon the authorities, that these fixtures were not goods and chattels in the possession of the bankrupt within the meaning of the statute (*c*).

By the Consent and Permission of the True Owner.—If the true owner does all that lies in his power to obtain possession, it cannot be said that he has consented to the goods remaining in the debtor's possession (*d*). Therefore, where a creditor having a bill of sale of his debtors, as security for payment on a certain day, and

(*z*) *Ex parte Gawan, In re Barclay*, 5 De Gex, M. & G. 403; 25 L. J. (N. S.) Bankr. 1.

(*a*) 12 & 13 Vict. c. 106, s. 125, then in force.

(*b*) See note (*t*), *ante*, p. 312.

(*c*) The whole judgment in this case (which has been overlooked by the last editors of Smith's Leading Cases) is well worthy of attention, more especially as it places the case of *Trappes v. Harper*, 2 Cr. & M. 153;

3 L. J. (N. S.) Ex. 24 (the subject of much comment) on the right foundation. See also *Tebb v. Hodge*, 38 L. J. (N. S.) C. P. 217, affirmed on error 39 L. J., C. P. 56, a similar but even stronger case than *Ex parte Gawan*.

(*d*) *Ex parte Cohen, Re Sparke*, 40 L. J. (N. S.) Bankr. 14. Bacon, C. J., observed, that "*Brewin v. Grant* (5 E. & B. 237; 24 L. J. (N. S.) Q. B. 301) lays down the law very clearly."

did all in his power to take possession, short of a forcible entry, it was held there was no consent and permission within sub-sect. (5), and that, therefore, the creditor and not the bankruptcy trustee was entitled to the goods (*e*).

Things in Action.—Under previous acts, choses in action passed to the assignees under the order and disposition clause (*f*).

The exception of “things in action,” does not include everything not capable of manual delivery. Shares in a registered joint stock company are goods and chattels and not “things in action,” and a mere deposit of them by a debtor as security for a debt constitutes the mortgagee “the true owner,” but they are “in the order and disposition” of the debtor, “by the consent and permission of the true owner,” unless the latter has given notice to the company or otherwise taken some step to perfect his title (*g*).

Bills of Sale Act.—Reference may be here made to “The Bills of Sale Act, 1854” (17 & 18 Vict. c. 36), the provisions of which will be found *ante*, Vol. I., pp. 891—893. The act in substance, so far as relates to bankruptcy, is that if the owner of a bill of sale of personal chattels do not comply with the provisions of the act respecting registration, his security shall be void against assignees (for whom trustee is now to be read) in bankruptcy, with respect to chattels left in the apparent ownership of one who becomes bankrupt. The creditor is at liberty, under his bill of sale, whether registered or not to take possession of that which has been assigned to him, and to remove or deal with it as the owner. If, instead of exercising his right, he thinks fit to leave the goods which have been assigned to him, and which have thereby become his, in the house or on the premises of his debtor, the bill of sale not having been duly registered, he leaves them in that debtor's apparent ownership, and he cannot be relieved from the consequences by proving that he took even more than formal possession of them (*h*).

(*e*) *Ex parte Cohen, Re Sparke*, *ante*, p. 314.

(*f*) See 2 Smith's Leading Cases, 5th edition, p. 207.

(*g*) *In re Jackson, Ex parte Union Bank of Manchester*, 40 L. J. (N. S.) Bankr. 57, Bacon, C. J., observed, that “the case of *Ex parte Stewart, Re Shelley*, 35 L. J. (N. S.) Bankr. 6, is valuable; it establishes two propositions—first, that a deposit of shares constituted a good equitable assignment; secondly, that notice is necessary, and that in that case, notice having been given, the title of

the mortgagee prevailed.”

(*h*) See judgment of Bacon, C. J., *Ex parte Homann, Re Vining*, 39 L. J. (N. S.) Bankr. 47, where it was held that the creditor having a man on the premises to watch the goods, was not sufficient possession to oust the title of the bankruptcy trustee, the bill of sale not being *duly* registered. In *Stansfield v. Cubitt*, 27 L. J. (N. S.) Ch. 266, Turner, L. J., expressed an opinion that the Bills of Sale Act in no degree affected the doctrine of reputed ownership.

§ 5.—EFFECT OF ADJUDICATION ON CLAIMS AGAINST THE
BANKRUPT.

PART VII.
CHAP. XI.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 12. “Where a debtor shall be adjudicated a bankrupt, no creditor to whom the bankrupt is indebted in respect of any debt proveable in the bankruptcy shall have any remedy against the property or person of the bankrupt in respect of such debt except in manner directed by this act. But this section shall not affect the power of any creditor holding a security (*i*) upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same if this section had not been passed.”

Creditors
bound by
bankruptcy
proceedings.

As to restraining proceedings in actions as against debtors, see sect. 13, *ante*, p. 249, and cases on that section. The rights of creditors *inter se*, however, under sect. 12, are not taken away, although they may be held in abeyance by sect. 13 (*k*).

§ 6.—STOPPAGE IN TRANSITU.

The doctrine of *stoppage in transitu* does not appear to be taken away or affected either by sect. 12, or by any other provision of “The Bankruptcy Act, 1869.” “Stoppage in transitu,” is *the right of an unpaid vendor, in case of the vendee's insolvency, to stop the goods sold, in transitu.*

This right of a vendor to stop *in transitu*, is bestowed upon him in order to prevent the injustice which would take place, if, in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized upon in satisfaction of his liabilities, and so the property of one man were to be disposed of in payment of the debts of another (*l*). Therefore, if goods are

(*i*) In *Slater v. Pinder*, 40 L. J. (N. S.) Ex. 151, Martin, B., expressed an opinion that “holding a security” would include an interest in an execution under which a sheriff has seized and is in possession of goods, and that the interest of such an execution creditor is expressly protected by this section, subject of course to circumstances where the execution is after notice of an act of bankruptcy, (see sect. 95, *post*, p. 321), and Mellish, L. J., seems to have expressed a similar opinion in *Ex parte Roche, In re Hall*, 40 L. J. (N. S.) Bankr. 73. The definition of a “secured creditor” in sect. 16, *ante*, pp. 265, 266, does not appear to include a seizure under an execution.

(*k*) *Ex parte Roche, In re Hall*, 40 L. J. (N. S.) Bankr. 70.

(*l*) See *Lickbarrow v. Mason*, and *Mason v. Lickbarrow*, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21, and the notes to this case, 1 Smith's Leading Cases, 5th edition, p. 729. This doctrine was first introduced in equity by the cases of *Wiseman v. Vandeput*, 2 Vern. 203; *Snee v. Prescott*, 1 Atk. 246; and *D'Aquila v. Lambert*, 2 Eden, 75; Amb. 39. In *Straker v. Ewing*, 34 Beav. 147, it was said that stoppage *in transitu* is an ordinary legal right, as to which the Court of Chancery, unless by reason of some unusual circumstances, will not interfere.

sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee, although he is immediately entitled to the possession and the right of possession, and the right of property vest in him, has not an absolute right of possession, but a right of possession liable to be defeated if he become insolvent before he obtains possession. The seller, although he may have dispatched the goods to the buyer, has in that case a right in virtue of his original ownership to stop them *in transitu* (m).

The right to stop means the right not only to countermand delivery to the vendee, but to order delivery to the vendor (n).

When the Transit ends.]—Stoppage *in transitu*, as its name imports, can only take place while the goods are on their way; if they once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end of the vendor's right over them. And, therefore, in most of the cases the dispute has been whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the cases is, that they are *in transitu* so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission; but that, if after their arrival at their place of destination they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop *in transitu* (o).

"A right to stop *in transitu* upon bankruptcy, even where credit has not expired, remains till the goods are delivered to the buyer or his agent for custody, or for sending the goods upon a new journey or destination, or for a purpose other than carriage upon the original transit. Until one or the other happens, the seller has a right of stoppage *in transitu*; the right exists unless it be lost by acceptance of the goods by the purchaser or his agent for custody, or a new purpose other than that of carriage. But it is besides to be observed, that the arrival, in order to do away with the right of stoppage *in transitu*, must be such a one that the buyer has actual or constructive possession, and this cannot be whilst the buyer repudiates the goods. These are the elements of the law of stoppage *in transitu*" (p).

(m) See the judgment of Bayley, J., in *Bloxam v. Sanders*, 4 B. & C. 948, and cases there cited.

(n) See judgment of Dr. Lushington, *The Tigress*, 32 L. J. (N. S.) Prob. Mat. and Admiralty Cases, 102. As to what is a sufficient authority from the vendor to enable another person on his behalf to stop goods *in transitu*, see *Whitehead v. Ander-*

son, 9 M. & W. 518.

(o) 1 Smith's Leading Cases, 5th edition, p. 733, citing *Nicholls v. Lefevre*, 2 Bing. N. C. 83; *James v. Griffin*, 1 M. & W. 20; 2 *Id.* 623; *Edwards v. Bremer*, 2 M. & W. 375; per Lord Campbell, C. J., *Nicholson v. Borer*, 1 E. & E. 172.

(p) Judgment of Willes, J., *Bolton v. Lancashire and Yorkshire Rail-*

§ 7.—AVOIDANCE OF VOLUNTARY CONVEYANCES AND TRANSFERS.

PART VII.
CHAP. XI.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 91. “Any settlement of property made by a trader (*q*), not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this act, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement unless the parties claiming under such settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlements, be void against such trustee. Any covenant or contract made by a trader, in consideration of marriage for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under this act.

Avoidance of
voluntary
settlements.

“Settlement shall for the purposes of this section include any conveyance or transfer of property.”

It has been long an established principle in bankruptcy, that an assignment of all the goods of a debtor as a security for a past debt is invalid, and this principle seems to be clearly included in this section.

There are cases, however, where a bill of sale is, upon an advance being made, agreed to be given, and afterwards is given, in which cases the bill of sale has been held to have a consideration relating back to the time of the advance (*r*).

Where the debtor gave a bill of sale of all his property, worth about 700*l.*, to a creditor for securing 55*l.* borrowed, and, in pursuance of an agreement, gave successive bills of sale every twenty-one days, to avoid registration under the Bills of Sale Act,

way Co., 35 L. J. (N. S.) C. P. 137. For the various cases on the subject of stoppage *in transitu*, see 1 Smith's Leading Cases, 5th edition, pp. 729—747. As to how far a reliance on the right to stop *in transitu* may operate as an affirmation of a fraudulent contract, see *Clough v. London and North Western Railway*, 41 L. J. (N. S.) Ex. 17.

(*q*) As to who are traders, see *ante*, p. 221.

(*r*) Mellish, L. J., *Ex parte*

Cohen, Re Sparke, 41 L. J. (N. S.) Bankr. 18; commenting on *Bittleston v. Cooke*, 6 E. & B. 296; 25 L. J. (N. S.) Q. B. 281; *Harris v. Ricketts*, 4 H. & N. 1; 28 L. J. (N. S.) Ex. 197; *Hutton v. Cruttwell*, 1 E. & B. 15; 22 L. J. (N. S.) Q. B. 78; *Penneil v. Reynolds*, 11 C. B. Rep. (N. S.) 707. “In all those cases the agreement to give the bills of sale was binding on the debtor and was for the benefit of the creditor.”

but the last bill of sale was registered, and a petition for liquidation was shortly afterwards filed, it was held, that the bill of sale was void, as a device for the benefit of the debtor, it being obvious that the debtor did not agree to give a fresh bill of sale for the benefit of the creditor (s).

§ 8.—AVOIDANCE OF FRAUDULENT PREFERENCES.

“The Bankruptcy Act, 1869,” enacts that—

Avoidance of
fraudulent
preferences.

Sect. 92. “Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration.”

Although the preceding section is new, “The Bankruptcy Act, 1869,” being the first statute containing any enactment as to fraudulent preference, it introduced no new principle into the law. Long before the passing of that act there had been rules relating to fraudulent preference clearly laid down; and those rules were not in any substantial degree modified or altered by the act. Before the act it had been laid down that in order to constitute fraudulent preference it was essential that two things should concur. First, there must be a voluntary payment; secondly, the payment must be made in contemplation of bankruptcy. As to the first point, it had been decided that an earnest *bonâ fide* threat would deprive a payment made under it of that voluntary character which made it impeachable. With regard to the second point, it had been held that when the payment had been made by a person in a hopeless state of insolvency, it had been made in contemplation of bankruptcy. There were numerous instances of cases in which payment, in the ordinary course, of a bill of exchange which had been presented at maturity, or the payment of debts which had become due in a particular manner or time, had been held not to be open to objection on the ground that they were voluntary payments. To hold them to be otherwise would impede and embarrass the ordinary transactions of commerce. If sect. 92 had merely enacted that “every payment made to a creditor shall, if the person making the same become bankrupt within three months after making the same, be deemed fraudulent and void,” it would have put an end to any question that could be raised as to contemplation of bank-

(s) *Ex parte Cohen, Re Sparke*, 41 L. J. (N. S.) Bankr. 17.

ruptey. But a qualification has been added, namely, that in order to be fraudulent, the payment must have been made "with a view of giving such creditor a preference over the other creditors." These words are the very life and essence of the provision, and, therefore, unless it is made clear that the object of the payment was the preference of one creditor over another, the payment cannot be impeached. If the act of the debtor can be referred to any other motive than that of giving one creditor preference above another, the payment would not be fraudulent or void. That this is the meaning of the act is made clearer by the proviso at the end of the section, to the effect that the section shall not affect the rights of a purchaser, payee, or incumbrancer "in good faith and for valuable consideration." As a matter of construction, it may be doubtful to what persons the words "for valuable consideration" were meant to apply; but the payee must clearly act in good faith (*t*).

Therefore to bring a case within the new section it must be within the old law (*u*). The law is thus stated by Lord Mansfield in the earliest case on the subject: "If a man about to become bankrupt, and knowing that the law intends that the creditors shall share equally in the property, voluntarily, and not upon pressure, does an act which contravenes the spirit of those bankrupt laws, the goods, or the money delivered or paid over, can be recovered back from the person to whom he may have only paid a just debt" (*x*). The law, as thus defined, was recognized and adopted in the latest case previous to "The Bankruptcy Act, 1869" (*y*).

(*t*) See judgment of Bacon, C. J., *In re Cheesebrough, Ex parte Hitchcock*, 40 L. J. (N. S.) Bankr. 81; see also judgments of the Lords Justices, *In re Craven, Ex parte Tempest*, 40 L. J. (N. S.) Bankr. 22.

(*u*) James, L. J., *In re Craven, Ex parte Tempest*, 40 L. J. (N. S.) Bankr. 24.

(*x*) *Alderson v. Temple*, 4 Burr. 2235.

(*y*) *Marks v. Feldman*, in the Exchequer Chamber, Law Rep., 5 Q. B. 283; 39 L. J. (N. S.) Q. B. 107. "In some of the cases exception has been taken to the direction given to the jury by the judge; in others it has been contended that the inference drawn by the jury was not justified by the evidence. But the courts in dealing with these questions seem never to have departed from the rules originally established, and although it is true that in some of the earlier cases a stronger case, or rather a stronger degree of pressure, appears to have been required in order to de-

prive the debtors' act of that spontaneity which is requisite in order to set aside the transaction, it is no less true that in later cases it has been held that a demand or request made by a creditor although not accompanied by any threat or expressed in angry, or even any urgent terms, is still sufficient to deprive the act of a voluntary character. In *Hurst v. Mortimer* (10 B. & C. 44), Lord Tenterden said that some of the previous cases had gone too far as against the creditor; and in *Edwards v. Glyn* (2 E. & E. 29; 28 L. J. (N. S.) Q. B. 350) two of the judges referring to the same point, and contrasting the more recent with the former decisions, observed that the tide had turned." Bacon, C. J., *Ex parte Craven*, 39 L. J. (N. S.) Bankr. 35 (affirmed on appeal, 40 *Id.* Bankr. 22), where most of the authorities will be found. See the law applied to the mortgage of ships, *The Heart of Oak*, 39 L. J. (N. S.) Adm. 15.

The following cases have been expressly decided under sect. 92:—

A mortgage to secure a previous debt, executed upon a demand for security and considerable pressure, although accompanied by a desire on the part of the debtor to make the creditor, who was a personal friend, secure, was upheld, as well on the ground that it was not voluntary as that it came within the proviso as being executed in good faith and for a valuable consideration (*z*).

Where traders in a hopeless state of insolvency, three days before they suspended payment, paid in the ordinary course of business, and without any motive for favouring the payee, a considerable sum to a creditor, who received it *bonâ fide*, the payment was upheld (*a*).

It is to be observed, that the question whether what is alleged to have been a preference, was voluntary or not, is one of fact, and has been at all times so stated and considered. It is for a jury, if the question arises before them, to say whether or not the just inference from the evidence is that the act done was voluntary on the part of the debtor; and if the like duty is to be discharged by the judge, the same rules must guide his judgment as ought to influence a jury in pronouncing their verdict (*b*).

Question of fact for a jury.

Protection of certain transactions with bankrupt.

§ 9.—PROTECTION OF CERTAIN TRANSACTIONS.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 94. “Nothing in this act contained shall render invalid—

- (1) Any payment made in good faith and for value received to any bankrupt before the date of the order of adjudication by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:
- (2.) Any payment or delivery of money or goods belonging to a bankrupt, made to such bankrupt by a depositary of such money or goods before the date of the order of adjudication, who had not at the time of such payment or delivery notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication:

(*z*) *In re Craven, Ex parte Tempest*, 40 L. J. (N. S.) Bankr. 22 (Lords Justices), affirming judgment of Bacon, C. J., 39 L. J. (N. S.) Bankr. 33. In this case the ruling under the former Act, in *Brown v. Kempton*, 19 L. J. (N. S.) C. P. 169; was cited approvingly.

(*a*) *In re Cheesebrough, Ex parte Hitchcock*, 40 L. J. (N. S.) Bankr. 79.

(*b*) Judgment of Bacon, C. J., *Ex parte Craven, Re Craven*, 39 L. J.

(N. S.) Bankr. 37. The former rule in bankruptcy that if a bankrupt fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods in trover, but that if they affirm the contract, then the creditor may set off the debt, still holds good. See the rule in the notes to *Smith v. Hodson*, 2 Smith's Leading Cases, 5th edition, pp. 118—123, and *post*, Chap. XIII.

- (3.) Any contract or dealing with any bankrupt, made in good faith and for valuable consideration before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

Sect. 95. "Subject and without prejudice to the provisions of this act relating to the proceeds of the sale and seizure of goods of a trader (*d*), and to the provisions of this act avoiding certain settlements (*e*), and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings (*f*), the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy,—

Protection of certain transactions entered into by or in relation to the property of the bankrupt.

- (1.) Any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise howsoever made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication :
- (2.) Any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication :
- (3.) Any execution or attachment against the goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication" (*g*).

The provision of sect. 95, which declares the validity of conveyances, &c. made in good faith and for valuable consideration before the date of the order of adjudication, is subject to, and not in contravention of, the existing law (*h*). There is, for example, nothing inconsistent between it and the provision of the Partnership Act, 28 & 29 Vict. c. 86 (*i*).

(*d*) See sect. 87, *post*, p. 324.

(*e*) See sect. 91, *ante*, p. 317.

(*f*) See sect. 92, *ante*, p. 318.

(*g*) As to the corresponding provisions of former bankrupt acts, see the notes to *Cooper v. Chitty*, 1 Smith's Leading Cases, 5th edition,

pp. 436—449.

(*h*) *Ex parte Macarthur*, *In re Ramsden*, 40 L. J. (N. S.) Bankr. 86.

(*i*) *Id.* And see as to this act, *post*, Chap. XIV., § 2.

§ 10.—EFFECT OF BANKRUPTCY ON PROPERTY TAKEN IN EXECUTION.

The effect of bankruptcy on property taken in execution, and where the process has been partially or wholly executed, has been a fruitful source of litigation (*k*).

Sub-sects. (2) and (3) of sect. 95 (*ante*, p. 321) relate to cases where the seizure is *after* the act of bankruptcy.

A consequence of the doctrine that the title of the trustee has relation back to the time of the act of bankruptcy, was, that if a sheriff levied after the act of bankruptcy under an execution against the bankrupt, he levied, not upon the goods of the bankrupt, but upon the goods of the assignee, and was a wrongdoer as against him and liable to an action for the value of the goods.

Provisions were introduced into the bankrupt acts to meet the injustice resulting from the liability of the sheriff for levying an execution when he was ignorant of the circumstance rendering him liable to an action; and sect. 95 of the present act accordingly gives protection to the seizure and sale, before the order of adjudication, but after an act of bankruptcy of which the creditor had no notice (*l*).

This special protection does not apply to where the seizure is before the act of bankruptcy, for no protection is required in that case, as the act of bankruptcy could not have any effect on the execution; and notice of an act of bankruptcy after the seizure could have no more effect than the act of bankruptcy itself (*m*).

(*k*) The seizure of goods by the sheriff does not vest any property whatsoever in the creditor under whose writ the seizure is made. The property which is vested in the sheriff by seizure is merely that which results from his being appointed officer of the law, and to enable him to sell the goods and raise the money, not that thereby the property is taken out of the debtor. The goods are, in substance, *in custodia legis*; the seizure by the officer is for the benefit of those who are by law entitled; it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. *Giles v. Grover* (House of Lords), 1 Cl. & F. 72; 9 Bing. 128; 6 Bligh, N. S. 277; see judgment of Bacon, C. J., *Ex parte Rayner, In re Johnson*, 41 L. J. (N. S.) Bankr. 26.

(*l*) See judgment of Martin, B., in *Slater v. Pinder*, 40 L. J. (N. S.) Ex. 146.

(*m*) *Edwards v. Scarsbrook*, 3 B. & S. 280; 32 L. J. (N. S.) Q. B. 45;

Ex parte Todhunter, Law Rep., 10 Eq. 429; 39 L. J. (N. S.) Bankr. 17; *Slater v. Pinder*, 40 L. J. (N. S.) Ex. 146; affirmed on error, 41 *Id.* 66; *Ex parte Roewe, Re Hall*, 40 L. J. (N. S.) Bank. 70; *Ex parte Bailey, In re Jecks*, 41 L. J. (N. S.) Bankr. 1. A former bankrupt act, 12 & 13 Vict. c. 106, s. 184, enacted that no creditor having security for his debt of the goods and chattels of the bankrupt, should receive upon such security more than a rateable part of such debt, except in respect of an execution levied by seizure and sale before the date of the fiat or the filing of the petition. Upon this section the Court of Queen's Bench held in *Edwards v. Scarsbrook*, 3 B. & S. 280; 32 L. J. (N. S.) Q. B. 45, that when the order of things was—(1) Seizure; (2) Act of bankruptcy and notice; (3) Sale; and (4) Adjudication; the execution creditor was entitled to the proceeds of the goods; and the Court of Exchequer held in *Young v. Roebuck*, 2 H. & C. 296;

Executed in Good Faith.—The words “good faith” in the section, so far as executions are concerned, mean “really intended to be executed for a *bonâ fide* debt (*n*), and they refer to the conduct of the execution creditor, not that of the bankrupt” (*o*).

Notice of Act of Bankruptcy.—In order to constitute notice of an act of bankruptcy there ought to be a notice of the happening of facts which amount to an act of bankruptcy, and which turn out to be so (*p*).

When between the seizure and sale the bankrupt’s attorney wrote to the execution creditors’ attorney “B. (the bankrupt) made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at,” it was held that this was not notice of an act of bankruptcy, although, in fact, the assignment referred to in the letter did amount to an act of bankruptcy (the assignment being for the benefit of creditors, and, consequently, an act of bankruptcy under sect. 6, sub-sect. 1); for the letter did not disclose the fact that it was for the benefit of creditors (*q*).

To whom Notice of Act of Bankruptcy may be given.—Notice to the attorney of the execution creditor, acting in the execution, is the same as notice to the creditor himself (*r*).

But notice to the attorney’s clerk, though at the office of the principal, is not sufficient, at least not unless he has full discretion

32 L. J. (N. S.) Ex. 260, that where the adjudication preceded the sale, the assignee was the party entitled under sect. 184. This section was, however, repealed, and has not been re-enacted; see judgment of Martin, B., *Slater v. Pinder*, 40 L. J. (N. S.) Ex. 150. Bacon, C. J., in bankruptcy, had held that although the section was not in terms re-enacted, the effect and spirit and meaning were preserved for the purpose of effecting that equal distribution of the bankrupt’s estate which it has always been the policy of the bankrupt laws to effectuate; but although Bramwell, B., also appears to have formed a similar opinion (see *Slater v. Pinder*, supra), the law must now be taken as stated in the text. See judgment of Bacon, C. J., *Ex parte Rayner, Re Johnson*, 41 L. J. (N. S.) Bankr. 26.

(*n*) Parke, B., *Edwards v. Cooper*, Nisi Prius, cited in 1 Smith’s Leading

Cases, 5th edition, p. 438.

(*o*) *Belcher v. Magnay*, 12 M. & W. 102; see *Stansfield v. Cubitt*, 2 G. & J. 222; 27 L. J. (N. S.) Ch. 266. Although the dicta in these cases were expressed in reference to the words “bonâ fide” in a previous bankrupt act, they are clearly applicable to the present act.

(*p*) Blackburn, J., *Evans v. Hallam*, 40 L. J. (N. S.) Q. B. 232. A general notice, however, that J. S. has committed an act of bankruptcy is sufficient. *Udall v. Walton*, 14 M. & W. 254.

(*q*) *Evans v. Hallam*, supra. See the various cases under former acts collected in 1 Smith’s Leading Cases, 5th edition, pp. 440, 441; the notes to *Cooper v. Chitty*, 1 Burr. 417.

(*r*) Cockburn, C. J., *Evans v. Hallam*, supra; *Rothwell v. Timbrell*, 1 Dowd., N. S. 778; and see *Brewin v. Briscoe*, 28 L. J. (N. S.) Q. B. 329.

as to issuing or countermanding the execution (*s*). Nor is notice to the sheriff or his officer sufficient (*t*).

In reference to the question as to the person who must have notice it has been laid down that "the knowledge or ignorance of the person who *actually*, not constructively, deals with the bankrupt, as to any prior act of bankruptcy is the material question" (*u*).

Sub-sects. 2 and 3 of sect. 95 are to be read subject to the following provision, which requires the retention for fourteen days of the proceeds of the sale of goods of a trader taken in execution on a judgment exceeding 50*l.*, and, moreover, such an execution is itself an act of bankruptcy (*x*).

"The Bankruptcy Act, 1869," enacts that—

Sect. 87. "Where the goods of any trader (*y*) have been taken in execution in respect of a judgment for a sum exceeding fifty pounds and sold, the sheriff, or in the case of a sale under the direction of the county court, the high bailiff, or other officer of the county court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition (*z*) having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

The sixth section of the act having made an execution against a debtor, a trader, to obtain payment of not less than fifty pounds, levied by seizure and sale, an act of bankruptcy (*a*), the sheriff, except for the 87th section, would have been bound to pay the execution creditor the amount of the levy immediately upon its realization, and at the same time, upon the adjudication of the execution debtor to be bankrupt, would have been liable to pay the

(*s*) *Pike v. Stephens*, 12 Q. B. Rep. 465; *Pennell v. Stephens*, 7 C. B. Rep. 987.

(*t*) *Ramsey v. Eaton*, 10 M. & W. 22.

(*u*) *Green v. Steer*, 1 Q. B. Rep. 710; see 1 Smith's Leading Cases, 5th edition, p. 439 (where *Parcett v. Fearne*, 6 Q. B. Rep. 20, so far as it does not accord with the proposition in the text, is impugned). Although *Green v. Steer* was decided under a former act, it seems equally applicable to the present act.

(*x*) *Ex parte Keys*, 39 L. J. (N. S.) Bankr. 28; and see *Ex parte Rayner, In re Johnson*, 41 L. J. (N. S.) Bankr. 26, noticed *ante*, p. 323.

(*y*) That is to say, a trader at the time of the proceedings in bankruptcy, and not merely when the debt was contracted. *Ex parte Bailey, In re Jecks*, 41 L. J. (N. S.) Bankr. 1.

(*z*) "Or petition for liquidation," as the case may be. See *Ex parte Keys*, 39 L. J. (N. S.) Bankr. 28.

(*a*) See *ante*, p. 231.

value of the goods seized, to the trustee, by the operation of the doctrine of relation back as provided for by sect. 11 (*b*). This section (87) is enacted for the avoidance of this injustice, and also, it may be, to put such a creditor in the same position as the general creditors (*c*). Its immediate object is plainly to prevent the execution creditor, even after the sheriff has sold, from receiving the proceeds of such sale (*d*); and, although the act of bankruptcy is not complete under sect. 6, until sale as well as seizure, yet where goods of a trader are seized in execution on a judgment debt exceeding 50*l.*, before bankruptcy, and bankruptcy supervenes, the trustee may obtain an order restraining the sale; for as a sheriff who has sold, having notice of bankruptcy, is under sect. 87 to hold the proceeds upon trust to pay to the bankruptcy trustee, the latter is entitled in equity (and the bankruptcy court is a court of law and equity) to restrain the sale. It would be strange if the bankruptcy trustee could not exercise an option whether he will or will not incur the expense of a sale which might not only be burthensome to the estate, but which might be positively disadvantageous. A sale by auction of the fixtures in the shop or manufactory of a bankrupt trader might be mere waste or destruction, and a multiplicity of cases might be suggested in which it would be obviously to the interests of the creditors that a sale should be prevented. As an order, therefore, restraining the sale may be obtained, so, also, an order may be made that possession of the goods be given up (*e*).

Although sect. 87 refers, in terms, to the case of a bankruptcy petition against a trader, it clearly includes the case of a petition by the trader for liquidation by arrangement (*f*).

As to interpleader by sheriff on claims made in cases of bankruptcy see the Interpleader Act, 1 & 2 Will. 4, c. 58 (*g*), and as to staying proceedings, see sect. 13 of "The Bankruptcy Act, 1869," *ante*, p. 249.



§ 11.—DISCLAIMER OF ONEROUS PROPERTY.

"The Bankruptcy Act, 1869," enacts that—

Sect. 23. "When any property of the bankrupt acquired by the trustee under this act consists of land of any tenure burdened with

Disclaimer as to onerous property.

(*b*) See *ante*, p. 308.

(*c*) Martin, B., *Slater v. Pinder*, 40 L. J. (N. S.) Ex. 151.

(*d*) Bacon, C. J., *Ex parte Rayner, In re Johnson*, 41 L. J. (N. S.) Bankr. 29.

(*e*) *Ex parte Rayner, In re Johnson*, 41 L. J. (N. S.) Bankr. 26.

(*f*) See *post*, Chap. XVI. The

case of *Ex parte Rayner, In re Johnson, supra*, was the case of a petition for liquidation by arrangement.

(*g*) See the cases on this statute, 1 Smith's Leading Cases, 5th edition, p. 449, notes to *Cooper v. Chitty*. As to interpleader in the county court, see *ante*, Vol. I. p. 356.

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onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy" (*h*).

Limitation
of time for
disclaimer.

Sect. 24. "The trustee shall not be entitled to disclaim any property in pursuance of this act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application or such further time as may be allowed by the court declined or neglected to give notice whether he disclaims the same or not."

The above provisions, coupled with sect. 15 (*ante*, p. 308) and the interpretation clause as to property (s. 4, *ante*, p. 201), render obsolete a previously important branch of the law of bankruptcy, relating to the title of the assignees to land under leases (*i*).

"The Bankruptcy Rules, 1871," provide with respect to disclaimer of leasehold interest, that—

Rule 28. "Where any property of a bankrupt acquired by a trustee under 'The Bankruptcy Act, 1869,' shall consist of a leasehold interest, the trustee shall not execute a disclaimer of the same without the leave of the court being first obtained for that purpose; and upon any application to the court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the court shall direct, and such order shall be made thereon as the court shall think fit."

Section 23, however, is not free from difficulty in its construc-

(*h*) As to the amount of proof under this section, see *post*, Chap. XIII., § 5.

(*i*) See the notes to *Mills v. Auriol*, and *Auriol v. Mills*, 1

Smith's Leading Cases, 5th edition, pp. 769—775; and Smith's Landlord and Tenant, by Maude, pp. 302—306.

tion. It has been held by the Court of Exchequer, that, although upon the execution of a disclaimer, a lease is to be deemed to have been surrendered on the date of the order of adjudication, nevertheless the liability for rent accruing due before the disclaimer, but after the adjudication, is not taken away. The court differed in opinion without giving any formal decision as to whether the section is confined to cases (so far as regards leases) between lessor and lessee, or whether the lease is to be deemed to be surrendered as respects all persons, so that on the bankruptcy of an assignee the assignor would be released from liability to the original lessor (*k*).

§ 12.—PROPERTY DEFEASIBLE ON BANKRUPTCY.

An interest in property may be limited so as to cease or be forfeited on bankruptcy. Unless, however, the gift over or the cesser of the interest is either expressly or by necessary inference made to take effect on bankruptcy, the right of the bankruptcy trustee will not be excluded. Thus, if the instrument creating the interest appears to contemplate alienation as the sole ground of forfeiture, this will be construed to mean a voluntary act of alienation, and not a proceeding which operates *in invitum*, like bankruptcy (*l*), but otherwise in the case of liquidation by arrangement (*m*). Interests defeasible upon bankruptcy can only be limited in property belonging to some person other than the party to whom the interest is given. It is contrary to the policy of the law to allow a man to settle his own estate so as to give himself an interest to cease on his bankruptcy; and it is immaterial in a case of this sort that the provision for the cesser of the interest is followed by a limitation over in favour of the settlor's wife and children, or of any other person (*n*).

Still a limitation over is valid, even where the settlor is himself the person to whom such defeasible interest is limited, provided the settlement is founded on a valuable consideration, such as marriage (*o*). And if a man receives a portion with his wife, a settlement of his own property, or a contract by him to pay a sum of money to trustees, to take effect on his bankruptcy, will be good to the extent of the fortune received from the wife (*p*). And there is nothing to prevent the property of a woman on her marriage

(*k*) *Smyth v. North*, 41 L. J. (N. S.) Ex. 103. See as to the former bankruptcy law, bearing on this point, *Manning v. Flight*, 3 B. & Ad. 211; *Taylor v. Young*, 3 B. & A. 521.

(*l*) *Doe v. Bevan*, 3 M. & S. 353; *Shee v. Hale*, 13 Ves. 404; *Lear v. Leggett*, 2 Sim. 479; *Whitfield v. Prickett*, 2 Keen, 608.

(*m*) *Lady Amherst's Trusts*, 41 L. J. (N. S.) Ch. 222.

(*n*) Robson's Bankruptcy Law, p. 320, citing *Higinbotham v. Holme*, 19 Ves. 88; *Phipps v. Ennismore*, 4 Russ. 131; *Whitmore v. Mason*, 2 J. & H. 204; *Ex parte Boddam*, 2 D. F. & J. 427.

(*o*) *Brooke v. Pearson*, 27 Beav. 181.

(*p*) *Ex parte Cooke*, 8 Ves. 353; *Ex parte Hodgson*, 19 Ves. 206.

being settled so as to give an interest in it to her husband, determinable upon his bankruptcy (*q*), and a legacy acquired by the wife after marriage may, by virtue of her equity to a settlement, be settled in the same way (*r*).

Where the intention of the settlor is clear to limit an interest for life, determinable on bankruptcy, effect will be given to such intention, although the donee may have become bankrupt before the execution of the settlement, and the latter apparently contemplated a future bankruptcy (*s*).

If, before the property is dealt with in the bankruptcy, the latter is annulled, no forfeiture will ensue (*t*), but a forfeiture will be caused by a past bankruptcy which remains unannulled at the time at which the first payment under the gift for life becomes due, although the bankruptcy is afterwards annulled, and before any claim is made by the persons entitled under the gift, for the retention by the trustee on the bankruptcy in accordance with the trust causes a forfeiture just as much as a payment to another person (*u*).

Leases determinable on Bankruptcy.—Cases where leases or terms cease on bankruptcy by express agreement, constitute a distinct class. When a term ceased, by proviso, on the tenant's bankruptcy, it was held that the assignees could not justify the removal of a trade fixture after the expiration of a reasonable time for that purpose. Whether they might have removed it within such reasonable time was not decided (*x*).

§ 13.—EFFECT OF BANKRUPTCY IN MISCELLANEOUS MATTERS.

Apprentices and Articled Clerks.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 33. “Where at the time of the presentation of the petition for adjudication any person is apprenticed or is an articled clerk to the bankrupt, the order of adjudication shall, if either the bankrupt or apprentice or clerk give notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement; and if any money has been paid by or on behalf of such apprentice or clerk to the bankrupt as a fee, the trustee may on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as such trustee, subject to an appeal to the court, thinks reasonable, out of the bankrupt's property to or for the use of the apprentice or clerk,

(*q*) *Lockyer v. Savage*, Str. 947.

(*r*) *Montefiore v. Behrens*, Law Rep., 1 Eq. 171.

(*s*) *Manning v. Chambers*, 1 D. & S. 282; *Seymour v. Lucas*, 1 D. & S. 177; *Re Muggeridge's Trust*, 1 John. 625; *Sharp v. Cosserat*, 20 Beav. 470; *Lloyd v. Lloyd*, Law Rep., 2 Eq. 722; cited in Robson's B. L., p. 323.

(*t*) *Smalleombe v. Olivier*, 13 M. & W. 77; *White v. Chitty*, L. R., 1

Eq.; 35 L. J. (N. S.) Ch. 343; see *Trappes v. Meredith*, 41 L. J. (N. S.) Ch. 237.

(*u*) *Re Parnham's Trusts*, 41 L. J. (N. S.) Ch. 292.

(*x*) *Weeton v. Woodcock*, 7 M. & W. 14; see also *Stansfield v. Mayor of Portsmouth*, 4 C. B. Rep., N. S. 120; *Dumergue v. Rumsey* (in error), 2 Hurls. & C. 777; 33 L. J. (N. S.) Ex. 88.

regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture or articles before the commencement of the bankruptcy, and to the other circumstances of the case.

“Where it appears expedient to a trustee he may, on the application of any apprentice or artieled clerk to the bankrupt, or any person acting on behalf of such apprentice or artieled clerk, instead of acting under the preceding provisions of this section, transfer the indenture of apprenticeship or articles of agreement to some other person” (y).

Rent.—A discharge in bankruptcy did not take away the right to distrain (z). “The Bankruptcy Act, 1869,” enacts that—

Sect. 34. “The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year’s rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available.”

Power for
landlord to
distrain for
rent.

Sect. 34 has been held to be applicable to cases where, by agreement or act of parliament, the relation of landlord and tenant and a right of distress exists; as a distress for gas rent under a local statute (a).

Right to Farm Crops.—In the case of the bankruptcy of any person engaged or employed in husbandry on any lands let to farm, “any hay, straw, grass or grasses, turnips, or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed or other dressings intended for such land, and being thereon,” cannot be taken, used or disposed of in any other manner or for any other purpose than such bankrupt ought to have taken, used or disposed of the same (b).

Convicts.—The bankruptcy of a convict has the effect of making him thenceforth cease to be subject to the operation of certain provisions of the act 33 & 34 Vict. c. 23, abolishing forfeitures for treason and felony, and otherwise amending the law relating thereto (c). It is unnecessary, however, to do more than refer to the act, which, so far as it affects bankrupts, can be but of rare application.

(y) Bankruptcy does not of itself operate as a dissolution of contracts of service; see *Thomas v. Williams*, 1 A. & E. 685. As to the payment of wages in full, see *post*, Chap. XIV., § 2.

(z) *Briggs v. Sowry*, 8 M. & W. 729; *Newton v. Scott*, 9 M. & W. 434; 10 *Id.* 471; *Phillips v. Sherrill*, 6 Q. B. Rep. 944.

(a) *Ex parte Birmingham and Staffordshire Gaslight Co., Re Fanshaw*, 40 L. J. (N. S.) Bankr. 52.

(b) 56 Geo. 3, c. 50, s. 11. This provision is of general application (see *Wilmot v. Rose*, 3 E. & B. 563), but is only noticed here in reference to bankrupts.

(c) See sect. 7 of that act.

CHAPTER XII.

OF GETTING IN THE BANKRUPT'S PROPERTY.

- § 1.—TAKING POSSESSION OF PROPERTY IN GENERAL.
 § 2.—DEALINGS WITH PROPERTY OF A PARTICULAR KIND.
 § 3.—DELIVERY OF MONEY AND SECURITIES BY AGENTS.
 § 4.—APPROPRIATION OF PENSION OR SALARY.
 § 5.—ACTIONS AND SUITS IN RESPECT OF THE PROPERTY.
 § 6.—DISCOVERY OF PROPERTY.
 § 7.—SEIZURE OF PROPERTY BY WARRANT.
 § 8.—SALE AND MORTGAGE OF PROPERTY.
 § 9.—TAKING ACCOUNTS OF PROPERTY MORTGAGED OR PLEDGED,
 AND OF THE SALE THEREOF.



§ 1.—TAKING POSSESSION OF THE PROPERTY IN GENERAL.

“The Bankruptcy Act, 1869,” makes ample provision for securing the debtor’s property for his creditors. Even before adjudication and at any time after presentation of the petition, the court may appoint a receiver or manager of the property or business of the debtor or of any part thereof, “and may direct immediate possession to be taken of such property or business or any part thereof” (*a*).

On adjudication the property vests first in the registrar as trustee and then in the person appointed trustee by the creditors (*b*), and the trustee, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, is in the same position in all respects as if he were a receiver of such property appointed by the Court of Chancery, and the court may, on his application, enforce such acquisition or retention of property accordingly (*c*). On the other hand the bankrupt is bound to give an inventory of it (*d*); and further, he is punishable if he fails to deliver up possession to the trustee of any part of it (*e*).

(*a*) See sect. 13, *ante*, p. 249.

(*b*) See *ante*, p. 307. And as to what is included in property, see *ante*, p. 201, n. And as to what property is divisible amongst the creditors, see sect. 15, *ante*, p. 308. As to disclaimer of property, see sects. 23

and 24, *ante*, pp. 325, 326.

(*c*) Sect. 20, *ante*, p. 279.

(*d*) See sect. 19, *ante*, p. 289. As to delivery of property to trustee by receiver or manager, see “The Bankruptcy Rules, 1871,” r. 2, *ante*, p. 251.

(*e*) *Id.*

§ 2.—DEALINGS WITH PROPERTY OF PARTICULAR KIND.

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Stock and Shares, Copyholds, Choses in Action, Deeds and Books.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 22. “Where any portion of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office, or person, the right to transfer such property shall be absolutely vested in the trustee to the same extent as the bankrupt might have exercised the same if he had not become bankrupt. Where any portion of such estate consists of copyhold or customary property, or any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to such property, but may deal with the same in the same manner as if such property had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly.”

Possession of
property by
trustee.

“Where any portion of the property of the bankrupt consists of things in action, any action, suit, or other proceeding for the recovery of such things instituted by the trustee, shall be instituted in his official name, as in this act provided; and such things shall, for the purpose of such action, suit, or other proceeding, be deemed to be assignable in law, and to have been duly assigned to the trustee in his official capacity” (*f*).

“The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other property capable of manual delivery. The trustee shall keep, in such manner as rules of court shall direct, proper books, in which he shall from time to time make, or cause to be made, entries or minutes of proceedings at meetings, and of such other matters as rules of court shall direct, and any creditor of the bankrupt may, subject to the control of the court, personally or by his agent inspect such books.”

Delivery of Securities.—“The Bankruptcy Rules, 1870,” provide that—

Rule 117. “Where an order of adjudication has been made upon the petition of a secured creditor, who has been admitted as the petitioning creditor to the extent of the balance of the debt due to him after deducting the amount estimated by the creditor, as the value of his security, he shall upon the application of the trustee, made within two months after the date of the order of adjudication, give up the security to the trustee upon the payment to him of the value so estimated, and where the trustee does not so apply within such term he shall be considered to have waived his right to redeem the security by payment of such estimated value.”

Sect. 6.

Sequestration.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 88. “Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration, without any writ or other proceeding, and

Sequestra-
tion of ec-
clesiastical
benefice.

(*f*) See sect. 111 of the act, *post*, p. 336.

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the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy, except a sequestration issued before the date of the order of adjudication by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication; but the sequestrator shall allow out of the profits of the benefice to the bankrupt, while he performs the duties of the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situate directs; and the bishop may appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident."



§ 3.—DELIVERY OF MONEY AND SECURITIES BY AGENTS.

"The Bankruptcy Act, 1869," enacts that —

Payment of
money by
agents to
trustee.

Sect. 93. "Any treasurer or other officer, or any banker, attorney, or agent of a bankrupt, shall pay and deliver to the trustee all moneys and securities in his possession or power, as such officer or agent, if he be not by law entitled to retain as against the bankrupt or the trustee; if he do not he shall be guilty of a contempt of court, and may be punished accordingly on the application of the trustee."

No. 85. *Affidavit of Trustee under Sect. 93.*

"The Bankruptcy Act, 1869."

Sect. 93.

In the London Bankruptcy Court [or the county court of
holden at]].

In the matter of A. B., of , a bankrupt.

I, G. H., the trustee of the property of the said bankrupt, make oath and say:—

1. That I believe that L. M., of , hath in his possession or power as [*here set out the capacity in which the person stands to the bankrupt*] certain monies [and securities] belonging to the bankrupt, that is to say [*here set out and describe the particular monies and securities*].

2. That on the day of 187 , I did apply personally to the said L. M., to pay and deliver to me the said monies and securities, and that he did not then, nor has he since paid or delivered to me the same [or That I, on the day of , posted a letter to the said L. M., addressed to him at , calling upon him to, &c., and that on the day of 187 , I posted another letter, by which I again called upon him to, &c., and that he has failed to pay and deliver the same].

3. That I firmly believe that the said L. M. is not entitled by law to retain such monies [and securities] as against the bankrupt or against me as the trustee of the property of the bankrupt.

Sworn at, &c.

G. H.

No. 88. *Notice of Application for Committal under Sect. 93.*

"The Bankruptcy Act, 1869."

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holden at].

Sect. 93.

In the matter of A. B., of , a bankrupt.

To [here insert name, address, and description of the person to whom the notice is to be sent].

Take notice that the trustee of the property of the said bankrupt will on the day of 187 , at o'clock in the day noon, apply to this court for an order for your committal to prison for contempt of this court, you having failed to pay and deliver to him certain monies [and securities] belonging to the bankrupt in your possession or power as [here state whether as treasurer, banker, &c.] that is to say [here set out and describe the particular monies and securities]. And further take notice that you are required to attend the court on such day at the hour before stated to show cause why an order for your committal should not be made.

Dated this day of 187 .

Registrar.

No. 91. *Order of Committal under Sect. 93.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of , a bankrupt.

Upon the application of the trustee of the property of the bankrupt, and upon hearing L. M. [or if L. M. does not appear, reading the affidavit of] [here insert name and description of person by whom the notice to shew cause was served] and upon reading the affidavit of [enter evidence] the court being of opinion that L. M. has been guilty of a contempt of this court by having failed to pay and deliver to the said trustee certain monies [and securities] [here follow the notice], and that the said L. M. do stand committed to [here insert prison] for his said contempt.

Given under the seal of the court this day of 187 .

By the court,
Registrar.

§ 4.—APPROPRIATION OF PENSION OR SALARY.

"The Bankruptcy Act, 1869," enacts that—

Sect. 89. "Where a bankrupt is or has been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the crown, or is in the enjoyment of any pension or compensation granted by the treasury, the trustee during the bankruptcy, and the registrar, after the close of the bankruptcy, shall receive for distribution amongst the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension as the court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the court, with the consent in writing of the chief officer of the

Appropriation of portion of pay of officers to creditors.

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CHAP. XII.

Appropriation of portion of salary to creditors.

department under which the pay, half-pay, salary, emolument, pension or compensation is enjoyed, directs.”

Sect. 90. “Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the court, upon the application of the trustee, shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar, if necessary, after the close of the bankruptcy, to be applied by him in such manner as the court may direct.”

“The Bankruptcy Rules, 1870,” contain the following Rules on this subject—

Sect. 89. Rule 180. “Where an order of court is made under section 89 of the act, the registrar shall give to the trustee a sealed copy of the order, who shall submit the same to the chief of the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed, for the purpose of his consent to the order being written thereon.”

Sect. 90. Rule 181. “Where a trustee intends to apply to the court for an order for payment by a bankrupt of a portion of his salary or income under section 90 of the act, he shall give notice to the bankrupt of his intention of the time and place fixed for the hearing of his application, and that the bankrupt is at liberty to attend and show cause against an order being made on the application.”

Sect. 90. Rule 182. “Where an order has been made for the payment by a bankrupt, or by his employer for the time being, of a portion of his income or salary, the bankrupt may, upon his ceasing to receive a salary or income of the amount he received when the order was made, apply to the court to rescind the order, or to reduce the amount ordered to be paid by him to the trustee.”

No. 77. *Order setting aside Pay, Pension, &c. under Sect. 89.*

“The Bankruptcy Act, 1869.”

Sect. 89. In the London Bankruptcy Court [or the county court of holden at].

Rule 180. In the matter of A. B., of , a bankrupt.

Whereas it appears to the court that the said bankrupt is [or has been, here state what the bankrupt is or has been], and as such is in the enjoyment of the annual pay [or half-pay or salary or emoluments] of pounds [or pension or compensation of pounds, granted by the commissioners of her Majesty's treasury]; and whereas upon the application of G. H., of the trustee of the property of the bankrupt, it appears to the court just and reasonable that the annual sum of pounds, portion of the said pay [or, as the case may be] ought to be paid to the said trustee during the bankruptcy, and after the close of the bankruptcy, to the registrar of this court, in order that the same may be applied in payment of the debts of the said bankrupt, and that such payment ought to be paid out of the first monies which shall be due after the day of 187 , and be continued until this court shall make order to the contrary: it is ordered, subject to the consent of [here insert the official title of the chief officer of the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed],

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§ 5.—ACTIONS AND SUITS IN RESPECT OF THE PROPERTY.

The property of the bankrupt divisible amongst his creditors comprises (*inter alia*) "the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice (*e*).

The trustee is expressly empowered "to bring or defend any action, suit or other legal proceeding relating to the property of the bankrupt" (*f*). The trustee "may sue and be sued by the official name of the trustee of the property of a bankrupt," inserting the name of the bankrupt, and by that name may hold property of every description, make contracts, sue and be sued, enter into any engagements binding upon himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office (*g*).

Choses in Action.—

Power of assignee to sue.

Sect. 111. "Any person to whom anything in action belonging to the bankrupt is assigned in pursuance of this act may bring or defend any action or suit relating to such thing in action in his own name" (*h*).

As to actions by the trustee for choses in action, see sect. 22, *ante*, p. 331.

Arbitration and compromise.

As to the power of the trustee to refer disputes to arbitration and make compromises and arrangements, see sect. 27, *ante*, p. 283.

Actions in the case of Partnership.—

Suits by trustee and bankrupt's partners.

Sect. 105. "Where a member of a partnership is adjudged bankrupt, the court may authorize the trustee, with consent of the creditors, certified by a special resolution, to commence and prosecute any action or suit in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action or suit relates shall be void; but notice of the application for authority to commence the action or suit shall be given to such partner, and he may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action or suit, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the court directs."

Where the Bankrupt is a joint Contractor.—

Saving as to joint contracts.

Sect. 112. "Where a bankrupt is a contractor in respect of any contract jointly with any other person or persons, such person or persons may sue or be sued in respect of such contract, without the joinder of the bankrupt."

(*e*) See sect. 15, *ante*, p. 308.

p. 276.

(*f*) See sect. 25, sub-sect. (3), *ante*, p. 282.(*h*) As to choses in action, see sect. 15, sub-sect. (5), *ante*, p. 309; and *ante*, p. 314.(*g*) See sect. 83, sub-sect. (7), *ante*,

As to actions in general by and against the trustee in bankruptcy, see *ante*, Vol. I., pp. 628, 811.

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§ 6.—DISCOVERY OF PROPERTY.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 96. “The court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property; and if any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce such documents, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant addressed as aforesaid, cause such person to be apprehended and brought up for examination.”

Power of court to summon persons before it suspected of having property of bankrupt.

Sect. 97. “The court may examine upon oath, either by word of mouth or by written interrogatories, any person so brought before it in manner aforesaid concerning the bankrupt, his dealings or property.”

Examination of parties by court.

“The Bankruptcy Rules, 1870,” provide that—

Rule 171. “Every application to the court under section 96 of the Bankruptcy Act, 1869, shall be in writing, and shall state shortly the grounds upon which the application is made and where the application is not made on behalf of the trustee, the grounds upon which the application is made shall be verified by affidavit” (i).

Sect. 96.

No. 76. *Summons under Sect. 96 (in a County Court).*

“The Bankruptcy Act, 1869.”

In the county court of _____ holden at _____
In the matter of A. B., of _____, a bankrupt.
To X. Y. of _____

Sect. 96.

You are hereby required to attend at the court house in _____ on the _____ day of _____, in the _____ noon to give evidence in the above matter [*add where issued at instance of petitioning creditor on behalf of C. D. of _____, by whom the said petition has been presented*], and then and there to have and produce [*state any particular documents required*]: hereof if you fail, having no lawful impediment to be then made known to the court and allowed by it, the court may by warrant cause you to be apprehended and brought up for examination.

Rule 166.

Dated the _____ day of _____ 187 .

Registrar.

(i) See Rule 166, *ante*, p. 217, as to witnesses.

No. 95. *Warrant to apprehend a Person summoned under Sect. 96.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of , a bankrupt.

To X. Y., and his assistants of this court [or where warrant issues
from a county court, to the high bailiff and others the bailiffs of the said
court].

Whereas by summons or subpoena dated the day of
187 , and directed to the said A. B. [or to F. M. of], he was
required personally to be and appear on the day of
instant, at o'clock in the noon at this court, to be
examined; and which said summons or subpoena was afterwards, on the
day of 187 , as hath been proved upon oath, duly
served upon the said , and a reasonable sum was tendered him
for his expenses. And whereas the said having no lawful
impediment made known to or allowed by this court hath not appeared
before me as by the said summons or subpoena he was required, but
therein has wholly made default. These are therefore to will, require,
and authorize you and every of you to whom this warrant is directed,
immediately upon receipt hereof, to take the said and bring
him before this court on the day of in order to his
being examined as aforesaid, and for your so doing this shall be your
sufficient warrant.

Given under the seal of the court this day of
187 .

By the court,
Registrar.

"The Bankruptcy Act, 1869," enacts that—

Order of
court for
payment of
amount
admitted on
examination.

Sect. 98. "If any person on examination before the court admit he is
indebted to the bankrupt, the court may, on the application of the
trustee, order him to pay to the trustee, at such time and in such
manner as to the court seems expedient, the amount admitted, or any
part thereof, either in full discharge of the whole amount in question or
not, as the court thinks fit, with or without costs of the examination."

No. 43. *Admission of Debt by Debtor of Bankrupt.*

"The Bankruptcy Act, 1869."

Sect. 48.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of , a bankrupt.

I, the undersigned J. K. of , do hereby admit that I am
indebted to the said bankrupt in the sum of pounds, upon the
balance of accounts between myself and the said bankrupt.

Witness,

J. K.

C. D., Registrar.

No. 44. *Order to pay admitted Debt.*PART VII.
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"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 98.

In the matter of A. B., of , a bankrupt.

Whereas J. K. of , in his examination taken this day, and signed and subscribed by him, has admitted that he is indebted to the said bankrupt in the sum of pounds, on the balance of accounts between him and the bankrupt; it is ordered that the said J. K. do pay to the trustee of the property of the bankrupt, in full discharge of the sum so admitted, the sum of pounds forthwith [or if otherwise, state the time and manner of payment], and do further pay to the said trustee the sum of pounds for costs.

Given under the seal of the court this day of
187 .

By the court,
Registrar.



§ 7.—SEIZURE OF PROPERTY BY WARRANT.

"The Bankruptcy Act, 1869," enacts that—

Sect. 99. "Any person acting under warrant of the court may seize any property of the bankrupt divisible amongst his creditors under this act, and in the bankrupt's custody or possession, or in that of any other person, and with a view to such seizure may break open any house, building, or room of the bankrupt where the bankrupt is supposed to be, or any building or receptacle of the bankrupt where any of his property is supposed to be; and where the court is satisfied that there is reason to believe that property of the bankrupt is concealed in a house or place not belonging to him, the court may, if it thinks fit, grant a search warrant to any constable or prescribed officer of the court, who may execute the same according to the tenor thereof."

Seizure of
property of
bankrupt.No. 71. *Search Warrant.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [or the county court of
holden at].

Sects. 76 and
79.

In the matter of A. B., of , a bankrupt.

Rule 176.

Whereas by evidence duly taken upon oath it hath been made to appear to the court that there is reason to suspect and believe that property of the said bankrupt is concealed in the house [or other place, describing it as the case may be] of one X. M. of in the county of such house [or place] not belonging to the said bankrupt.

These are therefore to require you to enter in the daytime into the house [or other place, describing it] of the said X. M. situate at aforesaid, and there diligently to search for the said property, and if any property of the said bankrupt shall be there found by you on such search,

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that you seize the same, to be disposed of and dealt with according to the provisions of the said act.

Given under the seal of the court this _____ day of _____ 187 .
Registrar.

To the X. Y. officer of this court and his assistants [*or* high bailiff and others the bailiffs of this court].

No. 72. *Warrant of Seizure.*

"The Bankruptcy Act, 1869."

Sect. 96.

In the London Bankruptcy Court [*or* the county court of _____ holden at _____].

Rule 166.

In the matter of A. B., of _____, a bankrupt.

Whereas on the _____ day of _____ 187 , an order of adjudication was made against the said bankrupt:—These are therefore to require you, forthwith to enter into and upon the house and houses, and other the premises of the said bankrupt, and also in all other place and places belonging to the said bankrupt where any of his goods and monies are or are reputed to be; and there seize all the ready money, jewels, plate, household stuff, goods, merchandise, books of accounts, and all other things whatsoever, belonging to the said bankrupt except his necessary wearing apparel, bedding and tools, as excepted by the said statute in that behalf.

And that which you shall so seize you shall safely detain and keep in your possession until you shall receive other orders in writing for the disposal thereof from the trustee; and in case of resistance or of not having the key or keys of any door or lock of any premises belonging to the said bankrupt where any of his goods are or are suspected to be, you shall break open, or cause the same to be broken open for the better execution of this warrant.

Given under the seal of the court this _____ day of _____ 187 .
Registrar.

To the X. Y. officer of this court, and to his assistants [*or* to the high bailiff and others the bailiffs of this court].



§ 8.—SALE AND MORTGAGE OF PROPERTY.

The trustee has express power "to sell all the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction (*k*), or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company or to sell the same in parcels" (*l*), and with the sanction of the committee of inspection he may mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts (*m*).

(*k*) As to when the trustee is an auctioneer, see *ante*, p. 282, note.

(*l*) Sect. 25, sub-sect. (6), *ante*, p. 282.

(*m*) Sect. 27, sub-sect. (1); *ante*, p. 283. See also the same section as to reference of disputes to arbitration and to make compromises.

§ 9.—TAKING ACCOUNTS OF PROPERTY MORTGAGED OR PLEDGED,
AND OF THE SALE THEREOF.

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“The Bankruptcy Rules, 1870,” contain the following provisions relating to “Taking accounts of property mortgaged or pledged, and of the sale thereof:”—

Rule 78. “Upon application by motion by any person claiming to be a mortgagee of, or to have security over any part of the bankrupt’s estate or effects, real or personal, and whether such mortgage or security shall be by deed or otherwise, and whether the same shall be of a legal or equitable nature, the court will proceed to inquire whether such person is such mortgagee, or is entitled to such security, and for what consideration and under what circumstances; and if it shall be found that such person is such mortgagee, or is entitled to such security, and no sufficient objection shall appear to the title of such person to the sum claimed by him, under such mortgage or security, the court will then proceed to take an account of the principal, interest, and costs due upon such mortgage or security, and of the rents and profits, or dividends, interest, or other proceeds received by such person, or by any other person by his order or for his use, in case he shall have been in possession of the property over which the mortgage or security shall extend, or any part thereof, and the court will then direct notice to be given in such public papers as it shall think fit, when and where, and by whom and in what way the said premises or property, or the interest therein so mortgaged, or over which the security shall so extend, are to be sold, and that such sale be made accordingly, and that the trustee (unless it be otherwise ordered) shall have the conduct of such sale; but it shall not be imperative on any such mortgagee to make such application.”

Rule 79. “All proper parties shall join in the conveyance to the purchaser, where necessary, as the court shall direct.”

Rule 80. “The monies to arise from such sale shall be applied in the first place in payment of the costs, charges, and expenses of the trustee, of and occasioned by the application to the court, and of and attending such sale, and then in payment and satisfaction so far as the same shall extend of what shall be found due to such mortgagee, or person so having security, for principal, interest, and costs, and that the surplus of the said monies (if any) be paid to the trustee. But in case the monies to arise from such sale shall be insufficient to pay and satisfy what shall be so found due to such mortgagee or person so having security, then he shall be entitled to prove as a creditor for such deficiency, and receive dividend thereon rateably with the other creditors, but so as not to disturb any dividend or dividends then already made.”

Rule 81. “For the better making such inquiry and taking such account, and making a title to the purchaser, all parties may be examined by the court upon interrogatories or otherwise as it shall think fit, and shall produce before the court upon oath all deeds, papers, and writings in their respective custody or power, relating to the estate or effects of the bankrupt, as the court shall direct.”

CHAPTER XIII.

PROOF OF DEBTS.

- § 1.—DESCRIPTION OF DEBTS PROVEABLE.
- § 2.—PROOF IN CASE OF MUTUAL CREDITS, DEBTS AND DEALINGS.
- § 3.—PROOF BY SECURED CREDITORS.
- § 4.—PROOF IN THE CASE OF RENT AND PAYMENTS DUE AT STATED PERIODS.
- § 5.—PROOF WHERE PERSONS INJURED BY DISCLAIMER OF ONE-ROUS PROPERTY.
- § 6.—PROOF AGAINST SEPARATE ESTATES.
- § 7.—RULES RELATING TO PROOF OF DEBTS.



§ 1.—DESCRIPTION OF DEBTS PROVEABLE.

“The Bankruptcy Act, 1869,” enacts that—

Description
of debts
proveable in
bankruptcy.

Sect. 31. “Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be proveable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

“Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts proveable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy.

“An estimate shall be made according to the rules of the court for the time being in force, so far as the same may be applicable, and where they are not applicable at the discretion of the trustee, of the value of any debt or liability proveable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

“Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court, and the court may, if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect, and upon such order being made such debt or liability shall, for the purposes of this act, be deemed to be a debt not proveable in bankruptcy, but if the court think that the value of the debt or liability is capable of being fairly estimated it may direct such value to be

assessed with the consent of all the parties interested before the court itself without the intervention of a jury, or if such parties do not consent by a jury, either before the court itself or some other competent court, and may give all necessary directions for such purpose, and the amount of such value when assessed shall be proveable as a debt under the bankruptcy.

“ ‘Liability’ shall for the purposes of this act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money’s worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion.”

As to effect of bankruptcy on indentures of apprenticeship or articles of clerkship, see *ante*, p. 328; and as to payment of certain debts in full, see *post*, p. 357; as to mutual credits see *post*, p. 344; and as to secured creditors, see *post*, p. 346.

With referencē to the preceding section (s. 31), it is to be observed that the legislature, in act after act, had been trying to relieve bankrupts from their present and their future liabilities upon contracts; but down to the passing of this last act that object had been but very incompletely accomplished; and by the construction which the courts had put on previous acts, it was found that, notwithstanding the language used by the legislature, a bankrupt did still remain liable upon a variety of contracts which he had previously entered into. The object of the present section is that the bankrupt shall be absolutely relieved from every liability under every contract which he has ever entered into (*a*).

The determination of questions whether there is a “liability” entitling a person to prove, may, and often does, involve various branches of law and intricate points wholly beyond the province of this work to investigate.

A recent case, although under a former Bankruptcy Act, will illustrate this. N., a partner in a mercantile firm, received goods on his own account from T., and resold them, and paid in the proceeds to an account of his own with the firm, who acted in that respect as his bankers. On the bankruptcy of the partnership, with a balance at the time in N.’s favour on his account, T. claimed to prove for the amount of that balance, a larger sum being due to him from N., the claim to prove being made on the contention that the balance belonged to T., being trust money held by N. as

(*a*) See judgment of Mellish, Lord Justice, *Ex parte Llynvi Coal and Iron Co., In re Hide*, 41 L. J. (N. S.) Bankr. 7.

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his trustee and received by the bankrupts with notice of the trusts. This question of whether T. was in the position of a *cestu que trust* turned ultimately on the nature of the relationship between himself and N.; that is to say, whether N. was his *del credere* agent for the sale of the goods, or whether N. was a purchaser on his own account. On the special facts the Lords Justices, reversing the decision of the Chief Judge in Bankruptcy, held that the relationship between T. and N. was not that of principal and agent but of vendor and purchaser, so that there was no constructive trust between the bankrupt and T., and consequently no liability on which to found a proof (b).

Liability of
shareholders
in companies
wound up.

As to proof by liquidators in respect of the liability of shareholders on the winding-up of companies, see *Re Land Credit Company of Ireland, M'Ewen's case*, 40 L. J. (N. S.) Ch. 341.

Married Women.—A married woman is entitled to prove against her husband for a sum settled to her separate use (c), and she was allowed to do so in a case where the husband was trustee (d).



§ 2.—PROOF IN CASE OF MUTUAL CREDITS, DEBTS AND DEALINGS.

“The Bankruptcy Act, 1869,” enacts that—

Set-off.

Sect. 39. “Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt notice of an act of bankruptcy committed by such bankrupt and available against him for adjudication.”

The rule of mutual credit is not at all dependent upon the statute of set-off (e).

The equitable principle was adopted very early in bankruptcy, and existed long before any statute of set-off, that cross accounts should be set off one against the other, and that the balance only should be proved.

(b) *Ex parte White, In re Nevill*, 40 L. J. (N. S.) Bankr. 73.

(c) See *Ex parte Melbourn, In re Melbourn*, 40 L. J. (N. S.) Bankr. 25.

(d) *Ex parte Wells*, 2 M. D. & D. 504.

(e) 2 Geo. 2, c. 22, s. 13, made perpetual by 8 Geo. 2, c. 34, s. 4. As to set-off, see *ante*, Vol. I. p. 550.

This practice was introduced into the statute 4 Anne, c. 17, s. 11, and was continued afterwards in other statutes down to the present time (*f*).

The rights as between the trustee in bankruptcy and the claimants against or the debtors to the estate must depend upon the facts at the time of the bankruptcy (*g*).

Notice of Act of Bankruptcy, taking away the right of Set-off.]—Notice of an act of bankruptcy is the dividing point at which the right of set-off terminates; and consequently it has been held, that a person who, after bankers had actually stopped payment, industriously collected their notes for the express purpose of setting them off against a debt due from himself to the firm, should be allowed to do so, as he had no notice of any *act of bankruptcy* actually committed by either of the partners (*h*).

Equitable Claims.]—The court, in settling the debts of a bankrupt will take into account equitable claims, and equity as well as law (*i*), for it would be unjust and contrary to law to say that cross debts which, though legally due between the bankrupt and another, in truth belonged to different persons, might be set off one against the other (*k*).

Where I. was indebted to a bank and became bankrupt, and his trustee paid the proceeds of his estate into the bank, and the bankruptcy was afterwards annulled, it was held that I. might, under sect. 39, set off the money so paid in against a claim by the trustee of the bankers (who had in the meantime become bankrupt), against I. in respect of his original debt (*l*).

The mere existence, however, of an equitable lien over a particular fund, where the person having the lien does not in the slightest degree benefit or lose by the fund, does not prevent the

(*f*) See judgment of Blackburn, J., *Bailey v. Finch*, 41 L. J. (N. S.) Q. B. 83. Sect. 39 is not in the exact words of sect. 171 of the Bankrupt Act, 1849, but in substance it is the same. Martin, B., *Bailey v. Johnson*, 40 L. J. (N. S.) Ex. 192, *sed quare?* For the law and cases under the former acts see *Rose v. Hart*, 8 Taunt. 449, 2 Smith's Leading Cases, 5th edition, p. 251, and notes. *Rose v. Hart* is the leading case on the subject of *mutual credits*, and decided that mutual credits within the meaning of the bankrupt laws are *credits which must in their nature terminate in debts*.

(*g*) Blackburn, J., *Bailey v. Finch*, 41 L. J. (N. S.) Q. B. 86; Martin, B., *Bailey v. Johnson*, 40 L.

J. (N. S.) Ex. 192.

(*h*) *Dickson v. Cass*, 1 B. & Ad. 343 (accord. *Harkins v. Whitten*, 10 B. & C. 217). But it was held in the same case that he could not set off notes which he had taken after he knew that *some* of the partners had committed acts of bankruptcy. See 2 Smith's Leading Cases, 5th edition, p. 259.

(*i*) *Forster v. Wilson*, 12 M. & W. 191; 13 L. J. (N. S.) Ex. 209; cited by Blackburn J., in *Bailey v. Finch*, 41 L. J., Q. B. 87, as stating this principle.

(*k*) Blackburn, J., in *Bailey v. Finch*, *supra*.

(*l*) *Bailey v. Johnson*, 40 L. J. (N. S.) Ex. 189.

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fund being taken into account with the other, who has the legal right, and the whole of the benefit or the whole of the loss; for then he who has the legal right is really the person beneficially interested in the fund, and he may set off that fund against a debt of his own due to the bankrupt (*m*).

This position of parties may be illustrated by two recent cases.

F. kept two accounts at a bank, one private and the other as executor of a person whose residuary legatee he was. The private account was overdrawn. It was held, in the absence of any interference by the other persons interested in the will, and it appearing that F. had assets, apart from the bank, more than sufficient to meet outstanding claims under the will, that on the bankruptcy of the bank he was entitled to set off the amount standing in his favour on the executorship account against the amount claimed by the trustee on the private overdrawn account, he being in truth the person beneficially entitled to the former (*n*).

On the other hand, where a county treasurer kept a private account and a police account with a bank, and the balance was against him on the former but in his favour on the latter account, it was held, on his bankruptcy, that the bank having notice that the county had a beneficial interest, and the bankrupt being indebted to the county on the police account, it was against equity to let the bank pay off the private debt of the treasurer to them with county money, but as the balance, standing at the bank on the police account to the bankrupt's credit, exceeded the amount due from him to the county, the bank was entitled to retain it against the overdrawn private account. The decision, therefore, in effect was, that as far as the beneficial interest was not in the bankrupt, the persons in whom the beneficial interest really was, viz., the county, had an equity to interpose and prevent a set-off; but as regards the surplus there was no such equity, and the bank had a right to take the surplus (*o*).

§ 3.—PROOF BY SECURED CREDITORS.

“The Bankruptcy Act, 1869,” enacts that—

Provision as
to secured
creditor.

Sect. 40. “A creditor holding a specific security on the property of the bankrupt, or on any part thereof, may, on giving up his security, prove for his whole debt.

“He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the value of his security, in manner and at the time prescribed.

(*m*) Blackburn, J., *Bailey v. Finch*, 41 L. J. (N. S.) Q. B. 87, 88.

(*n*) *Bailey v. Finch*, 41 L. J. (N. S.) Q. B. 83.

(*o*) *Ex parte Kingston, Re Gross*, 40 L. J. (N. S.) Bankr. 91, as explained by Blackburn, J., in *Bailey v. Finch*, 41 L. J. (N. S.) Q. B. 86, 87.

"A creditor holding such security as aforesaid and not complying with the foregoing conditions shall be excluded from all share in any dividend."

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"The Bankruptcy Rules, 1870," provide that—

Rule 99. "A secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security" (p).

Rule 100. "Any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realization of such security by the creditor, to redeem the same upon payment of such assessed value."

Rule 101. "The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same."

Sect. 12 of "The Bankruptcy Act, 1869," which enacts that no creditor in respect of a debt proveable in bankruptcy shall have any remedy except as directed by the act, provides that "this section shall not affect the power of any creditor holding a security upon the property of the bankrupt to realize or otherwise deal with such security in the same manner as he would have been entitled to realize or deal with the same, if this section had not been passed" (q).

Sect. 16 enacts that "a secured creditor shall for the purpose of voting be deemed to be a creditor only in respect of the balance (if any) due to him after deducting the value of his security; and the amount of such balance shall, until the security be realized, be determined in the prescribed manner. He may, however, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him;" and the same section proceeds to say that "a secured creditor shall in this act mean any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as security for a debt due to him" (r).

The above provisions are in accordance with an established rule in bankruptcy that a secured creditor must give up his security before he proves for his debt, or must realize his security and prove for the balance only (s).

(p) See Rule 117, *ante*, p. 331.

(q) See the section, *ante*, p. 315.

(r) See the entire section, *ante*, p. 265.

(s) See *Ex parte Brett, In re Howe*, 40 L. J. (N. S.) Bankr. 54,

where bills of lading were held, under special circumstances, to be securities for the amount of bills of exchange accepted and made payable on delivery of the bills of lading.

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§ 4.—PROOF IN THE CASE OF RENT AND PAYMENTS DUE AT STATED PERIODS.

“The Bankruptcy Act, 1869,” enacts that—

Proof in
case of rent
and periodical
payment.

Sect. 35. “When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the adjudication as if such rent or payment grew due from day to day.”

As to distraining for balance of rent after insufficient distress, see sect. 34, *ante*, p. 328.

§ 5.—PROOF WHERE PERSONS INJURED BY DISCLAIMER OF ONEROUS PROPERTY.

In the case of onerous property of the bankrupt disclaimed by the trustee under the power conferred by sect. 23 (see *ante*, p. 325), that section enacts, that “any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy.”

That means that he is to be a creditor in respect of what he would have been entitled to recover against the bankrupt, if the bankrupt had remained solvent (*t*).

Where a bankrupt was lessee of premises for a term of years, at an annual rent of 500*l.*, and the trustee disclaimed the lease under sect. 23, and the landlord was unable to relet the premises at so high a rent, it was contended that the injury occasioned to the landlord by the operation of the act was the amount he could have got in the bankruptcy by reason of his right of action being gone against the bankrupt, an amount therefore dependent on the dividend; but it was held that the landlord was entitled to prove for the difference between the rent agreed to be paid for the residue of the term, and its value under existing circumstances (*u*).

The same principle applies to every ordinary contract not performed at the time of bankruptcy and put an end to by sect. 23, as, for example, a contract to make a railway. There the obvious extent of the injury is the difference between the sum for which the bankrupt had covenanted to make it and the sum for which somebody else will covenant to complete it. No doubt in estimating the amount of damage when property is delivered up, that fact must be taken into consideration, and if the owner can get as much for the use of it, after, as he did before the bankruptcy, then

(*t*) *Ex parte Llynvi Coal and* Bankr. 5.
Iron Co., In re Hyde, 41 L. J. (N. S.)

(*u*) *Ibid.*

the damage would be nil. If he cannot get as much, he is entitled to prove for the difference (*x*).

§ 6.—PROOF AGAINST SEPARATE ESTATES.

Prior to the Bankruptcy Act of 1861, although a proof could be made against both the joint and separate estates, where the person had executed a joint and several guarantee or bond, or a joint and several contract, yet the creditor could not receive a dividend upon both estates, and he had to elect on which he would receive the dividend (*y*). This was first altered by the Act of 1861, but the alteration, then, was confined to bills of exchange and promissory notes (*z*).

“The Bankruptcy Act, 1869,” enacts that—

Sect. 37. “If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts, against the properties respectively liable upon such contracts.”

Proof in
respect of
distinct
contracts.

The construction of this section is, that wherever there is a joint and separate contract and joint and separate estates being administered in bankruptcy, the creditor shall be entitled to prove against both estates; and not merely to prove, but to receive dividends (*a*).

A joint and several promissory note is a distinct separate contract and a distinct joint contract within this section, notwithstanding it is on the same piece of paper (*b*).

§ 7.—RULES RELATING TO PROOF OF DEBTS.

“The Bankruptcy Rules, 1870,” contain the following rules relating to the proof of debts:—

Rule 67. “A creditor may prove his debt at any duly summoned meeting of creditors, or at any time before the meeting, by delivering or sending through the post in a prepaid letter, before the appointment

Sects. 25 and
31.

(*x*) See judgment of Mellish, L. J., *Ex parte Llynvi Coal and Iron Co., In re Hide*, 41 L. J. (N. S.) Bankr. 5.

(*y*) *Goldsmid v. Cazenove*, 7 H. L. Cas. 785; 29 L. J. (N. S.) Bankr. 17.

(*z*) 24 & 25 Vict. c. 134, s. 152, this statute is now repealed.

(*a*) *Ex parte Honey, In re Jeffery*, 41 L. J. (N. S.) Bankr. 9.

(*b*) *Ibid.*

PART VII. of a creditor's trustee, to the registrar of the court, and after the appointment of a creditor's trustee to such trustee, an affidavit according to the form in the schedule."
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Sect. 26. Rule 68. "The affidavit may be made by himself or by any agent, or any clerk or other person in his employment, but if the affidavit is made by an agent or clerk it shall state that he is authorized by the creditor to make the affidavit, and that it is within his own knowledge that the debt was incurred for the consideration stated, and that to the best of his knowledge and belief the debt still remains unpaid and unsatisfied."

Sect. 80, Rule 69. "A company or other body incorporated or authorized to sue may prove their debt by an agent, according to the form in the schedule."
par. 7.

Sects. 17, 25. Rule 70. "A registrar in his capacity of trustee may admit proofs, and upon sufficient cause shown, disallow any proof to which objection may be taken at the first or any other meeting of creditors."

Sect. 14. Rule 71. "Where a trustee has been appointed by the creditors, the proofs of debts that have been received by the registrar shall be given over to the trustee, but the registrar shall make and file a list of such proofs on the proceedings."

Sects. 25 and Rule 72. "A creditor's trustee as soon as may be after his appointment, and after the receipt of a proof of a debt, shall examine every proof and the grounds of the debt, and in writing reject or admit it, in whole or in part, or require further evidence in support thereof, and when he shall admit or reject any claim he shall give notice thereof in writing to the creditor, stating, in case of rejection, the grounds thereof."
31.

Rule 73. "If at any time after the admission of any debt by the trustee he shall have reason to believe that such debt has been improperly admitted, he may apply to the registrar, upon affidavit setting forth the facts, for a day to be appointed for the court to consider the propriety of expunging the proof or reducing the amount thereof."

Rule 74. "Any creditor dissatisfied with the decision of the trustee in respect of a proof, may, within fourteen days after the receipt of the notice from the trustee, apply to the court to vary or reverse the decision, and the creditor shall give notice to the trustee thereof seven days before the day so fixed."

Sect. 20, Rule 75. "The trustee in every bankruptcy shall send to the registrar of the court in which such bankruptcy is pending a copy certified by him of every resolution of a meeting of creditors, and shall also, on the first day of every month, send to the said registrar a certified list of all proofs, if any, tendered during the month next preceding, distinguishing in such list the proofs admitted, those rejected, and such as stand over for further consideration."
par. 3.

Rule 76. "Any separate creditor of any bankrupt shall be at liberty to prove his debt under any adjudication of bankruptcy made against such bankrupt jointly with any other person or persons. And under every such adjudication distinct accounts shall be kept of the joint estate and also of the separate estate or estates of each bankrupt, and the separate estate shall be applied in the first place in satisfaction of the debts of the separate creditors. And in case there shall be an overplus of the separate estate, such overplus shall be carried to the account of the joint estate. And in case there shall be an overplus of the joint estate, such overplus shall be carried to the account of the

separate estates of each bankrupt in proportion to the right and interest of each bankrupt in the joint estate. And the cost of taking such accounts shall be paid out of the joint and separate estates respectively as the court shall direct."

Rule 77. "Upon all debts or sums certain, payable at a certain time or otherwise, whereupon interest is not reserved or agreed for, and which shall be overdue at the date of the order of adjudication and proveable in bankruptcy, the creditor shall be entitled to prove for interest, to be calculated, at a rate not exceeding four pounds per centum per annum, up to the date of the said order, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment. Any creditor may prove for a debt not payable when the bankrupt committed an act of bankruptcy, and be entitled to prove such debt as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per centum per annum, computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms upon which it was contracted."

Rule 118. "The trustee shall, within seven days of his allowing or disallowing a proof, file such proof with the registrar with a memorandum thereon of his allowance or disallowance thereof."

No. 32. *Affidavit for Proof of Debt with or without Security.*

In the London Court of Bankruptcy [or the county court of
holden at].

In the matter of A. B. of , a bankrupt.

I of make oath and say:—

1. That the said A. B. was at the date of the order of adjudication and still is justly and truly indebted to me in the sum of for (*state consideration*) for which said sum or any part thereof I say that I have not nor hath any person by my order or to my knowledge or belief for my use had or received any manner of satisfaction or security whatsoever, save and except the following:

[*Here set out the particulars of the security, and the value at which the creditor has assessed the same, or if bills be held specify them in the schedule.*]

Date.	Drawn.	Acceptor.	Amount.	Date when due.

Sworn at

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I appoint C. D., of, &c., my proxy in the above matter.

E. F. [or G. H. of in partnership name].

[When affidavit is made by a clerk alter the form accordingly and add the following.] That I am a person in the employ of C. D., and that I am duly authorized by him to make this affidavit, and that it is within my own knowledge that the aforesaid debt was incurred, and for the consideration above stated, and that such debt to the best of my knowledge and belief still remains unpaid and unsatisfied.]

No. 33. *Proxy (when not added to Proof).*

“The Bankruptcy Act, 1869.”

Sects. 16 and
80, par. 8.

In the London Bankruptcy Court [or the county court of
holden at].

Rules 59, 60.

In the matter of A. B. of , a bankrupt.

I, M. N. of , do hereby appoint F. K. of , as my proxy in this matter, excepting as to the receipt of dividend.

As witness my hand this day of M. N. [for self and partners.]

Signed by the said M. N. in the presence
of X. Y. of .

NOTE.—When the creditor desires that his proxy should receive dividends he should strike out the words “excepting as to the receipt of dividends,” putting his initials thereto.

No. 34. *Affidavit of Proof of Debt by Agent of a Company.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B. of , a bankrupt.

I , of , secretary [or manager or other officer] of [here state name of corporation] make oath and say that I am duly authorized, under the seal of the [here set out the name and style of the corporation], to make the proof of debt on its behalf [then follow last affidavit, altering form accordingly].

CHAPTER XIV.

DISTRIBUTION OF BANKRUPT'S PROPERTY.

§ 1.—DIVIDENDS.

§ 2.—PRIORITIES.



§ 1.—DIVIDENDS.

“The Bankruptcy Act, 1869,” contains the following provisions relating to dividends :—

Sect. 41. “The trustee shall from time to time, when the committee of inspection determines, declare a dividend amongst the creditors who have proved to his satisfaction debts proveable in bankruptcy, and shall distribute the same accordingly; and in the event of his not declaring a dividend for the space of six months, he shall summon a meeting of the creditors, and explain to them his reasons for not declaring the same.”

Distribution of dividends.

Sect. 42. “In the calculation and distribution of a dividend it shall be obligatory on the trustee to make provision for debts proveable in bankruptcy appearing from the bankrupt's statements, or otherwise, to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs, or to establish them if disputed, and also for debts proveable in bankruptcy, the subject of claims not yet determined.”

Provision for creditors residing at a distance, &c.

Sect. 43. “Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any monies for the time being in the hand of the trustee any dividend or dividends he may have failed to receive before such monies are made applicable to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.”

Right of creditor who has not proved debt before declaration of a dividend.

Sect. 44. “When the trustee has converted into money all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realized without needlessly protracting the bankruptcy, he shall declare a final dividend, and give notice of the time at which it will be distributed.”

Final dividend.

Sect. 45. “The bankrupt shall be entitled to any surplus remaining after payment of his creditors, and of the costs, charges, and expenses of the bankruptcy.”

Bankrupt entitled to surplus.

Sect. 46. “No action or suit for a dividend shall lie against the trustee, but if the trustee refuses to pay any dividend the court may, if it thinks

No action for dividend.

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fit, order the trustee to pay the same, and also to pay out of his own monies interest thereon for the time that it is withheld, and the costs of the application."

Joint Creditors.]—

Joint creditor may prove for purpose of voting.

Sect. 103. "If one partner of a firm is adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat, but shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts."

Joint and separate dividends.

Sect. 104. "Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the court on the application of any person interested, be declared together; and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property."

Unclaimed Dividends.]—

Forfeiture of dividends after five years' non-claim.

Sect. 116. "Where any dividends remain unclaimed for five years then and in every such case the same shall be deemed vested in the crown, and shall be disposed of as the commissioners of her Majesty's treasury direct; provided, that at any time after such vesting the lord chancellor or any court authorized by him may, by reason of the disability or absence beyond seas of the person entitled to the sum so vested, or for any other reason appearing to him sufficient, direct that the said sum shall be repaid out of money provided by parliament."

Interest on Debts.]—

Interest on debts.

Sect. 36. "Interest on any debt proveable in bankruptcy may be allowed by the trustee under the same circumstances in which interest would have been allowable by a jury if an action had been brought for such debt."

Bankruptcy Rules respecting Dividends.]—"The Bankruptcy Rules, 1870," contain the following provisions respecting dividends:—

Sect. 41.

Rule 131. "Where a dividend is intended to be declared, the trustee shall give reasonable notice thereof to such of the creditors, mentioned in the bankrupt's statement, as shall not have proved their debts, and the notice shall also be gazetted."

Rule 132. "Notice of a dividend having been declared shall be gazetted by the trustee according to the form in the schedule, and he shall also send a notice to each creditor who has proved, showing the amount of the dividend, and when and where it is payable."

Rule 133. "The amount of the dividend may, at the risk of the creditor, be transmitted to a creditor by registered post letter, inclosing a cheque or post-office order, less the cost of remittance, upon his returning the notice to the trustee with the receipt attached to it duly signed, or it

shall be paid upon the production of the notice and the receipt to the trustee at the time mentioned in the notice."

Rule 134. "All bills of exchange or other negotiable securities upon which proof has been made must be exhibited to the trustee before payment of dividend."

Rule 135. "A creditor may apply for the payment of a dividend withheld by a trustee by sending or giving to the registrar and the trustee a notice according to the form in the schedule, and the court may, if it shall see fit, make an order upon such application for the payment of the dividend without requiring the attendance of the creditor thereat."

Sect. 46.

Rule 136. "A creditor who is desirous of giving credit for the value of his security, in order to entitle him to a dividend in respect of the balance of his debt after deducting the assessed value, shall give notice thereof to the trustee, and the value of his security shall be determined in the same manner as the value of the security is to be determined, as prescribed with reference to the balance upon which a secured creditor may vote, and such creditor shall give credit for the value within fourteen days after he shall be called upon by the trustee so to do, unless he shall be out of England, and then within such reasonable time as the trustee may fix, having regard to the means of communication between England and the place where the creditor may be, and in default thereof shall be deemed to be fully secured. If the trustee or any other creditor shall be dissatisfied with the value put on the security, the trustee may require the security to be realized."

Sect. 40.

Rule 137. "Where the produce of the estate of a bankrupt is sufficient to pay twenty shillings in the pound and interest as hereinafter mentioned, and to leave a surplus, such surplus shall be paid by the trustee to such bankrupt, his executors, administrators, or assigns; and every such bankrupt shall be entitled to recover the remainder, if any, of the debts due to him; but such surplus shall not be paid until all the creditors who have proved shall have received interest upon their debts to be calculated and paid at the rate and in the order following, viz., all creditors whose debts are by law entitled to carry interest in the event of a surplus shall first receive interest on such debts at the rate of interest reserved or by law payable or proveable thereon, to be calculated from the date of the order of adjudication; and after such interest shall have been paid, all other creditors who have proved shall receive interest on their debts from such date at the rate of four pounds per centum per annum."

Sect. 45.

"The Bankruptcy Rules, 1871," require the trustee, upon the declaration of a dividend, to send to the comptroller a list of creditors who have proved, showing the amount of proof and dividends (a).

No. 49. *Notice in Gazette of intended Dividend.*

In the London Bankruptcy Court [or the county court of _____, holden at _____].
A dividend is intended to be declared in the matter of A. B., of _____, adjudicated a bankrupt on the _____ day of _____, 187 ____.

(a) Rule 17. See this rule with others relating to the close of the bankruptcy, *post*, p. 367.

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Creditors who have not proved their debts by the day of ,
187 , will be excluded.

Dated this day of , 187 .

G. H., trustee.

No. 50. *Application by Creditor for Order for Trustee to pay Dividend and Order thereon.*

“The Bankruptcy Act, 1869.”

Sect. 46. In the London Bankruptcy Court [or the county court of ,
holden at].

Rule 135. In the matter of A. B., of , a bankrupt.

I, F. K. of , make application to this court for an order to be made upon the trustee to pay the dividend in this bankruptcy due to me, with interest thereon for the time it has been withheld from me, that is to say, from the day of , 187 , on which day I applied to the trustee for its payment to me, and also to pay to me the costs of this application.

Dated this day of , 187 .

F. K.

Upon the reading of this application, and upon hearing the trustee [and the creditor, *where he has been required to attend and has attended*], it is ordered that the trustee do forthwith pay to the said F. K. the sum of pounds, the amount of such dividend.

And it is further ordered that the trustee do pay to the said creditor at the same time the sum of , for interest on such dividend, being at the rate of 5*l.* per cent. for the time that its payment has been withheld, together with a further sum of for the costs of this application.

Given under the seal of the court this day of , 187 .

By the court,

Registrar.

(If the court does not order payment, then, after the words “it is ordered” insert the order made.)

3. *Notice in Gazette of Dividend declared (b).*

In the London Bankruptcy Court [or the county court of
holden at].

Rule 132,
1870.

A dividend of shillings in the pound has been declared in the matter of A. B. of adjudicated bankrupt on the day of , and will be paid by me at [here set out fully the place where the dividend will be paid] on and after the day of 187 .

Dated this day of .

Trustee.

(b) “The Bankruptcy Rules, 1871.”

§ 2.—PRIORITIES.

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Priority of certain Debts.—“The Bankruptcy Act, 1869,” enacts that—

Sect. 32. “The debts hereinafter mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves: that is to say,

Preferential debts.

- (1.) All parochial or other local rates due from him at the date of the order of adjudication, and having become due and payable within twelve months next before such time, all assessed taxes, land tax, and property or income tax assessed on him up to the fifth day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment:
- (2.) All wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding fifty pounds; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages:

Save as aforesaid, all debts proveable under the bankruptcy shall be paid *pari passu*.”

Priorities in other Cases.—Apart from the priority of payment of debts of a certain description, above considered, and of the question of a secured creditor, as distinguished from the body of creditors, questions of priority may arise otherwise, and the Bankruptcy Act expressly empowers the court to decide all questions of priorities (*c*).

Thus, where two bills of sale of the same goods were given in succession by the bankrupt, and duly registered, and the goods were taken possession of by the holder of the second bill before the act of bankruptcy, and sold after adjudication, on the question as to who was entitled (the proceeds of the sale having been in the meantime paid into court), the court held, that the holders of the bills of sale were entitled to the proceeds as against the trustee, and as between themselves directed the holder of the first bill to be paid his claim, and what remained to go to the holder of the second bill, the costs of all parties to be the first charge (*d*).

It is to be observed, that in the case of bankruptcy the question of priority of the different creditors *inter se*, must be governed by the law of the country where the bankruptcy takes place, and where the assets of the company are being administered (*e*).

Creditors of Partnership where one Partner Bankrupt.—If one partner of a firm is adjudged bankrupt, any creditor to whom

(c) See sect. 72, *ante*, p. 203.

(e) Judgment of Mellish, L. J.,

(d) *Ex parte Allen and Page, Re Middleton*, 40 L. J. (N. S.)

Ex parte Melbourn, In re Melbourn, 40 L. J. (N. S.) Bankr. 25.

Bankr. 17.

the bankrupt is indebted jointly with the other partners, although entitled to prove his debt and vote, is not entitled to receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts (*f*).

Lender of Money on Receipt of Share of Profits.—In the event of any trader, that is to say, a person engaged in any trade or undertaking, being adjudged a bankrupt, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any loan to him, upon a contract that the lender shall receive a rate of interest varying with the profits, or receiving a share of the profits, is not entitled to recover any portion of his principal, or of the profits or interest, until the claims of the other creditors of the trader for valuable consideration, in money or money's worth, have been satisfied (*g*).

Even if the lender has a mortgage on the trader's property to secure the money lent (the loan being expressly within the above act), it must be treated as subject to the contingency of the trader's bankruptcy, in which case the lender or his trustee must concur in a sale of the mortgaged property for the benefit of creditors (*h*).

Apprentices and Articled Clerks.—As to the payment of a sum of money to apprentices and articled clerks, see *ante*, p. 328.

(*f*) See sect. 103, *ante*, p. 354.

(*g*) 28 & 29 Vict. c. 86, s. 5.

(*h*) *Ex parte Macarthur, In re Ramsden*, 40 L. J. (N. S.) Bankr. 87, where it was held that sect. 72

(*ante*, p. 203) gave the power to compel the parties to effect a sale, and that sect. 95, subs. 1 (*ante*, p. 321) is to be read subject to 28 & 29 Vict. c. 86.

CHAPTER XV.

CLOSE OF THE BANKRUPTCY AND DISCHARGE OF THE BANKRUPT.

- § 1.—CLOSE OF BANKRUPTCY.
- § 2.—DISCHARGE OF BANKRUPT.
- § 3.—RELEASE OF TRUSTEE.
- § 4.—ACCOUNTS OF CLOSED BANKRUPTCY.
- § 5.—STATUS OF UNDISCHARGED BANKRUPT.



§ 1.—CLOSE OF BANKRUPTCY.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 47. “When the whole property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can, in the joint opinion of the trustee and committee of inspection, be realized without needlessly protracting the bankruptcy, or a composition or arrangement has been completed, the trustee shall make a report accordingly to the court, and the court, if satisfied that the whole of the property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can be realized without needlessly protracting the bankruptcy, or that a composition or arrangement has been completed, shall make an order that the bankruptcy has closed, and the bankruptcy shall be deemed to have closed at and after the date of such order.” Close of bankruptcy.

“A copy of the order closing the bankruptcy may be published in the London Gazette, and the production of a copy of such gazette containing a copy of the order shall be conclusive evidence of the order having been made and of the date and contents thereof.”

No. 51. *Report of Trustee for closing Bankruptcy.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [*or* the county court of holden at]. Sect. 47.

In the matter of A. B. of , a bankrupt.

I, G. H., the trustee of the property of the bankrupt, do hereby report to this court, as follows:—

That the whole of the property of the bankrupt has been realized for the benefit of his creditors, [and a dividend to the amount of shillings in the pound has been paid as shown by the statement hereunto annexed;]

[*or* That so much of the property of the bankrupt as can, according to the joint opinion of myself and the committee of inspection, hereunto

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annexed in writing under our hands, be realized without needlessly protracting the bankruptcy, has been realized, as shown by the statement hereunto annexed, and a dividend to the amount of shillings has been paid];

Sect. 28. [or That a composition [or arrangement] offered by the bankrupt was duly accepted by me [or that a general scheme of settlement or arrangement of the affairs of the bankrupt has been assented to by me] to which the approval of this court was given on the day of

187].
Dated this day of 187 .

G. H., trustee.

No. 52. *Order on Report of Trustee as to the closing of a Bankruptcy.*

“The Bankruptcy Act, 1869.”

Sect. 47.

In the London Bankruptcy Court [or the county court of holden at].

In the matter of A. B., of , a bankrupt.

Upon reading a report of the trustee of the property of the bankrupt, dated the day of 187 , reporting (*here set out the terms of the report*) [and upon hearing (*here insert the name of any person who may appear to oppose an order for closing*)], the court being satisfied that (*here follow the terms of the report*), doth order and declare that the bankruptcy of the said A. B. has closed [or as the court may otherwise order].

Given under the seal of the court this day of 187 .

By the court,
Registrar.

§ 2.—DISCHARGE OF BANKRUPT.

“The Bankruptcy Act, 1869,” enacts that—

Order of
discharge.

Sect. 48. “When a bankruptcy is closed, or at any time during its continuance, with the assent of the creditors testified by a special resolution, the bankrupt may apply to the court for an order of discharge; but such discharge shall not be granted unless it is proved to the court that one of the following conditions has been fulfilled, that is to say, either that a dividend of not less than ten shillings in the pound has been paid out of his property, or might have been paid except through the negligence or fraud of the trustee, or that a special resolution of his creditors has been passed to the effect that his bankruptcy or the failure to pay ten shillings in the pound has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to him; and the court may suspend for such time as it deems to be just, or withhold altogether, the order of discharge in the circumstances following; namely, if it appears to the court on the representation of the creditors made by special resolution, of the truth of which representation the court is satisfied, or by other sufficient evidence, that the bankrupt has made default in giving up to his creditors the property which he is required by this act to give up; or that a prosecution has been commenced against him in pursuance of the provisions relating to

the punishment of fraudulent debtors, contained in the 'Debtors Act, 1869,' in respect of any offence alleged to have been committed by him against the said act."

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Sect. 49. "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts proveable under the bankruptcy, with the exception of—

Effect of
order of dis-
charge.

(1.) Debts due to the crown.

(2.) Debts with which the bankrupt stands charged at the suit of the crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence.

And he shall not be discharged from such excepted debts unless the commissioners of the treasury certify in writing their consent to his being discharged therefrom."

"An order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this act and the special matter in evidence."

Sect. 50. "The order of discharge shall not release any person who, at the date of the order of adjudication, was a partner with the bankrupt, or was jointly bound or had made any joint contract with him."

The following "Bankruptcy Rules, 1870," relate to the order of discharge :—

Rule 138. "A bankrupt intending to apply for an order of discharge shall file an application with the registrar, who shall thereupon fix the time and place at which the application will be heard. Notice of the time and place fixed for the hearing of the application of the order of discharge shall be gazetted, and also given to the trustee by the bankrupt, twenty-one days before such day."

Sect. 48.

Rule 139. "An order of discharge shall be dated of the day on which it is made, and shall take effect on and from the day of its date, and shall be gazetted."

Rule 140. "An order of discharge shall not be granted until after the public examination of the bankrupt under sect. 19 of the act."

Sect. 19.

Rule 141. "An order of discharge shall not be delivered out until after the expiration of the time allowed for appeal, or if an appeal be entered, until after the decision of the court of appeal thereon."

Rule 142. "A bankrupt desirous of obtaining the assent of his creditors to his applying to the court for an order of discharge during the continuance of his bankruptcy, shall request the trustee to summon a meeting of his creditors, and thereupon the trustee, upon the deposit of a sufficient sum for costs, shall summon such meeting; where at the meeting the creditors do not so assent no other meeting shall be called for the same purpose until after the lapse of three calendar months."

No. 64. *Application for Order of Discharge on a Special Resolution that the Bankruptcy or the Failure to pay a Dividend of 10s. arose from Circumstances for which the Bankrupt should not be held responsible.*

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“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 48.

In the matter of A. B., of , a bankrupt.

The bankruptcy of A. B. having been closed, as shown by the order published in the London Gazette on the day of 187 , and the creditors of the said bankrupt having, at a meeting held at on the day of 187 , passed a special resolution, as shown by the minutes of the proceedings had at such meeting, duly signed by the chairman thereof, to the effect that, in their opinion, his bankruptcy has arisen from circumstances for which the said bankrupt cannot justly be held responsible [or that his failure to pay a dividend of 10s. in the pound, in their opinion, has arisen from circumstances for which the said bankrupt cannot justly be held responsible], and that they desire that an order of discharge should be granted to the bankrupt, the said bankrupt both hereby apply to the court for an order of discharge.

Dated this day of 187 .

Let this application be heard on the day of 187 , at
o'clock in the noon.

Dated this day of 187 .

Registrar.

No. 65. *Application for an Order of Discharge during Continuance of Bankruptcy.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at].

Sect. 48.

In the matter of A. B., of , a bankrupt.

The creditors of the said bankrupt having, at a meeting held at on the day of 187 , passed a special resolution, as shown by the minutes of the proceedings had at such meeting, duly signed by the chairman thereof, assenting to the bankrupt applying to this court for an order of discharge, although the bankruptcy has not been closed.

[*Show here, as in previous forms, whether a dividend of 10s. has been paid, or could have been but for the negligence or fraud of the trustee, or that by special resolution the bankruptcy or the failure to pay a dividend of 10s. has arisen from circumstances for which the bankrupt should not be held responsible.*]

The said bankrupt doth hereby apply to the court for an order of discharge.

Dated this day of , 187 .

Let this application be heard on the day of 187 , at
o'clock in the noon.

Dated this day of , 187 .

Registrar.

No. 66. *Memorandum of Application for Order of Discharge.*

"The Bankruptcy Act, 1869."

In the London Bankruptcy Court [*or the county court of*
holden at].

In the matter of A. B. of , a bankrupt.

The application of the said bankrupt for his order of discharge having been read, and the court being satisfied that the bankrupt is entitled to such order, doth hereby grant it. [*If suspended or withheld, alter the form accordingly, and state reasons for suspending or withholding.*]

No. 67. *Order of Discharge.*

"The Bankruptcy Act, 1869."

Sect. 48.

In the London Bankruptcy Court [*or the county court of*
holden at].

In the matter of A. B., of , a bankrupt.

Whereas at a court held this day of 187 , the bankrupt applied for an order of discharge ;* and whereas it having been proved to the court that a dividend of ten shillings in the pound has been paid [*or might have been paid except through the negligence [or fraud] of the trustee of the property of the bankrupt, or that a special resolution of the creditors of the bankrupt has been passed to the effect that his bankruptcy [or the failure to pay a dividend of ten shillings in the pound] has, in their opinion, arisen from circumstances for which the bankrupt cannot justly be held responsible, and that they desire that an order of discharge should be granted to the bankrupt*], an order of discharge is hereby granted.

[*Or* *And whereas the court, having had made to it a representation of the creditors of the bankrupt made by special resolution of the creditors passed at a meeting of them held at on the day of 187 , duly signed by the chairman thereof, that the bankrupt has made default in giving up to his creditors the property which he is required by the Bankruptcy Act, 1869, to give up [*or that a prosecution has been commenced against the bankrupt in pursuance of the provisions relating to the punishment of fraudulent debtors contained in the Debtors Act, 1869, in respect of an offence alleged to have been committed by the bankrupt against the said act*]: and whereas the court being satisfied of the truth of the representation of the creditors made by the said special resolution, it is ordered that the discharge of the bankrupt be withheld altogether [*or suspended until from the date of this order*].

Given under the seal of the court this day of 187 .

By the court,
Registrar.

“The Bankruptcy Rules, 1871,” without expressly superseding the preceding form, gave the following form of order of discharge:—

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2. *Order of Discharge.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at].
In the matter of A. B., of , a bankrupt.
An order of discharge was this day granted to A. B., of , who
was adjudicated bankrupt on the day of , 187 . Rule 139,
Dated this day of 187 . Registrar. 1870.

No. 69. *Notice in Gazette of Order of Discharge (i).*

In the London Bankruptcy Court [or the county court of
holden at]. Sect. 48.
In the matter of A. B., of , a bankrupt.
An order of discharge was granted to A. B., of , who was ad- Rule 139.
judicated bankrupt on the day of 187 .
Registrar.

§ 3.—RELEASE OF TRUSTEE.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 51. “When the bankruptcy is closed, the trustee shall call a meeting of the creditors to consider an application to be made to the court for his release. At the meeting the trustee shall lay before the assembled creditors an account showing the manner in which the bankruptcy has been conducted, with a list of the unclaimed dividends, if any, and of the property, if any, outstanding, and shall inform the meeting that he proposes to apply to the court for a release. Release of trustee.

The creditors assembled at the meeting may express their opinion as to the conduct of the trustee, and they, or any of them, may appear before the court and oppose the release of the trustee.

The court, after hearing what, if anything, can be urged against the release of the trustee, shall grant or withhold the release accordingly, and if it withhold the release, shall make such order as it thinks just, charging the trustee with the consequences of any act or default he may have done or made contrary to his duty, and shall suspend his release until such charging order has been complied with, and the court thinks just to grant the release of the trustee.”

Sect. 52. “Unclaimed dividends, and any other monies arising from the property of the bankrupt, remaining under the control of the trustee at the close of the bankruptcy of any bankrupt, or accruing thereafter, shall be accounted and paid over to such account as may be directed by the rules of court to be made with the sanction of the treasury; and any parties entitled thereto may claim the same in manner directed by such rules. The trustee shall also deliver a list of any outstanding property of the bankrupt to the prescribed persons, and the same shall, when
Duty of trustee as to unclaimed dividends and outstanding property.

(i) “The Bankruptcy Rules, 1870.”

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practicable, be got in and applied for the benefit of the creditors in manner prescribed."

Effect of
release of
trustee.

Sect. 53. "The order of the court releasing the trustee of a bankruptcy shall discharge him from all liability in respect of any act done, or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee of such bankrupt; but such order may be revoked by the court on proof that it was obtained by fraud."

The following "Bankruptcy Rules, 1870," relate to the release of the trustee:—

Sect. 51.

Rule 122. "A trustee desirous of obtaining his release shall apply to the registrar to fix the time and place upon which he may make application to the court for such release, and upon such time being fixed he shall summon a meeting of the creditors to consider such application, stating therein the time and place on which the application to the court will be made."

123. "A trustee applying for a release shall produce to the meeting of creditors a report from the comptroller upon his accounts" (k).

124. "The release of a trustee shall operate as a removal of the trustee, and thereupon the registrar shall be the trustee."

Sect. 52.

125. "Upon the close of a bankruptcy the trustee shall deliver a list of the outstanding property to the registrar of the court, who shall realize the property, if practicable, and declare a dividend from the proceeds thereof in the same manner as if he had been the trustee by reason of there being no trustee acting during the continuance of the bankruptcy, as provided by sect. 83 of the act" (l).

Sect. 83.

No. 60. *Application for Release by Trustee and Order thereon.*

"The Bankruptcy Act, 1869."

Sect. 51.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of , a bankrupt.

I, the trustee of the property of the said bankrupt, do make application to this court for my release as such trustee.

Dated this day of 187 .

G. II.

On the hearing of the above application it is ordered by the court that the release of the said G. II. be granted, and it is hereby granted accordingly, and the said G. II. is hereby removed from the office of trustee of the property of the bankrupt.

Given under the seal of the court this day of 187 .

By the court,
Registrar.

(k) Rule 248 directs that—"Every trustee, before calling a meeting of the creditors to consider an application to be made by him to the court for his release, shall apply to the comptroller for a report on his ac-

counts, and the comptroller shall make such report and transmit it to the trustee, who shall produce the same at such meeting and to the court when making such application."

(l) See sect. 83, *ante*, p. 276.

§ 4.—ACCOUNTS OF CLOSED BANKRUPTCY.

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“The Bankruptcy Rules, 1871,” provide that—

Rule 17. “Upon the declaration of a dividend a trustee shall send to the comptroller a list of creditors who have proved, showing the amount of proofs and dividends.”

18. “At the expiration of twelve months from the declaration of such dividend, or if the bankruptcy be closed within twelve months of such declaration, then at the close of the bankruptcy the trustee shall forward to the comptroller a list of the dividends unclaimed, together with vouchers showing the payment of such dividends as have been paid.”

19. “Upon the receipt of such list the comptroller shall send to the trustee an order by the accountant in bankruptcy upon the Bank of England to receive the amount of the dividends which remain unclaimed, and the trustee shall within one week from the date of such order pay into the Bank of England the sum mentioned in such order.”

20. “Any other moneys arising from the property of the bankrupt remaining under the control of the trustee at the close of the bankruptcy of any bankrupt, shall, in like manner, be paid by the trustee into the Bank of England.”

21. “All moneys received by a registrar acting as trustee after the close of a bankruptcy, shall in like manner be paid by him into the Bank of England within one month of the receipt of the same.”

22. “The Governor and Company of the Bank of England shall receive and carry to the credit of the account of the accountant in bankruptcy all moneys so directed to be received by any order of the accountant.”

23. “Subject to the provisions of sect. 116 of ‘The Bankruptcy Act, 1869,’ and sect. 19 of ‘The Bankruptcy Repeal and Insolvent Court Act, 1869,’ the court, upon being satisfied that any person who may claim to be entitled to any dividend or other payment from moneys which shall have been so paid into the Bank of England is entitled thereto, may order payment of the same according to the form in the schedule.”

24. “Where payment is required to be made to a registrar of a county court for the fees authorized to be taken by him for the duties of realizing the estate and of making a dividend, the order directing such payment shall be signed by the judge of the court, and any order made by the London Bankruptcy Court for the payment of such fees shall be made payable to such officer as may be authorized to receive fees on behalf of her Majesty’s exchequer.”

25. “Every registrar acting as a trustee after the close of a bankruptcy shall, within ten days after the 30th June and 31st December, forward to the comptroller a certificate to the effect that he has paid into the Bank of England all sums of money received by him on account of closed estates.”

26. “Every registrar acting as a trustee after the close of a bankruptcy shall, within twenty days of the 30th June in every year, forward to the accountant in bankruptcy an account showing the balance standing to the credit of each closed estate in which he is trustee, which account, if correct, shall be certified by the accountant and returned by him to the registrar.”

27. “Where any money shall be paid into the Bank of England pursuant to these rules, the trustee shall receive a certificate from one of the cashiers of such bank.”

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CHAP. XV.

Order for payment,
No. .

Re :
Adjudication dated

5. *Order for Payment of Moneys out of Bank of
England (m).*

No.

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county
court of , holden at], day
of 18 .

In the matter of _____, a bankrupt.
(Under adjudication dated 18 .)

It appearing to the court that _____ is en-
titled to be paid the sum of _____ pounds
shillings and _____ pence, being
and that the said sum forms part of the moneys
standing to the credit of the account of the ac-
countant in bankruptcy in the Bank of England.
It is ordered, that the said sum be paid to

By the court,
£ (L.S.) Registrar.
To the Accountant in Bankruptcy.

£

Order for { In pursuance of the above order
payment. { pay to _____ or order, the sum
of _____ pounds shillings and
pence.

£ ” ”

Accountant.

To the Cashier of the Bank
of England.

N.B.—*This order, upon being properly endorsed,
will be paid at the Public Drawing Office, Bank
of England, any day until three o'clock.*

No. 68. *Notice to Creditors of a Bankrupt, who has paid an additional
Sum after close of his Bankruptcy, making up a Dividend of 10s.
in the Pound, that he will apply for an Order of Discharge.*

“The Bankruptcy Act, 1869.”

Sect. 54.

In the London Bankruptcy Court [or the county court of
holden at].

In the matter of A. B., of _____, a bankrupt.

To the creditors of the said bankrupt.

Rules 125 to
128.

Take notice, that the bankrupt will apply to this court on the
day of 187 , at _____ o'clock in the _____ noon, for an order

(m) “Bankruptcy Rules, 1871.”

of discharge on the ground that he has paid to his several creditors since the close of the bankruptcy a sum which, with the dividend of paid, makes up ten shillings in the pound on all the debts proved in his bankruptcy.

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Dated this day of 187 .

Registrar.

§ 5.—STATUS OF UNDISCHARGED BANKRUPT.

“The Bankruptcy Act, 1869,” enacts that—

Sect. 54. “Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:—

Status of
undischarged
bankrupt.

- (1.) No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy; and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property:
- (2.) At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the court which adjudicated such debtor a bankrupt, or of the court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such court, and after giving such notice and doing such acts as may be prescribed in that behalf.”

Application for Discharge during Three Years after Close of Bankruptcy.]—“The Bankruptcy Rules, 1870,” provide that—

Rule 172. “Where a bankrupt who has not obtained his order of discharge shall, after the close of the bankruptcy, pay or tender to the several creditors who have proved their debts, a sum, which with the dividend paid previous to the close of the bankruptcy shall make up a dividend of not less than ten shillings in the pound, and shall desire to obtain an order of discharge, he shall file with the registrar a statement, verified by affidavit, of the sums so paid or tendered, and when and where paid, with the receipts of the creditors or their representatives for the sums respectively paid to them written on or attached thereto.”

Sect. 54.

173. “The registrar shall appoint a day for the hearing of the application for the order of discharge, and a notice thereof shall be gazetted twenty-one days before the day appointed, and a copy thereof shall be sent by the registrar to each creditor who has proved or claimed a debt under the bankruptcy.”

Form 63.

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CHAP. XV.

174. "Where a creditor cannot be found or is dead, and no representative is known, the bankrupt may deposit the money payable to such creditor with the registrar."

Form 64.

175. "At the hearing of the application, an order of discharge may be granted, if the court is satisfied that a sum equal to a dividend of ten shillings in the pound has been paid to all the creditors who proved their debts, unless, on a representation of creditors under sect. 48 of the act, the court thinks it just to suspend or withhold such order."

Sect. 48.

Enforcement of Debt against undischarged Bankrupt.—At the expiration of three years from the close of a bankruptcy, unpaid proved debts may be enforced against the property of the debtor (n). "The Bankruptcy Rules, 1870," provide that—

Sect. 54,
par. 2.

Rule 183. "Where after the expiration of a period of three years from the close of a bankruptcy, in which the bankrupt has not obtained an order of discharge, an application is made to the court for its sanction to the enforcement by a creditor, of the payment of the balance remaining unpaid of a debt proved under the bankruptcy, the creditor shall file a statement, verified by affidavit, showing the dividend paid under the bankruptcy, the balance remaining unpaid, and the property against which he seeks to enforce payment, and that such property is the property of the bankrupt, and the registrar shall thereupon appoint a time and place for the hearing of the application and direct notice of the time and place appointed for the hearing, according to the form in the schedule, to be served by an officer or a bailiff of the court, personally on the bankrupt, or at his usual or last known place of residence or business."

184. "At the hearing of the application service of the notice on the bankrupt shall be proved, unless he appears, and the court if it think fit may refuse the application, or adjourn the hearing to some other day, and in such latter case shall direct the creditor to cause a notice to be gazetted and inserted in one local paper, seven days before the day to which the hearing is adjourned, according to the form in the schedule."

185. "At the adjourned hearing the creditor shall produce a copy of the gazette and of the paper in which the notice was published, and the court may then hear all persons claiming to be creditors of the debtor before or since the close of the bankruptcy, and make such order in the matter as it thinks fit, or adjourn the hearing for further evidence."

No. 70. *Notice in Gazette that a Creditor seeks to enforce Payment of his Debt out of the Property of an undischarged Bankrupt.*

Sect. 54,
par. 2.

In the London Bankruptcy Court [or the county court of
holden at].

Rules 135 to
137.

Notice.—The sanction of this court is sought for the enforcement against A. B., adjudicated bankrupt on the day of 187 , of the payment of the balance remaining unpaid of a debt proved under his bankruptcy. The bankruptcy was closed on the day of 187 . All persons who have become creditors of this bankrupt since such day, and who may desire to show cause against the granting of the sanction sought, should attend at this court on the day of 187 , at o'clock in the noon.

Registrar.

(n) See sect. 54, subs. (2), *ante*, p. 369.

CHAPTER XVI.

LIQUIDATION BY ARRANGEMENT OR COMPOSITION WITH CREDITORS.

- § 1.—THE GENERAL EFFECT OF THE PROVISIONS FOR ARRANGEMENT AND COMPOSITION.
- § 2.—LIQUIDATION BY ARRANGEMENT.
- § 3.—COMPOSITION WITH CREDITORS.
- § 4.—RULES RESPECTING LIQUIDATION BY ARRANGEMENT OR COMPOSITION.
- § 5.—FORMS.



§ 1.—THE GENERAL EFFECT OF THE PROVISIONS FOR ARRANGEMENT AND COMPOSITION.

IN the preceding chapters, the subject of bankruptcy, pure and simple, has been dealt with. Other parts of "The Bankruptcy Act, 1869," have now to be considered, which enable the creditors to decide, upon the application of the debtor, whether the distribution shall be made upon terms to which a majority of the creditors shall agree, with or without actual bankruptcy, or by means of a composition. Nevertheless in each of the cases, except a composition, the plain purpose and effect of the statute is to transfer the whole property of the debtor to the creditors, for the purpose of equal distribution among them, and to leave in the debtor neither right nor power in or over that which, before his inability to pay his debts was declared, was his. Although it was thought proper to enact the law relating to simple bankruptcy in separate clauses, yet the provisions as to liquidation by arrangement are, by reference and by implication, strong and clear, so united with those clauses as to make one entire, complete and harmonious law upon the subjects which the statute comprehends (a).

Liquidation by composition stands on a somewhat different footing. The great difference between cases of liquidation where the creditors have resolved that their debtor's affairs are to be liquidated by arrangement and not in bankruptcy, and cases in which creditors have resolved to accept a composition in satisfaction of their

(a) Judgment of Bacon, C. J., of the Bankruptcy Court, in *Ex parte Duignan, Re Bissell*, 40 L. J. (N. S.) Bankr. 36; approved of on appeal, *Id.* 68.

debts, must in all cases be observed. The rights of the debtor and his creditors are wholly different in the two cases. Both are initiated by a petition filed by the debtor stating his inability to pay his debts (*b*). At that time it is uncertain whether the liquidation shall be effected by means of the appointment of a trustee, and the distribution among the creditors of the *whole* of the debtor's estate, with all the powers and provisions which are enacted respecting bankruptcy, and it is at the option of the requisite majority of creditors at a meeting duly convened, to determine whether the estate shall be so distributed and dealt with or not; and to this state of things the 125th section of the act (comprising the provisions relating to liquidation by arrangement) and the rules applicable to that section, relate. But it is also in the power and at the option of the creditors, under the 126th section, at a like meeting to resolve that, instead of exercising the powers conferred upon them by section 125, they will "without any proceedings in bankruptcy," accept a composition in satisfaction of their debts; and thereupon machinery is provided by the 126th section and the Rules, for giving effect to such composition. When once a resolution is passed to accept a composition, the appointment of a trustee is unnecessary and improper. The property of the debtor is not taken from him, nor vested in a trustee; it is not "distributed in the same manner as in bankruptcy" (as is provided for in the law of liquidation by arrangement) (*c*). On the contrary, the debtor is left in the possession of his assets, for the very purpose, it may be, of enabling him to fulfil the engagement he has entered into with his creditors to pay them the stipulated composition. The terms agreed to are binding upon all the creditors, may be embodied in a deed and secured by covenants if the creditors so will, and may be enforced by the court as any order of the court may be. But there is no power in this latter case to deprive secured creditors of their securities; no relation of title to any act of bankruptcy prior to the presentation of the petition or otherwise; nor anything in which the creditors who have resolved to accept a composition, have any interest beyond enforcing the performance of that condition on which they have agreed to accept the composition (*d*).

§ 2.—LIQUIDATION BY ARRANGEMENT (*e*).

The subject of bankruptcy simple being dealt with by the first

(*b*) See the rules, *post*, p. 381.

(*c*) See sect. 125, subs. (7), *post*, p. 374.

(*d*) Judgment of Bacon, C. J., *Ex parte Birmingham Gas Light and Coke Co., Re Adams*, 40 L. J. (N. S.) Bankr. 1.

(*e*) With respect to deeds of ar-

angement and composition executed under the former law, the "Bankruptcy Rules, 1870," contain the following provisions:—

"Trust Deeds."

Rule 316. "The chief judge of the London Bankruptcy Court shall have and exercise all the powers, jurisdic-

five parts or divisions of "The Bankruptcy Act, 1869" (*f*); the sixth part deals with LIQUIDATION BY ARRANGEMENT.

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The section enacts as follows—

Sect. 125. "The following regulations shall be made with respect to the liquidation by arrangement of the affairs of the debtor:

Regulations
as to liqui-
dation by
arrangement.

- (1.) A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may, by a special resolution as defined by this act, declare that the affairs of the debtor are to be liquidated by arrangement and not in bankruptcy, and may at that or some subsequent meeting, held at an interval of not more than a week, appoint a trustee, with or without a committee of inspection.
- (2.) All the provisions of this act relating to a first meeting of creditors, and to subsequent meetings of creditors in the case of a bankruptcy, including the description of creditors entitled to vote at such meetings, and the debts in respect of which they are entitled to vote (*g*), shall apply respectively to the first meeting of creditors, and to subsequent meetings of creditors, for the purposes of this section, subject to the following modifications:
 - (a.) That every such meeting shall be presided over by such chairman as the meeting may elect; and
 - (b.) That no creditor shall be entitled to vote until he has proved by a statutory declaration a debt proveable in bankruptcy to be due to him, and the amount of such debt, with any prescribed particulars; and any person wilfully making a false declaration in relation to such debt shall be guilty of a misdemeanor.
- (3.) The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the meeting at which the special resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meeting some one on his behalf, shall produce to the meeting a statement showing the whole of his assets and debts,

tions and authorities of the old London Bankruptcy Court, and the judges of the local bankruptcy courts shall have and exercise all the powers, jurisdictions and authorities of any district court of bankruptcy, or of any county court with respect to any trust deed, or deed of arrangement, composition or inspectorship executed by a debtor whether registered or in course of registration, on or before the 31st day of December, 1869, in the same manner as he or they may exercise jurisdiction, powers and authorities with respect to any other legal proceedings pending on that day under any of the enactments repealed by the Bankruptcy Repeal and Insolvent Courts Act, 1869, as provided by sect. 20 of such act."

Rule 317. "Every such deed in respect of which an order has been made extending the time for registering the same to a date subsequent to 31st December, 1869, shall be deemed to have been in course of registration within the meaning of the last rule."

Rule 318. "The chief registrar of the old London Bankruptcy Court shall complete the registration of any such last-mentioned deed in manner required by the Bankruptcy Act, 1861, and the Bankruptcy Amendment Act, 1868, and shall retain and exercise all necessary authority for that purpose."

(*f*) See the divisions of the statute, *ante*, p. 200, note.

(*g*) See *ante*, p. 269.

and the names and addresses of the creditors to whom his debts are due.

- (4.) The special resolution, together with the statement of the assets and debts of the debtor, and the name of the trustee appointed, and of the members, if any, of the committee of inspection, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, but if satisfied that it was so passed, and that a trustee has been appointed with or without a committee of inspection, he shall forthwith register the resolution and the statement of the assets and debts of the debtor, and such resolution and statement shall be open for inspection on the prescribed conditions, and the liquidation by arrangement shall be deemed to have commenced as from the date of the appointment of the trustee (*h*).
- (5.) All such property of the debtor as would, if he were made bankrupt, be divisible amongst his creditors shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement, and be divisible amongst the creditors, and all such settlements, conveyances, transfers, charges, payments, obligations and proceedings as would be void against the trustee in the case of a bankruptcy shall be void against the trustee in the case of liquidation by arrangement.
- (6.) The certificate of the registrar in respect of the appointment of any trustee in the case of a liquidation by arrangement shall be of the same effect as a certificate of the court to the like effect in the case of a bankruptcy.
- (7.) The trustee under a liquidation shall have the same powers, and perform the same duties, as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy; and with the modification herein-after mentioned, all the provisions of this act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation, and the word 'bankruptcy' included liquidation by arrangement; and in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy.

(*h*) See the various rules as to the meeting and voting, *post*, § 4. The registrar under Rule 295, *post*, is to determine the validity of the resolution by the affirmative signatures, which are conclusive; and if the assents of the proper proportion of the whole value present, in person or by proxy, appears by such written proof it is immaterial, and the registrar cannot inquire, whether one of the creditors so signing, voted in the negative at the meeting. *Ex parte Pooley*, *In re Russell*, 40 L. J.

(N. S.) Bankr. 41. It is unnecessary that the votes in the negative should be evidenced in the same way. If a creditor does not sign affirmatively, he must be conclusively taken to have voted in the negative, unless before the resolution is put he withdraws his proof under Rule 273 (*post*, p. 384). *Ex parte Orde*, *In re Horsley*, 40 L. J. (N. S.) Bankr. 60. The same regulations apply to a resolution for adjournment (*Id.*).

See further, note to Rule 295.

- (8.) The creditors at their first or any general meeting may prescribe the bank into which the trustee is to pay any monies received by him, and the sum which he may retain in his hands.
- (9.) The provisions of this act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement; but the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution, at such time and in such manner and upon such terms and conditions as the creditors think fit.
- (10.) The trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under this act.
- (11.) Rules of court may be made in relation to proceedings on the occasion of liquidation by arrangement in the same manner and to the same extent and of the same authority as in respect of proceedings in bankruptcy.
- (12.) If it appear to the court, on satisfactory evidence, that the liquidation by arrangement cannot, in consequence of legal difficulties, or of there being no trustee for the time being, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly.
- (13.) Where no committee of inspection is appointed, the trustee may act on his own discretion in cases where he would otherwise have been bound to refer to such committee.
- (14.) In calculating a majority on a special resolution for the purposes of this section, creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value, but not in the majority in number."

The registration of the resolutions is, in the absence of fraud, conclusive evidence that they were duly passed, and all the requisitions of the act in respect of such resolutions complied with (i).

Some difficulty arises from the circumstance that while the provisions relating to bankruptcy proper are expressed in detail, those which relate to liquidation by arrangement are made by reference only to those which belong to the former.

It will be observed, that by the section now under consideration (forming, as already stated, the sixth part of the act), all the property (sub-sect. 5) of the debtor vests in a trustee appointed under liquidation, and is divisible among the creditors, and all proceedings which would be void against a trustee in bankruptcy are void against a trustee under liquidation; and by sub-sect. 7, such a trustee has the same powers as a trustee under a bankruptcy, and the property of the debtor is to be distributed in the same manner

(i) See sect. 127, *post*, p. 379.

as in a bankruptcy, and all the provisions of the act apply to the case of liquidation by arrangement in the same manner as if the word "bankrupt" included a debtor whose affairs are under liquidation, and the word "bankruptcy" included liquidation by arrangement (*k*).

In the sub-sections, and in the rules (see *post*, § 4), relating to this part of the statute, the possibility of actual bankruptcy being adopted instead of liquidation by arrangement is kept in view, and yet the power of adjudicating in bankruptcy exists only by means of a petition in a prescribed form (see Rule 252, *post*, p. 381), containing an admission of the debtor's insolvency. The filing of the petition is, therefore, an act of bankruptcy (*l*).

Form of Resolution for Liquidation by Arrangement.]—Resolutions that the estate should be wound up by liquidation, not by bankruptcy, and appointing a trustee and committee of inspection, and that upon payment by the debtor of a fixed named sum within a month after the registration of the resolution, and his giving a bond for a further payment, the debtor should have his discharge, and that the first payment should be accepted in full satisfaction of all right to apply to the court as to the pay of the debtor, were held to be good resolutions under sect. 125, and not to require to be treated as an acceptance of a composition and requiring an extraordinary resolution under sect. 126 (*post*, p. 378) (*m*).

Rights of the Trustee in Liquidation.]—Although by sub-sect. 4 the liquidation by arrangement is deemed to have commenced as from the date of the trustee's appointment, that is, that the active prosecution of the liquidation shall thenceforth ensue, it is also provided by sub-sect. 7 that the appointment of a trustee in liquidation (and this, it seems, without any reference to the particular time at which such appointment may have been made) shall be deemed to be equivalent to, and a substitute for, the presentation of a petition in bankruptcy, or the service of such petition or an order of adjudication in bankruptcy; and, therefore, the trustee in liquidation is as much entitled to call in question any proceeding by which a portion of the debtor's property has been withdrawn from distribution, as a trustee in bankruptcy (*n*), for notwithstanding the words of sub-sect. 4 create a difficulty, they cannot control sub-sect. 5 and the other parts of the act which clearly make the same property vest in the trustee as would vest

(*k*) See the judgment of the chief judge in bankruptcy in *Ex parte Todhunter*, 39 L. J. (N. S.) Bankr. 22.

(*l*) See *Ex parte Duignan, Re Bissell*, 40 L. J. (N. S.) Bankr. 33;

affirmed on appeal, *Id.* 69.

(*m*) *Ex parte Pooley, In re Russell*, 40 L. J. (N. S.) Bankr. 41.

(*n*) See the judgment in *Ex parte Todhunter*, 39 L. J. (N. S.) Bankr. 22.

in bankruptcy if the creditors chose to make the debtor bankrupt (*o*).

Effect of Petition for Liquidation, on Executions.]—In accordance with this view of the effect of a petition for liquidation by arrangement, it was held, that the seizure in execution of the goods of a debtor, after the filing of a petition for liquidation, although before the appointment of a trustee, was of no avail as against the trustee, the goods on his appointment becoming the property of the trustee from the act of bankruptcy by filing the petition (*p*).

On the other hand, a trustee in liquidation is not entitled to the proceeds of a sale under an execution against a non-trader debtor where the seizure was before the petition was filed (*q*).

Therefore, where the sheriff having seized the goods of a non-trader debtor under an execution, sold them under judge's orders, paying the proceeds into court, and between the seizure and sale the debtor filed a petition in liquidation, of which notice was given before sale to the sheriff and execution creditor, and after the sale a trustee was appointed, it was held, that the question must be decided as if the petition for liquidation had been a petition in bankruptcy presented before the sale, followed by an adjudication after sale; and that, assuming the filing the petition for liquidation to be an act of bankruptcy, yet the execution creditor, having seized before notice thereof, was entitled to retain the proceeds against the trustee (*r*).

So, in a subsequent case, where before sale the sheriff was served with notice of a petition for liquidation, and an injunction by the county court judge to restrain the sale, it was held, that the judgment creditor was entitled to have his debt satisfied out of the proceeds of the goods (*s*).

(*o*) Mellish, L. J., *Ex parte Duignan, In re Bissell*, 40 L. J. (N. S.) Bankr. 70.

(*p*) *Ex parte Duignan, Re Bissell*, 40 L. J. (N. S.) Bankr. 33; affirmed on error, *Id.* 68.

(*q*) See *Ex parte Roche, In re Hall*, 40 L. J. (N. S.) Bankr. 70; see also *ante*, p. 322.

(*r*) *Ex parte Todhunter*, Law Rep., 10 Eq. 425; 39 L. J. (N. S.) Bankr. 17; and see *Ex parte Roche, In re Hall*, 40 L. J. (N. S.) Bankr. 70. In a case decided the same day as *Ex parte Todhunter*, where the seizure was before the petition for liquidation, but the trustee was appointed before the sale, the chief judge held that the execution was not protected. *Ex parte Veness (Re Gwyn)*, Law Rep., 10 Eq. 419;

39 L. J. (N. S.) Bankr. 23. This case was, however, in apparent conflict with the authorities noticed, *ante*, p. 322 (*Slater v. Pinder, Ex parte Roche, &c.*). Although *Ex parte Veness* cannot be supported on the grounds on which it was decided, it may be supported on the facts, for there was in that case an act of bankruptcy before seizure, and the doctrine of relation back applies to liquidation by arrangement (see *Ex parte Duignan, supra*); but the judgment did not proceed on that ground. See the comments on *Ex parte Veness* in the judgments of the Court of Exchequer in *Slater v. Pinder*, 40 L. J. (N. S.) Ex. 146.

(*s*) *Ex parte Bailey, In re Jecks*, 41 L. J. (N. S.) Bankr. 1.

A petition for liquidation has the same effect as a petition in bankruptcy in cases under sect. 87, which provides for the proceeds of sale of goods of a trader taken in execution on a judgment for a sum exceeding fifty pounds, where notice of a bankruptcy petition is given within fourteen days, although no trustee is appointed within that period (*t*).

§ 3.—COMPOSITION WITH CREDITORS.

The main distinctive features of liquidation by composition with creditors, as compared with liquidation by arrangement, have been already pointed out (see *ante*, pp. 371, 372). The procedure and precise effect of such composition have now to be considered. The "*Regulations*" respecting COMPOSITION WITH CREDITORS comprise the seventh part of "The Bankruptcy Act, 1869," and are contained in sect. 126 of that act.

Regulations
as to com-
position by
creditors.

Sect. 126. "The creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor.

"An extraordinary resolution of creditors shall be a resolution which has been passed by a majority in number and three-fourths in value of the creditors of the debtor, assembled at a general meeting to be held in the manner prescribed, of which notice has been given in the prescribed manner, and has been confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting, of which notice has been given in the prescribed manner, and held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which such resolution was first passed.

"In calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding ten pounds shall be reckoned in the majority in value, but not in the majority in number, and the value of the debts of secured creditors shall, as nearly as circumstances admit, be estimated in the same way, and the same description of creditors shall be entitled to vote at such general meetings as in bankruptcy.

"The debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present at both the meetings at which the extraordinary resolution is passed, and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meetings some one on his behalf, shall produce to the meetings a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due (*u*).

"The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in manner directed by this section, and if satisfied that it has

(*t*) *Ex parte Keys, Re Skinner*,
39 L. J. (N. S.) Bankr. 28.

(*u*) See note to Rule 295, *post*.

been so passed he shall forthwith register the resolution and statement of assets and debts, but until such registration has taken place such resolution shall be of no validity; and any creditor of the debtor may inspect such statement at prescribed times, and on payment of such fee, if any, as may be prescribed.

"The creditors may, by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation; and any such extraordinary resolution shall be presented to the registrar in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance.

"The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors.

"Where a debt arises on a bill of exchange or promissory note, if the debtor is ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor or person to whom it is payable, and any other particulars within his knowledge respecting the same, and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt, and any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice has been given, with the consent of a general meeting of his creditors.

"The provisions of any composition made in pursuance of this section may be enforced by the court on a motion made in a summary manner by any person interested, and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court.

"Rules of court may be made in relation to proceedings on the occasion of the acceptance of a composition by an extraordinary resolution of creditors in the same manner and to the same extent and of the same authority as in respect of proceedings in bankruptcy.

"If it appear to the court on satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt and proceedings may be had accordingly."

Sect. 127. "The registration by the registrar of a special resolution of the creditors on the occasion of a liquidation by arrangement under part six of this act, or of an extraordinary resolution of the creditors on the occasion of a composition under the seventh part of this act, shall, in the absence of fraud, be conclusive evidence that such resolutions respectively were duly passed and all the requisitions of this act in respect of such resolutions complied with."

Registration
of resolutions
of creditors
conclusive in
certain cases.

This section is part of the comprehensive provisions which include the general law relating to insolvent debtors and their creditors. The rules (see *post*, § 4) which relate equally to proceedings for liquidation by arrangement and composition, require

that the proceedings by the debtor shall be instituted by a petition which is entitled in bankruptcy (*x*); and until after the meetings have been held it cannot be ascertained what form the future proceedings shall assume, but it is certain that until the resolutions shall have been passed and registered, the proceedings are in bankruptcy. The meaning of the language at the commencement of the section that the creditors of a debtor may "without any proceedings in bankruptcy," resolve to accept a composition, mean, without any proceedings by them or on their behalf, and have not the effect of abrogating all that has been done before the resolution, and by reason of which alone the resolution could be passed and registered. On the contrary, the proceedings are subject to the general control and jurisdiction of the Courts of Bankruptcy conferred by sect. 72 (see *ante*, p. 203) and other sections, and such jurisdiction may be accordingly exercised in reference to sect. 126, for the purpose of deciding "all questions whatsoever whether of law or fact, arising in any case of bankruptcy coming within the cognizance of the court, or which the court may deem it expedient to decide for the purpose of doing complete justice" (*y*).

For example, until at the meeting of the creditors it has been determined by their resolution whether the proceedings shall be under sect. 125 or sect. 126, it would be quite right that an injunction should be granted restraining any creditor's process against the debtor's person or estate (*z*).

Not only does this jurisdiction exist before the resolution is passed, but even after the resolution is registered.

Thus, where goods were seized in execution by the sheriff, and the debtor filed a petition for liquidation, and the court granted an injunction restraining any dealing with the goods, and subsequently the creditors passed a resolution accepting a composition under sect. 126, and after the resolution was registered, the debtor, claiming the goods, brought an action against the sheriff, and, on the other hand, the execution creditor ruled the sheriff to proceed. It was held, that the sheriff being under this cross-fire was right in applying to the Bankruptcy Court, and the court accordingly stayed the debtor's proceedings against the sheriff, holding that the execution creditor was entitled to the execution of the writ.

In the same case it was held that a resolution to accept a composition under sect. 126, has not the effect of revesting in the debtor the title to goods previously seized by the sheriff under an execution, but, on the contrary, restores the execution creditor to his position. It was urged, on behalf of the debtor, that the result of the resolution was that he was freed from all his debts except

(*x*) See Rule 252, *post*, p. 381.

(*y*) See the judgment of the chief judge in bankruptcy, approved by the Lords Justices, *In re England, Ex parte The Sheriff of Middlesex*, 40

L. J. (N. S.) Bankr. 65.

(*z*) *Ex parte The Birmingham Gas Light and Coke Company, Re Adams*, 40 L. J. (N. S.) Bankr. 1.

only as to the composition, and that he was restored to the same position and with the same rights as he was before he presented his petition. The court agreed with the latter proposition, but observed that before the presentation of the petition the goods in question had been seized. The debtor could not have then prevented the sheriff from selling except by the proceedings in bankruptcy, and that proceeding having terminated, the debtor and creditor were in exactly the same position as before the petition, (except that the creditor had been delayed), but it would be putting them in totally different positions if the creditor were to be deprived of the rights which he had acquired under his execution (*a*).

The same view of the effect of a composition was taken in a previous case, where a creditor in exercise of a statutory power to distrain and sell a debtor's goods (*b*) seized them, and on the debtor's subsequently petitioning for liquidation by arrangement, a composition was accepted; it was held that the creditor was entitled to proceed and sell as before the petition (*c*).



§ 4.—RULES RESPECTING LIQUIDATION BY ARRANGEMENT OR COMPOSITION.

“The Bankruptcy Rules, 1870,” contain the following rules relating to “proceedings for liquidation by arrangement or composition with creditors.”

Sections 125 and 126.

Rule 252. “Proceedings under these sections shall be instituted by the debtor by petition and affidavit thereto annexed according to the forms given in the schedule.”

253. “The court having jurisdiction in such proceedings shall be the court to which a bankruptcy petition against the debtor could be presented.”

254. “The first general meeting shall be summoned, to be held at the place mentioned in the affidavit filed with the petition (subject to such place being changed by order of the court, as hereinafter provided), and the time of meeting shall be at a stated hour between 10 a.m. and 5 p.m. on a day within one calendar month from the presentation of the petition, unless the court in any particular case shall otherwise order.”

255. “The first general meeting of creditors shall be summoned by notice according to the form in the schedule.”

256. “All first general meetings shall be summoned as follows:—

“A sufficient number of forms of such notice, duly signed, addressed, and stamped for post, shall be delivered to the registrar, together with

(*a*) *In re England, Ex parte The Sheriff of Middlesex*, 40 L. J. (N. S.) Bankr. 65.

(*b*) See sect. 34, *ante*, p. 329.

(*c*) *Ex parte The Birmingham Gas Light and Coke Company, Re Adams*, 40 L. J. (N. S.) Bankr. 1.

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a request and list of creditors according to the form in the schedule, and such list may be added to, or additional requests and lists be filed, as circumstances may require. Every request shall bear a stamp calculated at the rate of threepence for each notice required to be sent. The registrar shall cause the notices to be checked with the list or lists delivered to him, and to be sealed with the seal of the court and to be posted to the creditors, and the person posting the same shall forthwith make and file an affidavit, exhibiting a form of notice, and stating that he had posted similar notices to the persons mentioned in the lists delivered to the registrar, and stating also the date and place of posting."

257. "The debtor shall also deliver to the registrar a notice according to the form in the schedule to be gazetted seven days at least before the meeting is to be held."

258. "Notices summoning any first general meeting shall be posted at least 14 days before the day on which the meeting is to be held."

259. "Upon sufficient cause proved to the satisfaction of the court by the debtor or by any creditor, either *ex parte* or otherwise, the court may order and direct the place of any general meeting to be changed, provided application be made in such time as will allow notice of the change to be given to the creditors, as hereinafter directed. Any order so made by the court shall be according to the form in the schedule, and a copy thereof shall be gazetted forthwith, and notice thereof shall be given by the registrar by sending by post, on or before the eighth day prior to the meeting, a sealed office copy of the order of the court addressed to the several creditors, and to the debtor. The expense of and incident to such order and despatching copies thereof to the creditors as aforesaid shall be borne and paid in such manner as the court shall direct, and in case of non-compliance the copies of the order shall not be sent, but the meeting shall be held as originally summoned."

260. "The court may at any time after the presentation of a petition restrain further proceedings in any action, suit, execution, bankruptcy petition or other legal process against the debtor or his estate in respect of any debt proveable; or it may allow such proceedings, whether in progress at the filing of the petition or subsequently commenced, to proceed upon such terms as the court may think just. The court may also at any time after presentation of the petition appoint a receiver or manager of the property or business of the debtor, or of any part thereof, and may direct immediate possession to be taken of such property or business or any part thereof" (*d*).

261. "Any receiver or manager so appointed shall enter upon and act in the performance of his office at such time and in such manner and to such extent as the court may from time to time direct."

262. "A trader shall state in his petition the estimated amount of the debts owing by him to his creditors, and where no receiver or manager has been appointed by the court, a majority in value of such creditors may at any time prior to the passing of the special or extraordinary resolution, as the case may be, nominate and appoint a receiver or manager of the trade effects or business of the debtor, or any part

(*d*) Rule 260 is a repetition of sect. 13 (*ante*, p. 249), only applied to liquidation. Semble, sect. 13 would have applied to liquidation by arrangement,

and the rule seems inapplicable to composition, so the force of the rule may be doubted.

thereof according to the form in the schedule. Where any such receiver or manager has been so appointed he shall investigate the state of the debtor's affairs, and report thereon to the general meeting of creditors. The nomination and appointment of any such receiver shall be confirmed by the court upon summary application in any case in which the debtor refuses to give possession or control to the receiver or manager so appointed. Any such nomination paper shall be in duplicate, and may be signed by the creditors in their individual or partnership names, or by some person who shall state in his signature that he does so by procuration on the creditor's behalf. The signatures or debts need not be verified further than by the affidavit of one of the three principal creditors signing the nomination paper (or a partner in the firm of one of them) according to the form in the schedule, and such affidavit shall be filed in court with one of the nomination papers. If any receiver or manager has been appointed by the court, the nominee of the creditors shall be forthwith substituted in his place, and the court shall order accordingly."

263. "Where a receiver or manager has been appointed the court may at any time cancel his appointment by consent of the debtor and of the creditor or creditors (if any) upon whose application the appointment was made, and of any creditor or creditors whose proceedings may have been restrained as aforesaid, or if the court shall see fit."

264. "Where a receiver or manager has been appointed he shall be entitled to the custody of the books and effects of the debtor, and the debtor or any person having the previous custody thereof on his behalf shall forthwith deliver the same to the receiver."

265. "The receiver or manager shall at all times permit the debtor or any of his creditors or their agents to have access to and inspect the debtor's books of account."

266. "Where proceedings have been instituted for liquidation or composition the court may adjudicate the debtor bankrupt if in the opinion of the court the property of the debtor cannot be sufficiently protected by the exercise of the power hereinbefore given to restrain suits and actions, and the appointment of a receiver or manager; but in any such case all proceedings under such order of adjudication shall be stayed immediately upon the making thereof, and until the creditors shall have passed some special or extraordinary resolution in reference to the liquidation or composition, and in the event of any such resolution being duly passed the adjudication shall be forthwith annulled."

267. "In the event of any neglect on the part of the creditors to pass such resolution, the court may, on the application of any of the creditors, and after notice to the debtor, make an order of adjudication against the debtor, or direct the bankruptcy to be proceeded with, as the case may be."

268. "The chairman of the first general meeting shall be elected by a majority of the persons present thereat claiming to be or to represent creditors. The chairman of any subsequent general meeting shall be elected by a majority in value of the creditors present or represented thereat who have proved their debts."

269. "Creditors may prove their debts and appoint proxies as in bankruptcy."

270. "All debts which would have been proveable in bankruptcy had the debtor been adjudicated bankrupt at the date of the institution of the proceedings shall be proveable under any such proceedings."

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271. "All proofs and proxies intended to be used at any general meeting, and not previously filed, shall be handed in to the chairman of the meeting. Any objection thereto shall be marked thereon by the chairman, and shall be dealt with by the registrar on the resolution being presented to him for registration."

272. "A secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed value of the security. In cases of liquidation by arrangement any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled at any time before realization of such security by the creditor to redeem the same upon payment of such assessed value. The proof of any such creditor shall not be increased in the event of the security realizing a less sum than the value at which he has so assessed the same."

273. "Where any creditor shall desire to retire from any meeting and not to be considered as present, he may withdraw his proof without prejudice to his again proving his debt on any subsequent occasion."

274. "The debtor shall produce to the first general meeting, and also, in case there be any, to the second general meeting, a statement showing the whole of his debts and assets, and the names and addresses of the creditor to whom such debts respectively are due. The name of each creditor in such statement shall be numbered consecutively, and the list of creditors whose debts do not exceed 10*l.* shall be separated from and follow after the list of those creditors whose debts exceed that amount. The debtor's statement of affairs shall be as near as may be in the form required in bankruptcy."

275. "The resolution passed at the first general meeting (or first and second general meetings, as the case may be) shall determine whether the affairs of the debtor are to be liquidated by arrangement and not in bankruptcy, or whether any and what composition shall be accepted in satisfaction of the debts due to the creditors from the debtor, or it may reject either of such modes of arrangement. The resolution may declare to whom the registration of the resolution and the debtor's statement of affairs shall be intrusted, and the original resolution and statement shall forthwith be delivered accordingly to the person so appointed, and in the event of no such declaration being made in the resolution the same shall be registered by the debtor. Only such resolutions as are reduced into writing and are signed by or on behalf of the statutory majority of the creditors assembled at a meeting shall be taken cognizance of by the court, but the signatures of such creditors may be subscribed subsequently to the meeting, but prior to the filing or registration of the resolution."

276. "The chairman shall be bound forthwith to deliver to the person, if any, so appointed, or, in default of such appointment, to the debtor, every declaration or affidavit for proof of debt and proxy paper of what nature or kind soever, and whether in due form or otherwise, which shall have been received at the general meeting or meetings, and also the debtor's statement of affairs, and in default thereof may be summoned before the court, and the court may make such order in the matter as it shall think fit."

277. "In the event of a liquidation by arrangement being resolved upon at any general meeting, and no trustee with or without a committee of inspection being then appointed, a subsequent meeting shall be held at such time and place, at an interval of not more than a week, as shall be appointed by the resolution, or in default of any such subsequent meeting being so appointed, the same shall be held on the same day in the following week, at the same time and place. No notice of any such subsequent meeting need be given to the creditors."

278. "In cases of liquidation by arrangement the general meeting shall by special resolution declare what security, if any, shall be given by the trustee, and what remuneration, if any, the trustee shall receive, or they may resolve to leave his remuneration to the committee of inspection, or to a subsequent general meeting."

279. "Where the creditors at the first general meeting duly pass a resolution that a composition shall be accepted in satisfaction of the debts due to them from the debtor, they shall specify in their resolution the amount of the composition and the instalments and dates at which the same shall be payable, and they may name some person as trustee for receipt and distribution of the composition and any negotiable securities which may be given for the same."

280. "Instead of specifying by their resolution the security to be given the creditors may resolve that the composition or some part or instalment thereof shall be secured in such manner as may be approved by a creditor or creditors to be named by the resolution."

281. "The extraordinary resolution may provide that the terms of the composition be embodied in a deed between such parties and containing such covenants for payment of the composition, and for protecting and releasing the debtor, and such other covenants and such provisions for securing the composition either by assignment of property, or by inspection of the debtor's business or otherwise, as the nature of the case may require, and as the resolution may specify in particular or general terms."

282. "Where, at the first general meeting, a resolution has been passed, resolving that a composition shall be accepted in satisfaction of the debts due to the creditors from the debtor, such resolution shall be filed with the statement of the debtor's affairs, proof, and proxies within three days, and another general meeting shall be appointed to be held at an interval of not less than seven days nor more than fourteen days from the date of the meeting at which the resolution was first passed. The second general meeting shall be held at the same place as the first general meeting unless the resolution at such first general meeting shall have otherwise directed. Notice thereof according to the form in the schedule shall be given to every creditor in manner provided with respect to first general meetings, with this addition, that the notice to every creditor who was not present or represented at the first general meeting shall be sent by registered post letter. Such notices shall be sent on or before the sixth day prior to the day on which the second meeting is appointed to be held. In the event of notice not being requested to be sent by the debtor or his attorney on the sixth day prior to the second meeting, any creditor may file a similar request, desiring the registrar to forward the notices summoning the second meeting; and in the event of any meeting being so summoned it shall be sufficient if the notices are signed by the registrar and sealed, and are posted on the third day prior to the meeting."

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283. "At the second general meeting of creditors, the creditors assembled may confirm the resolution passed at the first general meeting, or they may pass a special resolution that the affairs of the debtor are to be liquidated by arrangement and not in bankruptcy."

284. "The person to whom the registration of the special or extraordinary resolution may have been entrusted, or the debtor or his attorney, as the case may be, shall file the same in court, together with the debtor's statement of affairs and all proofs and proxies, within three days after he shall have received the same, or in default thereof shall be summoned before the court, and some person able to depose thereto shall verify and identify the resolutions, statement, proofs, and proxies so filed as being the whole of the resolutions, statement, proofs, and proxies come to and produced at the meeting or meetings when such special or extraordinary resolutions were passed."

285. "In cases of proceedings for liquidation, by arrangement or composition, instituted by partners, separate meetings of the different classes of creditors shall be held; thus: if the partnership consists of A., B. and C., a meeting of the joint creditors of A., B. and C. shall be first held, and separate meetings of the separate creditors of A., B. and C. shall be held at a date or time subsequent to the meeting of the partnership creditors. The joint creditors may come to such resolution as they may think fit with regard to the joint estate. The separate creditors may also come to such resolution as they may think fit as regards the liquidation of the estate of their individual debtor, but in the event of their determining upon his bankruptcy, or the liquidation of his estate by arrangement, they shall choose the same trustee, if any, as has been or shall be appointed by the joint or partnership creditors, but they may appoint a committee of inspection from their own body, if they think fit, or they may adopt the committee (if any) appointed by the joint or partnership creditors. In the event of the separate creditors of any such debtor agreeing to accept a composition, in cases where the joint creditors have resolved on a liquidation by arrangement, the assets of such separate debtor shall be made available by the trustee for or towards the payment thereof, in such manner as the court shall direct and approve, and any surplus of such separate estate remaining in the hands of the trustee, after payment of or provision for such composition, and all proper costs incurred in connexion therewith, shall be deemed partnership assets. If in any such case the separate debtor shall be a member of more than one firm, the surplus of his separate estate shall be applied in such manner as the court may direct."

286. "If the petition be by partners, and any two or more of such partners constitute a separate and independent firm, the creditors of such firm may likewise come to a separate resolution as regards the liquidation of such minor partnership estate, and where any surplus shall arise upon the liquidation thereof, the same shall be carried over to the separate estates of the partners in such minor firm according to their respective rights therein."

287. "In cases of proceedings for or towards liquidation by arrangement or composition by an individual debtor, his creditors and debts shall be deemed to be and include not only those creditors to whom or those debts in respect of which he is individually responsible, but also those creditors and debts to whom or in respect of which he is also responsible jointly with any other person or persons; and the statutory majority required for the purpose of any resolution shall be a collective

majority of the whole of such joint and separate creditors assembled at any meeting. In any such last-mentioned proceedings the terms of the resolution as regards joint and separate creditors need not be identical, and, if so desired, the resolution may provide for the payment of a composition to the separate creditors, and that the rights of the joint creditors shall not be prejudiced or affected thereby."

288. "The creditors assembled at any general meeting may include in their resolution a direction that the proceedings be transferred to any court other than that in which the same were originated; and upon any such resolution being filed, the proceedings shall be forthwith transferred by the registrar in accordance therewith; and the court to which the same shall have been transferred shall thereafter act in the matter of the proceedings in like manner as if the same had been properly instituted therein in the first instance."

289. "Every creditor in respect of a proveable debt shall in the event of a liquidation by arrangement being resolved upon, be absolutely restrained from commencing or continuing or enforcing any proceedings whatsoever against the debtor or his property, notwithstanding that such creditor has not received notice of the general meeting, unless the court shall be of opinion that such creditor's rights have been prejudicially affected by the resolution, and that the estate would yield a larger dividend if administered in bankruptcy" (e).

290. "Where bankruptcy occurs during the continuance of a liquidation by arrangement, the trustee under such liquidation shall pay over and account for to the trustee to be appointed under the bankruptcy any monies or property of the debtor which have come to his hands, and in the event of a dividend having been paid to some of the creditors the court shall make such order for the appropriation thereof as will equalize the distribution of the monies or property amongst the creditors who would or should have been entitled thereto under the liquidation proceedings."

291. "In case of liquidation by arrangement, all proper costs of and incidental to the proceedings prior to the passing of the resolution shall be paid by the trustee out of the estate of the debtor in like manner and in the like priority as the costs of a petitioning creditor under a bankruptcy petition."

292. "Where bankruptcy occurs pending proceedings for or towards liquidation by arrangement or composition with creditors, the proper costs incurred in relation to such proceedings shall be paid by the trustee under the bankruptcy out of the debtor's estate, unless the court shall otherwise order."

293. "Where any resolution is required to be passed or any act to be done by the creditors present or represented at any meeting, the majority required for the purpose shall, in the absence of any enactment to the contrary, be a majority in value of the creditors present or represented thereat."

294. "Resolutions duly come to at any meeting shall have full force and effect, notwithstanding that it may also be resolved that for other purposes the meeting shall stand adjourned."

295. "Upon presentation of a special or extraordinary resolution for

(e) The judicial discretion of the court in granting injunctions is not excluded by this rule. *James, L. J., Ex parte Mills, Re Manning*, 40 L. J. (N. S.) Bankr. 89.

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registration the registrar shall examine the same, and may hear any creditor who shall have given him notice of his desire to be heard thereon. The registrar being satisfied that the requirements of the statute and of these rules have been complied with shall register the same, making a memorandum thereon and on the debtor's statement of affairs as follows:—

‘Registered _____ day of _____ 187 _____, Registrar,’ and shall seal the same with the seal of the court. The registrar in cases of liquidation by arrangement shall thereupon deliver to the trustee a certificate according to the form in the schedule. The registration of any special or extraordinary resolution, or the refusal to register the same by the registrar, shall be an act that may be appealed from by the debtor or any creditor who was heard before the registrar on the occasion of such registration or refusal. The registrar shall, where he refuses to register such resolution, certify the grounds of such refusal by memorandum under his hand, and file it with the proceedings” (f).

296. “The resolution and statement so registered shall at all times be open for inspection by any creditor whose name appears on the statement or by any person on his behalf.”

297. “If a receiver or manager has been appointed, his duties shall terminate upon the appointment of a trustee in cases of liquidation by arrangement, and upon the passing of the extraordinary resolution in cases of composition, unless such resolution shall otherwise provide.”

298. “Where a receiver or manager has been appointed and his duties are concluded, he shall render his account, and pay or deliver over any money or property in his hands to the trustee (in cases of liquidation by arrangement), or to the debtor or his nominee (in cases of composition).”

299. “The court shall have the same power and discretion as to the appointment, remuneration, and removal of the receiver or manager, and in the settlement of his accounts, and in directing the appropriation of monies or property in his hands as is exercised by the Court of Chancery, or as near thereto as may be.”

300. “Neither the resolutions nor the proofs or proxies of creditors assembled at any meeting shall be objected to or refused by the registrar by reason of any informality therein, unless he shall be of opinion that such informality is matter of moment, in which event he shall refer the matter to the judge.”

(f) The registrar has no power to examine the debtor or witnesses on the presentation of the resolution. The debtor may be examined (though not on oath) at the creditors' meetings, and his answers taken down may be used as evidence by an opposing creditor before the registrar. The registrar must of course hear a creditor (either in person, or his attorney or counsel) who has given notice under Rule 295; and the registrar, if not satisfied of the truth of the debtor's statement, may refuse to register the resolution; but in other respects his duties are merely minis-

terial. No abuse can arise from this limitation of the registrar's power, as there is an appeal under Rule 295, whether the registrar registers or refuses. Further, if a creditor had no opportunity of examining the debtor at the meetings, or if the debtor's answers are unsatisfactory, an application may be made to the court to restrain the registration even without an allegation of fraud. *Ex parte Levy, Re Varbetian*, 40 L. J. (N. S.) Bankr. 40. As to the duty of the registrar in ascertaining the validity of the resolution, see *ante*, p. 374, note.

301. "The passing of a special resolution (in the case of liquidation by arrangement) shall be deemed and taken as conclusive evidence that the debtor has complied with the provisions of the statute with regard to the statement of his affairs required to be submitted to the general meetings of his creditors. The debtor shall, however, at all times render to the trustee every information in his power with reference to his debts and assets, and shall in default be liable to be summoned and examined before the court thereon."

302. "Where liquidation by arrangement and not in bankruptcy has been resolved on, the creditors may at the same meeting at which such resolution is passed, resolve whether the debtor's discharge shall be granted either forthwith or at a date to be specified in the resolution, or subject to any and what conditions. In default of any resolution being then come to as to the debtor's discharge a general meeting shall be summoned for the purpose of considering the grant thereof, either when the trustee shall see fit or when the committee of inspection (if any) or when the debtor, with the concurrence of one-fourth in value of his creditors, who have proved, shall require the trustee to summon the same."

303. "The resolution to be come to at any such meeting and the report thereof to the registrar, and the debtor's discharge, shall be according to the form in the schedule."

304. "General meetings subsequent to the appointment of a trustee shall be summoned by him by giving seven days' notice by post to each of the creditors who have proved their debts, stating the object of the meeting and the business proposed to be transacted thereat."

305. "A general meeting may, however, at any time be similarly summoned by any creditor with the concurrence, including himself, of one-fourth in value of the creditors who have proved their debts."

306. "Any mistake made inadvertently by a debtor in the statement of his debts may be corrected with the assent of a majority in value of his creditors assembled at a general meeting similarly summoned by the debtor."

307. "A trustee may be removed by a special resolution of the creditors assembled at a general meeting summoned for the purpose, and another trustee may be appointed in his place, by a majority in value of the creditors then present or represented. Where a trustee shall die, or where for any reason there shall be no trustee acting in the liquidation, a general meeting may be summoned in manner hereinbefore directed, and another trustee may be appointed by the majority in value of the creditors present or represented thereat."

308. "The resolution appointing any such new trustee shall be registered with the registrar, and the certificate of the registrar in respect of the appointment of any such new trustee shall be conclusive evidence of his appointment."

309. "Any creditor or creditors resident in foreign parts, the notice to whom could not have been received in sufficient time to enable him or them to attend or be represented at the general meeting thereby convened may show cause to the court against the resolution being proceeded with, notwithstanding its registration, but the same shall not be disturbed unless the creditor or creditors do show or can prove to the satisfaction of the court that, had he or they been present and dissented from the resolution, the same could not have been carried by the statutory majority, and unless also the court is of opinion that it is unjust or inequitable that the resolution should be binding on him or them."

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310. "Proof of debt by any creditor shall be deemed conclusive evidence that notice of all general meetings, prior to and inclusive of that at which such proof is produced, has been duly given to him."


311. "All debts must be proved prior to the payment of dividend thereon by the trustee."

312. "Seven days at least before declaring any dividend under a liquidation by arrangement, a notice shall be gazetted by the trustee in the form given in the schedule requiring the creditors to send to him their names and addresses, and the particulars of their debts or claims, and on declaring a dividend, a sufficient reserve shall be made by the trustee for such dividend upon all debts or claims notified to him in pursuance of such notice. The trustee shall be also deemed to have notice of the debts of all creditors whose names are inserted in the debtor's statement of affairs, and (except where any such debt has been adjudicated upon prior to the declaration of the dividend) a similar reserve shall be made in respect thereof."

313. "Wherever the trustee shall reject the claim or proof of any creditor he shall give notice to such creditor by post in the form given in the schedule, and where the creditor is resident in Europe the trustee shall be entitled to exclude from dividend any such claimant or creditor whose debt he so rejects, unless such creditor shall, within fourteen days from the time at which the trustee's notice should have been delivered to him in the ordinary course of post, apply to the court to admit his proof and proceed with such application with due diligenece. Where any such creditor is resident beyond the limits of Europe such length of notice shall be given to him as the court shall order."

314. "Except as before mentioned, the trustee shall declare dividends amongst such creditors only as have proved their debts up to the time of such declaration of dividend, and no creditor who has omitted to prove his debt or to send to the trustee the particulars of his claim, or whose name does not appear in the debtor's statement shall be entitled to disturb any such dividend, or to make any claim in respect thereof against the trustee, but upon proof of his debt any such creditor shall be entitled to receive the same prior to the payment of any further dividend to the other creditors."

315. "An office shall be attached to the London Bankruptcy Court to be called the 'office for registration of arrangement proceedings.' Such office shall be presided over by such registrar or registrars as the chief judge may from time to time appoint. All petitions to such court under sects. 125 and 126, and all proceedings thereunder, shall be filed in such office, and the same shall be kept in continuation of the records of the trust deeds under 'The Bankruptcy Act, 1861,' which shall be transferred to the aforesaid office. A similar index to that heretofore in use for trust deeds, or as near thereto as may be, shall be kept of all resolutions registered under 'The Bankruptcy Act, 1869.' The resolutions registered in the London Court of Bankruptcy shall be entered therein as soon as registered, and the resolutions registered in the county courts shall be entered therein as soon as an office copy thereof shall be received. Every registrar of a county court registering any special or extraordinary resolution shall forthwith send an office copy thereof to the said office for registration of arrangement proceedings (such office copy to be paid for by the person registering the resolution)."



§ 5.—FORMS.

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The following forms relating to liquidation by arrangement or composition are provided by the Rules of 1870:—

No. 106. *Petition under Sections 125, 126.*

“The Bankruptcy Act, 1869.”

To the London Bankruptcy Court [or the county court of
holden at]].

The humble petition of A. B. of, &c.

Showeth,

That your petitioner alleges that he is unable to pay his debts, and is desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors, and hereby submits to the jurisdiction of this court in the matter of such proceedings. (*In the case of a trader, add “and that your petitioner estimates the amount of the debts owing by him to his creditors at £ ”.*)

[*Add where petition presented to a county court, That your petitioner does not reside or carry on business within the district of the London Bankruptcy Court.*]

Your petitioner therefore prays that notices convening such general meeting or meetings of his creditors as may be necessary to be given by him during the course of such proceedings may be sent in the prescribed manner, and that such resolution or resolutions as his creditors may lawfully pass in the course of such proceedings, and as may require registration, may be duly registered by the registrar of the court.

And your petitioner shall ever pray, &c.

A. B.

Signed by the petitioner, A. B., on the
day of 187 , in the presence of

Registrar

or

Attorney. (Address.)

If the petition be by partners alter the form accordingly.

No. 107. *Affidavit in support of Petition under Sections 125, 126.*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of
holden at]].

I, A. B. of , make oath and say, as follows:—

I am the [or one of the] petitioner [or petitioners] named in the petition herunto annexed.

I verily believe that it will be most convenient to the creditors whose debts exceed ten pounds that the general meeting should be held at

Sworn at

A. B.

(*Where an attorney is employed add the following certificate.*)

I certify my belief that it will be most convenient to the creditors of the petitioner that the general meeting should be held at [as above].

C. D.,

Attorney in the matter of the petition.

No. 108. *Notice to Creditors of General Meeting.*

“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy [or the county court of holden at].

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by A. B. of (*description as in petition*).

A general meeting of the creditors of the above-named person [or persons] is hereby summoned to be held at (*here insert name of town, and street or place*) on , the day of instant [or next], at o'clock in the noon precisely. The sections of “The Bankruptcy Act, 1869,” under which the proceedings are instituted, provide as follows:—

[*Here extract from clause 125, sub-sects. 1 and 5, and the two first paragraphs of sect. 126.*]

A form of proof and proxy will be found on the third side of this notice.

Dated the day of 187 .
(Signed) A. B. (*Debtor*),
or,
C. D. (*adding address*),
Attorney for the said debtor.

In case of partnership the notice must be signed by one of the partners in the partnership name, or by all the partners, or by a solicitor or solicitors on their behalf.

No. 109. *Affidavit to be annexed to the Notice summoning First General Meeting.*

In the London Court of Bankruptcy [or the county court of holden at].

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by A. B. of, &c.

I of make oath and say, as follows:—

The said A. B. was at the date of the institution of the said proceedings, and still is, justly and truly indebted to me in the sum of for (*state consideration*) for which said sum or any part thereof I say that I have not, nor hath any person by my order or to my knowledge or belief, for my use had or received any manner of satisfaction or security whatsoever, save and except the following:—

[*Here set out security, or if bills be held specify them in the schedule.*]

Date.	Drawn.	Acceptor.	Amount.	Due Date.

Sworn at
I appoint C. D. of, &c., my proxy in the above matter.
E. F. [*or G. H. of in partnership name.*]

No. 110. *Request with List of Creditors.*

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“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy [*or the county court of*
holden at _____].

(Stamp at the rate of _____ per notice.) In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by
(insert name; the address need not be inserted).

To the registrar.

I [*or we*] request that the notices of the general meeting on the day of _____ 187____, herewith delivered to you, duly addressed and stamped for post, may be sent to the under-scheduled creditors.

Dated this _____ day of _____ 187____.

(*To be signed by the debtor or one of the debtors or his or their attorney.*)

No.	Names of Creditors or Firms of Creditors.	Addresses.	Estimated Amount of Debt.

No. 111. *Notice for Gazette.*

“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy [*or the county court of*
holden at _____].

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by A. B. of _____.

Notice is hereby given that a first [*or second, as the case may be*] general meeting of the creditors of the above-named person or persons, has been summoned to be held at _____ on the _____ day of _____, at _____ o'clock in the _____ noon precisely.

Dated this _____ day of _____ 187____.

A. B.

or

C. D. (attorney for the said A. B.).

The signature to this notice, if not sealed, must be verified by affidavit, unless signed by a London solicitor.

No. 114. *List of Creditors assembled to be used at every General Meeting.*

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“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy [or the county court of _____,
holden at _____].

In the matter of _____
General meeting, held at _____ this _____ day of _____ 187 .

No. of Assents of Creditors whose Debts exceed £10.	Number.	Names of Creditors assembled.	Amount of Assent.	Amount of Proof.
1	1			
	2			
1	3			
1	4			
	5			
1	6			
1	7			
	7	Total number of creditors assembled.		
5	Total number of assents.			
		Totals . . .	£	

No. 56. *Order to stay Proceedings on a Composition, &c. (g).*

“The Bankruptcy Act, 1869.”

In the London Bankruptcy Court [or the county court of _____,
holden at _____].

Sect. 80,
par. 10.

In the matter of A. B., of _____, a bankrupt.

Upon the application of H. D. of _____ it having been proved to the satisfaction of the court that the proceedings in this bankruptcy ought to be stayed, by reason that negotiations are pending for the

(g) Sect. 80, sub-sect. 10, authorizes the stay of proceedings in the case of negotiations pending for the liquidation of the affairs of the bankrupt by arrangement, or for the acceptance of a composition by the creditors (see *ante*, p. 245, note), and the above

form, although placed among those relating to the acceptance of composition or settlement under proceedings in bankruptcy (*ante*, p. 297), seems intended to relate to sects. 125 and 126, and it is therefore inserted here.

- (3.) That the security of C. D. be accepted for the said composition [or the instalment thereof], or that the said composition [or the instalments thereof] be secured to the satisfaction of E. F. and G. H.
- (4.) That I. K. be appointed trustee in the matter.

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[Here follow signatures of creditors.]

F. K., Chairman.

No. 117. *Notice concerning Second General Meeting.*

“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy [or in the county court of
holden at].

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by A. B. of, &c.

A second general meeting of the creditors of the above-named person [or persons] is hereby summoned to be held at on the day of instant [or next], at o'clock in the noon precisely. A majority in number and value of the creditors then assembled may confirm the resolution come to at the first general meeting, or a majority in number representing three-fourths in value of such creditors may by resolution declare that the affairs of the above-named person [or persons] may be liquidated by arrangement and not in bankruptcy.

Dated the day of , 187 .

(Signed) A. B. (Debtor),
or
C. D. (adding address),
Attorney for the said debtor.

No. 118. *Resolution at Second General Meeting.*

“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy,
or

In the county court of , }
holden at . }

In the matter of proceedings for or towards the liquidation by arrangement or composition with creditors instituted by A. B., of
, &c.

We, the undersigned, being the statutory majority of creditors assembled at the second meeting in the above matter, duly held at this day of , 187 , in accordance with the provisions of the said act, do hereby confirm the resolution passed by the statutory majority of the creditors of the said A. B. assembled at the first meeting [or do hereby resolve that the affairs of the said A. B. be liquidated by arrangement and not in bankruptcy.]
[and following on as in the form provided for resolution at the first general meeting, where liquidation by arrangement is resolved on].

[Here follow signatures of creditors.]

F. K., Chairman.

No. 119. *To be added to Statement of Affairs in Cases under Sect. 126 where necessary.*

List of bills of exchange or promissory notes on which the debtor is liable, and of the holder whereof he is ignorant.

Acceptor's Name.	Name of Person to whom payable.	Due Date.	Amount of Bill or Note.	Here state any other Particulars within the Debtor's Knowledge respecting the Bill or Note.
	Total to be added to list of unsecured creditors } £			

No. 120. *Form of Affidavit to be used upon Registration of a Special or Extraordinary Resolution.*

In the London Bankruptcy Court [or the county court of _____, holden at _____].

In the matter of proceedings for liquidation by arrangement or composition with creditors instituted by A. B., of &c.

I, the above-named A. B. [or C. D. of, &c., as the case may be], make oath and say as follows:—

1. That I verily believe that the resolutions, statement of affairs, proofs and proxies filed in this matter are the whole of the resolutions, statement, proofs and proxies come to and produced at the general meeting [or meetings] held in this matter on the _____ day of _____, (and the _____ day of _____).

2. (*In cases of composition.*) That I verily believe that the gross amount of composition payable to my creditors [or to the creditors of the said A. B.] does not exceed £ _____.

Sworn, &c.

No. 121. *Certificate of Trustee's Appointment.*

“The Bankruptcy Act, 1869.”

In the London Court of Bankruptcy [or the county court of _____, holden at _____].

In the matter of a special resolution for liquidation by arrangement of the affairs of A. B. of, &c.

This is to certify that C. D. of, &c., has been appointed and is hereby declared to be trustee under this liquidation by arrangement.

Given under my hand and the seal of the court this _____ day of _____, 187 _____.

Registrar.

No. 122. *Resolution for Debtor's Discharge.*PART VII.
CHAP. XVI.

"The Bankruptcy Act, 1869."

In the London Court of Bankruptcy [or the county court of _____, holden at _____].

In the matter of a special resolution for liquidation by arrangement of the affairs of A. B. of, &c.

We, the undersigned, being the statutory majority of the creditors assembled at the general meeting of creditors in the above matter duly held at _____, this _____ day of _____, 187____, in accordance with the provisions of the said act, do resolve—

That the discharge of the said A. B. be and the same is hereby granted.

[or that the discharge of the said A. B. be granted to him on the _____ day of _____ 187____, or that the discharge of the said A. B. be granted to him on (here state the conditions on which the same is granted)].

That the close of this liquidation shall take place on and from the _____ day of _____ 187____.

That G. H., the trustee, be released on and from the _____ day of _____ 187____.

No. 123. *Report of Trustee as to Debtor's Discharge.*

"The Bankruptcy Act, 1869."

In the London Court of Bankruptcy [or the county court of _____, holden at _____].

In the matter of a special resolution for liquidation by arrangement of the affairs of A. B. of _____, &c.

I, being the trustee under the above liquidation, do hereby certify and report that a general meeting of the creditors of the said A. B. was held at _____ on the _____ day of _____ and that the discharge of the debtor was then granted by a special resolution of the creditors then assembled.

Dated this _____ day of _____ 187____.

Trustee.

To the registrar.

No. 124. *Debtor's Discharge.*

"The Bankruptcy Act, 1869."

In the London Court of Bankruptcy [or the county court of _____, holden at _____].

In the matter of a special resolution for liquidation by arrangement of the affairs of A. B. of, &c.

Whereas the trustee under the said liquidation has certified and reported to me that (here follow certificate of trustee).

I do, therefore, hereby certify such discharge in pursuance of the statute in that behalf.

Given under my hand and the seal of the court this _____ day of _____ 187____.

Registrar.

4. *Form of Affidavit on Nomination of Receiver by Creditors (h).*PART VII.
CHAP. XVI.

"The Bankruptcy Act, 1869."

In the London Court of Bankruptcy [*or* in the county court of
holden at].In the matter of proceedings for liquidation by arrangement or
composition with creditors instituted by A. B. of, &c.

I, of , make oath and say as follows:—

Rule 262,
1870.1. I am [*or* a partner in the firm of , which firm is] one of the
three principal creditors of the above-named A. B., who have nominated
C. D. as receiver [*or* manager] of the property (and business) of the said
A. B.2. I verily believe the said C. D. has been duly nominated as such
receiver [*or* manager] by a majority in value of the creditors of the said
A. B., in pursuance of Rule 262 of "The Bankruptcy Rules, 1870."

Sworn, &c.

(h) Bankruptcy Rules, 1871.

CHAPTER XVII.

FEES IN BANKRUPTCY PROCEEDINGS.

“The Bankruptcy Act, 1869,” enacted that—

Scale of fees.

Sect. 68. “The Lord Chancellor shall, with the sanction of the Treasury, from time to time prescribe a scale of fees to be charged for any business done by any court or officer thereof under this act; and the Treasury shall direct whether the same shall be imposed by stamps or otherwise, and by whom and in what manner the same shall be collected, accounted for, and appropriated, and whether any and what remuneration shall be allowed to any person performing any duties under this act.”

By virtue of the power thus vested in him, the Lord Chancellor with the sanction of the Treasury, by order dated 10th August, 1871, prescribed that the following scale of fees shall be the scale of fees to be charged for any business done by any court or officer under the said act in lieu of all other fees (i) :—

SCALE OF FEES.

TABLE A.

	Stamp duty.		
	£	s.	d.
Every declaration by a debtor of inability to pay his debts ..	0	5	0
Every debtor's summons	0	5	0
Every bankruptcy petition	5	0	0
Every bond with sureties	0	5	0
Every affidavit filed, other than proof of debts	0	1	0
Every subpoena	0	1	0
Every petition under sections 125 or 126 of the act	1	0	0
For despatching notice to creditors or others, exclusive of postage, each notice	0	0	3
Every application for an order of discharge in bankruptcy or certificate of discharge in liquidation	1	0	0
Every special resolution presented to a registrar for registration under sect. 125, paragraph 4, stamps denoting a duty computed at the rate of five shillings upon 100 <i>l.</i> or fraction of 100 <i>l.</i> on the gross amount of the estimated assets, not exceeding a total duty of 200 <i>l.</i>			
Every extraordinary resolution presented to a registrar under sect. 126, stamps denoting a duty computed at the rate of five shillings upon 100 <i>l.</i> or fraction of 100 <i>l.</i> on the gross amount of the composition, not exceeding a total duty of 200 <i>l.</i>			

(i) This order superseded a previous scale of 1st January, 1870.

	Stamp duty.			PART VII. CHAP. XVII.
	£	s.	d.	
Every application for search for proceedings, other than by petitioner, trustee, or bankrupt	0	1	0	
Every application to a court	0	5	0	
Every office copy, each folio of 72 words	0	0	2	
On first certified statement showing assets realized, forwarded by a trustee to the comptroller under sect. 55 of the act, stamps denoting a duty computed at the rate of five shillings upon 100 <i>l.</i> or fraction of 100 <i>l.</i> on the gross amount of the assets realized and brought to credit, and on any subsequent statement, stamps denoting a duty computed at the rate of one shilling upon 20 <i>l.</i> or any fraction of 20 <i>l.</i> on the gross amount of additional assets realized and brought to credit in any such subsequent statement.				
On every record of trial	5	0	0	
or such less sum as the court may specially order.				
Every allocatur by any officer of the court for any costs, charges, or disbursements, where such bill of costs shall not exceed 5 <i>l.</i> ..	0	1	6	
Exceeding £5 and not exceeding £10	0	2	6	
" 10 " 20	0	5	0	
" 20 " 30	0	7	6	
" 30 " 50	0	10	0	
" 50 " 100	0	15	0	
" 100 " 150	1	0	0	
" 150 " 200	1	10	0	
" 200 " 300	2	0	0	
" 300 " 500	3	0	0	
" 500 " —	5	0	0	

TABLE B.

Attending court each sitting	0	2	0
Serving every debtor's summons, bankruptcy petition, subpoena, order, notice, or other process within two miles, including affidavit of service	0	3	6
Preparing advertisement for Gazette or local paper	0	3	6
Agent's charge for insertion in Gazette	0	1	0
Executing every warrant of seizure, or search warrant, or warrant of apprehension, or order of commitment, within two miles of court house	0	10	0
Keeping possession—for each day the man is actually in possession; including affidavit of possession being actually kept	0	4	6
(3 <i>s.</i> 6 <i>d.</i> of the above sum is to be paid to the man in possession, and his receipt produced.)			
High bailiff's, or in the London Bankruptcy Court officer's, man travelling to place of possession, or to execute a warrant of or order of commitment, or to serve a summons, petition, order, notice, subpoena, or other process, or for any other purpose specially directed by the court per mile	0	0	5
His time, per day, where distance exceeds 10 miles	0	4	6
His expenses, per day	0	4	6
If high bailiff of a county court or officer of London Bankruptcy Court directed by the court personally to travel, per mile ..	0	0	7
If high bailiff of a county court or officer of London Bankruptcy Court directed by the court personally to travel, his time, per day	0	10	0
If high bailiff of a county court or officer of London Bankruptcy Court directed by the court personally to travel, his expenses, per day	0	10	0

Where an inventory is deemed requisite, and is directed by the court or trustee to be taken by a high bailiff or officer of the court, a proper remunera-

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tion may be allowed for taking it, having regard to the time occupied, and the nature of the property included in it.

Where no trustee is appointed by the creditors, or where there is a vacancy in the office of trustee, and the bankruptcy is carried on with the aid of the registrar as trustee: for realization of the estate 5*l.* per cent. on the first amount of 100*l.* or any less sum realized by the registrar; 2½ per cent. on the next amount of 400*l.* or any less sum; 1 per cent. on the next amount of 500*l.* or any less sum; and ½ per cent. on all further sums.

On dividend 2*l.* per cent. on the first amount of 1,000*l.* or any less sum actually divided, and 1 per cent. on all further sums.

TABLE C.

The fees and allowances payable on proceedings had after the 31st day of December, 1869, in respect of any matter which was pending in any court having jurisdiction in bankruptcy on the said day shall be the same as if those proceedings had been taken before such day, and shall be applied to the same purposes.

We, the undersigned Lords Commissioners of her Majesty's Treasury, do hereby sanction the foregoing scale of fees, and do direct that the fees to be taken by stamps shall be those mentioned in Table A., and that the fees mentioned in Table B. shall be taken in money, and that the fees and allowances referred to in Table C. shall be taken by stamps or money according as they have hitherto been taken.

And we further direct that the stamp shall be affixed or the money paid in respect of every fee before the proceeding is had in respect of which the fee is payable, and that the charge to be made by the London Gazette for the insertion of each notice authorized by the act or rules shall be ten shillings.

W. P. ADAM.
W. H. GLADSTONE.

10th August, 1871.

Stamps.]—"The Bankruptcy Rules, 1870," provide that—

Sect. 68.

Rule 206. "Every officer of the court who shall receive any document to which an adhesive stamp shall be affixed, shall, immediately upon the receipt of such document deface the stamp thereon, by writing partly on the stamp and partly on the document the name of the debtor; and no such document shall be filed or delivered until the stamp thereon shall have been defaced in manner aforesaid, and it shall be the duty of the party presenting or receiving such document to see that such defacement has been duly made."

CHAPTER XVIII.

COSTS IN BANKRUPTCY.

§ 1.—GENERAL PROVISIONS RELATING TO COSTS.

§ 2.—SCALE OF COSTS IN BANKRUPTCY.

§ 3.—SCALE OF COSTS IN LIQUIDATION BY ARRANGEMENT.



§ 1.—GENERAL PROVISIONS RELATING TO COSTS.

“The Bankruptcy Act, 1869,” s. 78, empowered the Lord Chancellor, with the advice of the chief judge in bankruptcy, to make rules of court, prescribing regulations *inter alia* “as to the fund out of which costs are to be paid, the order of payment, and the amount and taxation thereof” (a).

“The Bankruptcy Rules, 1870,” contain the following provisions relating to costs:—

Rule 186. “The court may in all matters before it award such costs as to it shall seem fit and just; and all costs so awarded by the London Bankruptcy Court shall be recoverable in the same manner as costs awarded by a rule of any of the superior courts of common law at Westminster may be recovered, and all costs so awarded by a county court shall be taxed and recoverable in the same manner as costs ordered to be paid in any such court in any action or suit.”

187. “Every order for payment of money and costs, or either of them, shall be sealed with the seal of the court, and be signed by a registrar, and shall be forthwith filed with the proceedings.”

188. “All costs shall be in the discretion of the court, and shall be paid by such persons as the court shall order, and every such order for payment of costs may be enforced by execution.”

189. “The costs directed by any such order to be paid shall be taxed on production of an office copy of such order, and the allocatur being duly stamped shall be signed and dated by the master or registrar taxing the costs.”

“The Bankruptcy Rules, 1871,” contain the following further provisions:—

Rule 4. “All bills and charges of attorneys, receivers, managers, accountants, auctioneers, brokers, and other persons not being trustees, in matters of bankruptcy, shall be taxed by the proper officer of the

(a) See sect. 78, *ante*, p. 206.

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court, and no payments in respect of such bills or charges shall be allowed by the comptroller, in the accounts of a trustee, without due proof of such taxation having been made. The taxing officer shall satisfy himself that the employment of a solicitor has been duly authorized by section 29 of the act."

Rule 5. "All bills and charges of attorneys, receivers, managers, accountants, auctioneers, brokers, and other persons not being trustees, in matters of liquidation, shall be taxed by the proper officer of the court, and no payments in respect of such bills or charges shall be allowed in the accounts of a trustee without due proof of such taxation having been made. No payment shall be allowed in respect of the remuneration of a trustee in liquidation, except on the allocatur of the taxing officer, as being in accordance with the determination of the creditors thereon."

Rule 6. "Where in bankruptcy or liquidation a receiver or manager is continued as trustee, the remuneration of trustee at the rate determined on shall commence as from the date of his appointment as receiver or manager, and shall be assessed accordingly; and no other than the aforesaid remuneration shall be made to the trustee for his services as receiver or manager."

Rule 7. "Where the receiver or manager is not continued as trustee, or is continued as trustee but without remuneration, he shall be allowed out of the estate such sum for his services as receiver or manager as the taxing officer of the court shall, having regard to the views of the trustee and committee of inspection (if any) thereon, think fit."

Rule 8. "Where any costs in bankruptcy or liquidation are incurred subsequent to these rules, and the proveable debts of the debtor do not exceed 750*l.*, or the estimated assets do not exceed 200*l.*, a lower scale of attorneys' costs shall be allowed, namely, three-fifths of the charges ordinarily allowed, disbursements being added. If in error any charges have been allowed or paid on the higher scale, and the proveable debts shall afterwards be ascertained not to exceed 750*l.*, or the gross proceeds of the assets not to exceed 200*l.*, the excess shall be disallowed, and if paid shall be repaid to the trustee."

The jurisdiction to tax costs in bankruptcy is, it seems, independent of the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, s. 37, and the registrar is bound to tax such costs, notwithstanding the lapse of twelve months from the delivery of the bill (*b*).



§ 2.—SCALE OF COSTS IN BANKRUPTCY.

The following scale of costs was issued on the 1st January, 1870:—

SCALE OF ATTORNEY'S COSTS.

Petitioning Creditor's Bill of Costs to the Appointment of Trustee.

		<i>£</i>	<i>s.</i>	<i>d.</i>
Instructions for petition.. .. .	..	1	0	0
Examining witnesses as to trading, where necessary.. .. .	..	0	10	0
Ditto as to act of bankruptcy .. .. .	..	0	10	0

(*b*) See *Ex parte Blair, In re Mackle*, 39 L. J. (N. S.) Bankr. 45.

	£	s.	d.	PART VII. CH. XVIII.
Examining particulars of petitioning creditor's account	0	6	8	
The act of bankruptcy being a declaration admitting inability to pay, filed by the attorney to the petitioner, or an assignment prepared by the attorney to the petitioner, or default made upon a debtor's summons issued by the attorney to the petitioner, these two last charges will not be allowed. The expense of an assignment will not be allowed where a declaration of inability would answer the purpose.				
If attorney reside at a distance:—				
Writing agent to search for prior petition, 3s. 6d.				
Agent's writing result of search, 3s. 6d.				
Searching, if prior petition filed	0	7	8	
Drawing bankruptcy petition, including order for hearing	0	10	0	
If exceeding 10 folios, a shilling a folio.				
Ingressing same, 4d. per folio only to be allowed where the petition exceeds seven folios.				
Paid for stamp and parchment.	5	1	0	
Attesting signature of each petitioner, except in case of partnership	0	6	8	
Drawing and fair copy affidavit verifying petition	0	3	4	
Attesting petitioner to be sworn	0	6	8	
Paid oath (if paid).. .. .				
Two copies of petition for sealing, 4d. per folio.				
Preparing subpoena and serving witnesses, or arranging with witnesses for their attendance on presentation of petition	0	13	4	
Paid them				
See Witnesses' Scale. Petitioning creditor is not to be regarded as a witness, and is not to be paid for loss of time; he may claim his expenses of travelling and subsistence.				
Attending on presentation of petition when court investigated statements therein, and clerk	1	0	0	
One fee only for attending will be allowed, unless by direction of the court at the time, and a memorandum of its allowance produced to the taxing officer.				
Drawing order for hearing of petition.	0	3	4	
Service of petition (<i>see General Rules</i>).				
Attending court on hearing (where debtor does not appear or dispute), including two fair copies of adjudication and certificate of registrar's appointment of trustee	1	0	0	
Drawing order for bankrupt's attendance at first meeting, and copy for service and attending and obtaining signature.. .. .	0	6	8	
Attending first meeting and clerk	1	5	0	

Where Act of Bankruptcy the filing a Declaration of Inability to pay.

Drawing declaration for inability to pay	0	6	8
Attending attesting	0	6	8
Paid stamp	0	5	1
Attending filing	0	6	8

Where Act of Bankruptcy is an Assignment for Benefit of Creditors (to be allowed only by special Order of the Court).

Instructions for assignment	0	6	8
Drawing same	0	10	0
If above 1s. per folio.			
Fair copy per folio 4d.			
Paid stamp and paper, if stamped	1	15	6
Attesting execution, each assigning party	0	6	8

<i>Cost of Debtor's Summons.</i>		£	s.	d.
Instructions for affidavit of debt, and for debtor's summons	.. .. .	0	6	8
Affidavit of debt, and for copy .. .. .	.. .. .	0	6	8
Particulars of demand (three copies) at 4d. per folio.				
Attending swearing each deponent .. .. .	.. .. .	0	6	8
Paid oath (if paid) .. .. .	.. .. .		
Attending filing .. .. .	.. .. .	0	6	8
Paid for office copy .. .. .	.. .. .		
Summons and two fair copies and particulars .. .. .	.. .. .	0	6	8
Attending sealing summons, copies and particulars .. .. .	.. .. .	0	6	8
Paid stamp .. .. .	.. .. .	0	5	0
Service of summons .. .. .	.. .. .	0	5	0
Attending court on hearing of summons .. .. .	.. .. .	0	13	4

Costs where the Debtor is required by the Court to enter into a Bond.

Attending making inquiries as to sufficiency of sureties	0	13	4
This charge will be subject to increase, according to the distance of the sureties' residence; and, where necessary, agency charges for making such inquiries.			
Drawing exceptions to sureties	0	3	4
Service thereof on debtor's attorney	0	5	0
Attending court when sureties allowed or disallowed	0	13	4
Costs of affidavits in opposition to the allowance of the bond for want of sufficiency of sureties, the same allowance as for other special affidavits.			

Costs of Debtor's Summons, where the Court allows Costs to Debtor on Dismissal of Summons.

The debtor's personal expenses for travelling and loss of time, according to the scale allowed to witnesses.

And if attended by a solicitor, and his costs allowed (which must be by special order of the court).

Instructions to attend the court on the summons	0	6	8
Affidavit of denial of debt	0	2	6
Paid stamp	0	1	0
Attending court on hearing of summons, and drawing up order	0	13	4
Attending for appointment to tax, and copy and service of order and appointment	0	5	0
Attending taxing	0	6	8
Paid allocatur stamp			

Costs of Application to prosecute a Petition in a particular District, or to transfer Petition from one District to another.

Instructions for affidavit to ground application	0	6	8
Drawing same, 1s. per folio.			
Fair copy, 4d. per folio.			
Attending deponent to be sworn	0	6	8
Paid oath			
Attending court when order made, and drawing up same	0	13	4

Costs on Application for Warrant.

Instructions for affidavit in support of application for warrant	0	6	8
Drawing same, per folio 1s.			
Fair copy, per folio 4d.			
Attending to read over and to get same sworn	0	6	8
Attending court, warrant granted	0	13	4
Fair copy, per folio 4d.			
Attending officer, instructing him as to the execution of the warrant	0	6	8

*Costs of disputing Statements in Petition.*PART VII.
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	£	s.	d.
Attending debtor served with copy of petition, taking instructions to show cause against same	0	6	8
Drawing notice showing cause	0	5	0
Two fair copies for service	0	2	0
Service on creditor, including postage	0	3	6
Ditto registrar	0	3	6
Perusing and considering petition	0	6	8
Examining witnesses in opposition	0	10	0
Costs of brief, and counsel's fee, where requisite to employ counsel.			
Attending court	1	0	0

Petitioning Creditor's Costs on Bankrupt disputing Statements in Petition.

The debtor having served notice of disputing the statements in petition, attending petitioner	0	6	8
Special attendances will be allowed to examine witnesses as to the facts they can prove, the charges for which, and for summoning them, will be in the discretion of the taxing officer, according to the circumstances; and where necessary to employ counsel to support the petition, the usual charges for brief and counsel's fees will be allowed.			
Attending court when adjudication made	1	0	0

Costs for substituted Service where Debtor keeps out of the way to avoid Service.

Several attendances to serve without effect, when it appearing that the debtor was keeping out of the way, and could not be personally served, instructions to apply for substituted service	0	6	8
Drawing affidavit of facts, and that due pains had been taken to effect personal service, per folio 1s.			
Fair copy, 4d. per folio.			
Attending court for order for substituted service, and drawing up order	0	13	4

Costs of Brief.

Instructions for brief in discretion of taxing officer			
(Allowed only when counsel employed.)			
Drawing same, 1s. per folio.			
Fair copy, 4d. per folio.			
Fee to counsel and clerk			
Attending him	0	6	8
Where consultation or conference is necessary, attending to appoint same	0	6	8
Fee to counsel and clerk			
Attending consultation or conference	0	13	4

Costs of Cases for Opinion of Counsel.

Instructions for case	0	6	8
Drawing same 1s. per folio.			
Fair copy, 4d. per folio.			
Fee to counsel and clerk			
Attending him	0	6	8
Where conference is necessary attending to appoint same	0	6	8
Fee to counsel and clerk attending conference	0	13	4
Attending for and perusing opinion	0	6	8
Attending client, reading over opinion, and conferring with him thereon	0	6	8

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		<i>Costs of Motion.</i>	£ s. d.
Instructions		0 6 8
Where on appeal		0 13 4
Drawing notice of motion to be served, per folio 1s.			
Fair copies, 4d. per folio.			
Perusing documents (by London agent) in an appeal, from 1l. 1s. to 2l. 2s.			
Making short note of motion, and attending registrar therewith, previously to the sitting of the court		0 3 4
Instructions for affidavit in support of motion		0 6 8
[No instructions allowed where the attorney or his clerk makes the affidavit; no fees allowed to counsel to settle affidavit, unless very special.]			
Drawing same, at per folio 1s.			
Fair copies, per folio 4d.			
Attending reading over and to be sworn		0 6 8
Paid oath		
Copy affidavit for service with the notice of motion, 4d. per folio.			
<i>Service (see General Rules).</i>			
Attending to file affidavit		0 6 8
Paid for office copy, when required		
Affidavit of service and copy notice of motion to annex		0 6 8
Attending court on motion if heard 1l. 1s., and if not		0 10 6
Drawing order, per folio 1s.			
Attending settling same		0 13 4
Fair copy, per folio 4d.			
Attending to pass order		0 6 8
Copy to serve, where necessary, per folio 4d.			

GENERAL RULES.

1. More than one attendance at presentation or hearing of bankruptcy petition will not be allowed unless ordered by the court, and memorandum be obtained to that effect.
2. Attendance upon the court for necessary purposes not included in the foregoing scale, each 0 6 8
 Attending court on each sitting* (including presentation and hearing of petition) 1 0 0
 If by agent 2 0 0
 Clerk's attendance at each sitting, when required 0 5 0
3. Service of petition, summons, order, notice, or other process, each service 0 5 0
 If the distance be more than three miles, 5d. per mile extra, or a further sum, in the discretion of the taxing officer, according to circumstances.
 In cases of great distance, the service must be by agent, unless otherwise sanctioned.
4. Drawing and copy bill of costs, per folio 0 0 4
5. General attendances, each 0 6 8
 Long and special attendances 0 13 4
 (Or more, in the discretion of the taxing officer.)
6. Writing letters, each, special 0 5 0
 Ditto, common 0 3 6
7. Circular letters, if above twenty each .. 0 1 0
 If numerous, they must be printed.
8. Attendances to insert advertisements 0 3 4
9. Extra allowances for length of sittings, or other increased allowances must have the sanction of the court, and a memorandum to that effect obtained, or all such charges will be disallowed.
10. Vouchers must be produced on taxation for all payments, or they will be disallowed.

11. Bills of costs must be written lengthwise, on one side only, and dates must be furnished to each item, such dates not to be written in the margin, which is to be left clear for taxation.
12. In special cases, where counsel are not instructed to appear in court, a charge by the attorney for the preparation of minutes of fact or evidence for his own use may be allowed.

N.B.—Other matters not herein provided for may be allowed on a similar scale, as nearly as may be, or in accordance with the practice of the superior courts, according to the nature of the proceeding.

Scale of Allowances to Witnesses.

	If resident in the town in which the Court is held.	If resident at a distance from the Court, subsistence in these cases included.
	£ s. d.	£ s. d.
1. Bankers, merchants, esquires, and gentlemen ..	1 1 0	1 1 0
2. Professional men	1 1 0	3 3 0
3. Auctioneers and accountants	1 1 0	1 1 0
4. Notaries	1 1 0	to
5. Engineers and surveyors	1 1 0	2 2 0
6. Clerks of attorneys or other persons	1 1 0	2 2 0
7. Master tradesmen, shopkeepers, yeoman farmers	0 10 6	1 1 0
	to	to
	0 15 0	0 7 6
8. Artizans, mechanics, &c.	0 7 6	to
		0 10 0
9. Females, according to station in life ..	0 5 0	0 5 0
	to	to
	0 10 0	1 0 0
10. Police inspector	0 5 0	0 7 6
		to
		0 10 0
11. Police constable	0 3 0	0 5 0
		to
		0 7 6
The travelling expenses of the first five classes of witnesses will be allowed at the rate of 7d. per mile, and the others at 5d. per mile one way, where no railway is available, or travelling expenses actually incurred, in the discretion of the taxing officer; the travelling expenses of female witnesses, 7d., or 5d. according to their station.		
Governors of gaols bringing up prisoners	0 10 6	1 1 0
		to
		1 11 6
Travelling expenses of gaoler bringing up prisoner under warrants in addition to the above allowance 7d. per mile one way for each (himself and prisoner), or the amount actually paid, and for the prisoner's safe custody and refreshment, in the discretion of the taxing officer.		

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The following charges to the end are to be subject to variation by the trustees, with the consent of the committee of inspection, or of the court where there is no committee:—

Broker's Allowance.

	£	s.	d.
For inventory and valuation—			
For the first 100 <i>l.</i>	2	10	0
For the next 400 <i>l.</i> per cent.	1	5	0
All above	1	0	0
(This allowance to include all expenses, and any travelling within five miles of the court, and a fair copy of the inventory.)			
Beyond 5 miles, per mile one way	0	0	7

Auctioneer's Charges, including all Expenses of Sale.

Sales by auction of goods, chattels, and effects:—

10*l.* per cent. on the first 100*l.*

After to 1,000*l.* .. 5*l.* per cent.

After to 5,000*l.* .. 2*l.* 10*s.* per cent.

After to 10,000*l.* .. 1*l.* 5*s.* per cent.

If the above be sold by valuation, 2*l.* 10*s.* per cent. on the first 1,000*l.*, and 1*l.* 5*s.* per cent. beyond.

Sales by auction of estates, freehold, leasehold, &c.:—

5*l.* per cent. on the first 300*l.*

After to 1,000*l.* .. 2*l.* 10*s.* per cent.

After to 5,000*l.* .. 1*l.* per cent.

After to 10,000*l.* .. 10*s.* per cent.

If the above be sold by valuation, half the above charges; and if not sold, the expenses to be paid, and fee to the auctioneer to be allowed as agreed with the trustee, or at the discretion of the taxing officer; or if bought in, and subsequently sold by private contract, by the negotiation of the auctioneer, half the above charges on sales by auction.

Farming stock 5*l.* per cent. on the first 100*l.*, and 2*l.* 10*s.* on the remainder. When sold by valuation, half the above charges.

Costs of Surveys, Dilapidations, and Specifications.

From 2*l.* to 5*l.* in discretion of taxing officer.

Sales of Stock by Tender.

Not above 400*l.* 4*l.* per cent.

After to 1,000*l.* 3*l.* 10*s.* per cent.

After to 2,000*l.* 2*l.* 10*s.* per cent.

After to 5,000*l.* 2*l.* per cent.

Above 5,000*l.* and upwards 1*l.* 15*s.* per cent.

Expenses to be allowed, such as advertisements and printing, not exceeding 2*l.* or at the discretion of the taxing officer.

Accountant's Charges.

For preparing balance sheet, investigating accounts, &c., principal's time, per day of eight hours, including necessary affidavit	£	s.	d.
Chief clerk's time	1	1	0
Other clerk's time, per day of eight hours	0	10	6
			to
			0 15 0

These charges to include stationery.

HATHERLEY, C.

JAMES BACON,

Chief Judge in Bankruptcy.

1st January, 1870.

§ 3.—SCALE OF COSTS IN LIQUIDATION BY ARRANGEMENT.

PART VII.
CH. XVIII.

The following Scale was issued in July, 1871:—

SCALE OF ATTORNEY'S COSTS OF PROCEEDINGS FOR LIQUIDATION BY ARRANGEMENT, UNDER SECT. 125, UP TO APPOINTMENT OF TRUSTEE.

(The taxing officer will exercise a fair discretion as to the allowance of preliminary or other charges connected with the debtor's failure and any steps taken to protect the estate for the general benefit of creditors, subject to order of court or resolution of creditors.)

	£	s.	d.
Instructions for petition	1	0	0
Attending searching if bankruptcy petition filed	0	6	8
Paid search	0	1	0
Drawing and engrossing petition	0	10	0
Paid stamp and parchment	1	1	0
Attesting signature of (each) petitioner	0	6	8
Drawing and fair copy affidavit verifying petition	0	3	4
Attending petitioner to be sworn	0	6	8
Paid oath and exhibit on petition where necessary	0	2	6
Paid stamp	0	1	0
Attending petitioner as to the nature of his liabilities and as to addresses of his creditors and preparing certificate as to place of meeting	0	6	8
Attending court on presentation of petition, and filling same and affidavit	1	0	0
<i>If by agent</i>	<i>2</i>	<i>0</i>	<i>0</i>
<i>[In special cases attorney's journey may be charged where resident at a distance from the court.]</i>			
Paid for file for proceedings			
Drawing notice to creditors of first general meeting and copies thereof			
<i>(2s. 6d. each for the first 20, and 1s. each afterwards, and 3d. each, throughout, for forms and printing.)</i>			
Paid postage stamps			
Drawing request to registrar to send notices and list of creditors to annex at 1s. per folio			
Fair copy (per folio 4d.)			
Paid stamps at 3d. per notice			
Attending with request and list of creditors and lodging notice, and going through and checking same with registrar (<i>in discretion of taxing officer according to length of list</i>)			
Drawing and two fair copies notice of general meeting for Gazette ..	0	6	8
Attending obtaining signature of registrar and seal thereto	0	3	4
Attending inserting in Gazette	0	6	8
Paid insertion			
Attending for copy Gazette and attending filing	0	3	4
Paid for copy Gazette (<i>cost of same</i>)			
<i>[Where statement of affairs prepared by attorney, charge to be allowed for instructions and attendances on debtor and drawing statement at 1s. per folio, and fair copy thereof at 4d., and attendances on debtor and obtaining his signature thereto: if prepared by an accountant, perusing and considering statement and attendances on debtor and accountant thereon.]</i>			
Attending meeting, self and clerk	1	5	0
<i>If by agent</i>	<i>2</i>	<i>5</i>	<i>0</i>
<i>[A double or longer sitting will only be allowed where certified for by the chairman, and approved by the taxing officer. In special cases attorney's journey may be charged where resident at a distance from the place of meeting.]</i>			

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	£	s.	d.
Fee for examining and exhibiting proofs, comparing and completing resolutions with proxies, &c., and (<i>where necessary</i>) obtaining signatures of creditors subsequently to the meeting. <i>Rule 275 of 1870</i>			
<i>[Where any special circumstances, drawing resolutions or deed for carrying same into effect, and fees to counsel to settle may be allowed.]</i>			
Drawing and fair copy affidavit, verifying resolutions, statement, proofs, and proxies produced at meeting and of appointment of chairman	0	6	8
Attending swearing	0	6	8
Paid oath (where necessary) and stamp	0	2	6
Drawing affidavit as to value of assets	0	6	8
Attending swearing	0	6	8
Paid oath (where necessary) and stamp	0	2	6
Attending registrar on application to register special resolution ..	1	5	0
<i>If by agent</i>	2	5	0
Paid <i>ad valorem</i> stamp duty on resolution			
<i>[In country cases paid for office copy resolutions to be sent to London court.]</i>			
Drawing and two fair copies certificate of trustee's appointment ..	0	6	8
Attending obtaining registrar's signature and seal of the court thereto	0	6	8

Where Resolutions objected to.

Attending obtaining appointment for registration	0	6	8
Drawing notice of intention to register and fair copy	0	5	0
Copy and service of notice (<i>each</i>)	0	5	0
Drawing affidavit of service and copy notice to annex	0	6	8
Paid oath and stamp	0	2	6
Attending swearing affidavit and filing	0	6	8
Attending registrar on hearing of application and drawing order ..	0	13	4
<i>[Any additional charges to be certified by registrar at time of hearing application.]</i>			

Where Receiver appointed.

Instructions for application for appointment of receiver	0	6	8
Drawing and fair copy application	0	5	0
Stamp thereon	0	5	0
Drawing affidavit in support of application	0	6	8
Attending swearing	0	6	8
Paid oath and stamp	0	2	6
Drawing affidavit of responsibility	0	6	8
Attending swearing	0	6	8
Paid oath and stamp	0	2	6
Attending court on application order made	0	13	4
<i>[The attendance of counsel is not to be allowed unless sanctioned by the court at the time of application for receiver.]</i>			
Drawing order, and two fair copies, and obtaining registrar's signature, and passing	0	6	8

Where Interim Injunction necessary pending full Notice of Motion for Injunction.

Instructions for application to restrain pending proceedings	0	6	8
Drawing and fair copy application	0	5	0
Paid stamp	0	5	0
Drawing affidavit in support of application and copy			
Attending swearing	0	6	8

	£	s.	d.	PART VII. CH. XVIII.
Paid oath and stamp	0	2	6	
[The attendance of counsel is not to be allowed unless sanctioned by the court at the time of application for interim injunction.]				
Attending court on application order made	0	13	4	
Drawing and engrossing order and passing	0	6	8	
Notice of injunction, copy and service (each)	0	5	0	
[Where possible the application for receiver and interim injunction to be made at one and the same sitting, and the costs to be allowed by the taxing officer accordingly.]				

Injunctions.

Instructions for notice of motion for (or to continue) injunction ..	0	6	8	
Drawing same, 1s. per folio				
Fair copies (4d. per folio)				
Drawing affidavit and copy				
Attending swearing	0	6	8	
Paid oath and stamp	0	2	6	
Copies affidavits to accompany notice, 4d. per folio				
Service of notice and copies affidavits (each service)	0	5	0	

[Costs of Brief.—See scale of costs under “The Bankruptcy Rules, 1870.”]

Attending court on application for (or for continuance of) injunction	0	13	4	
Drawing order, 1s. per folio				
Fair copy, 4d. per folio				
Attending passing	0	6	8	
Paid for office copies				
Service of order (each service)	0	5	0	

[Where more than one injunction (interim or absolute) is applied for or granted, the taxing officer is to exercise discretion whether more than one set of costs is to be allowed. Separate applications are not to be made unnecessarily. Where the proceedings restrained relate to a claim not exceeding 20l., charges are to be allowed on the lower scale in respect of the injunction, notwithstanding that the debts exceed 750l. or the assets 200l.—See Rule 8 of 1871.]

Where Appointment of Trustee advertised.

Drawing advertisement of appointment of trustee and copy ..	0	6	8	
Attending obtaining registrar's signature and seal thereto ..	0	6	8	
Attending to insert in Gazette and daily paper	0	6	8	
Paid				
Attending for copies, papers, and filing advertisements with registrar	0	6	8	
Paid				

Debtor's Discharge (where granted).

Drawing report of trustee to registrar and engrossing	0	10	0	
Attending obtaining trustee's signature	0	6	8	
Attending filing and obtaining registrar's certificate thereto ..	0	6	8	

As to matters not specifically provided for and subsequent to the appointment of a trustee, the taxing officer will be guided by the scale of attorney's costs under “The Bankruptcy Rules, 1870,” and the general practice in bankruptcy.

HATHERLEY, C.

JAMES BACON, Chief Judge.

7th July, 1871.

CHAPTER XIX.

PUNISHMENT OF FRAUDULENT DEBTORS.

“The Debtors Act, 1869” (32 & 33 Viet. c. 62), which came into operation simultaneously with “The Bankruptcy Act, 1869,” contains a variety of provisions affecting bankrupts. The act is divided into three parts. Part I. relates to the abolition of imprisonment for debt; and its provisions, and rules made under them, so far as they affect county courts, form the subject of a separate chapter in a former part of this work (*a*). It is sufficient to state here (so far as regards this part of the act) that while it enacts that, with certain exceptions, no person shall “be arrested or imprisoned for making default in payment of a sum of money,” one of the exceptions is “default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order” (*b*); and further, the same part of the act in a subsequent section enacts that—

Saving for
Bankruptcy
Act, 1869.

Sect. 9. “Nothing in this part of this act shall in any way affect any right or power under ‘The Bankruptcy Act, 1869,’ to arrest or imprison any person.”

The provisions of the second part of the act, relating to the “PUNISHMENT OF FRAUDULENT DEBTORS,” form the subject of the present chapter (*c*).

Punishment
of fraudulent
debtors.

Sect. 11. “Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of ‘The Bankruptcy Act, 1869,’ shall, in each of the cases following, be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned

(*a*) See *ante*, Vol. I., Part II., Chap. XIV. (pp. 335—354), “ORDER OF COMMITMENT ON A JUDGMENT SUMMONS.”

(*b*) See ss. 4 & 5 of the act, *ante*, Vol. I., p. 335. See also *ante*, pp. 107, 108. In the excepted cases, however, no person can be imprisoned for a longer period than one year. As to an order for payment of part of a salary, &c., see *ante*, p. 333.

(*c*) The third part of the act re-

lates to “*warrants of attorney, cognovits, and orders for judgment*,” and does not affect county court jurisdiction, except sect. 29, which enacts that “nothing in this act contained shall affect the custom of foreign attachment as exercised by any competent court, or the proceedings in relation to such custom.” See as to this custom, *ante*, Vol. I., pp. 327—334.

for any time not exceeding two years, with or without hard labour; that is to say,

1. If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud :
2. If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud :
3. If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud :
4. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud :
5. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of ten pounds or upwards :
6. If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud :
7. If, knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof :
8. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation he prevents the production of any book, document, paper or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :
9. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :
10. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law :

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11. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs :
12. If after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or at any meeting of his creditors within four months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses :
13. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same :
14. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud :
15. If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud :
16. If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy or liquidation."

Penalty for absconding with property.

12. "If any person who is adjudged a bankrupt or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour."

Penalty on fraudulently obtaining credit, &c.

13. "Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour ; that is to say,

- (1.) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud :
- (2.) If he has with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property :
- (3.) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him."

14. "If any creditor in any bankruptcy or liquidation by arrangement or composition with creditors in pursuance of 'The Bankruptcy Act, 1869,' wilfully and with intent to defraud makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour."

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False claim,
&c., a mis-
demeanor.

15. "Where a debtor makes any arrangement or composition with his creditors under the provisions of 'The Bankruptcy Act, 1869,' he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends."

Debts in-
curred by
fraud.

16. "Where a trustee in any bankruptcy reports to any court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this act, or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this act, the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence."

Order by
court for
prosecution
on report of
trustee.

17. "Where the prosecution of the bankrupt under this act is ordered by any court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne as expenses of prosecutions for felony are allowed, paid, and borne."

Expenses of
prosecutions.

18. "Every misdemeanor under the second part of this act shall be deemed to be an offence within and subject to the provisions of the act of the session of the twenty-second and twenty-third years of the reign of her present Majesty, chapter seventeen, intituled 'An Act to prevent vexatious indictments for certain misdemeanors;' and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the act charged was not committed with a guilty intent."

Application
of Vexatious
Indictments
Act to of-
fences under
this act.

19. "In an indictment for an offence under this act it shall be sufficient to set forth the substance of the offence charged, in the words of this act specifying the offence or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under 'The Bankruptcy Act, 1869.'"

Form of
indictment.

20. "So much of the act of the session of the fifth and sixth years of her Majesty's reign (chapter thirty-eight), 'to define the jurisdiction of justices in general and quarter sessions of the peace,' as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this act; and any offence under this act shall be deemed to be within the jurisdiction of such justices and recorders."

Quarter
sessions to
have juris-
diction in
respect of
offences
under act.

21. "The provisions of the act of the session of the fifth and sixth years of William the Fourth, chapter seventy-six, for the regulation of municipal corporations, sections fifty-two and fifty-three, as to the disqualification of mayors, aldermen, and town councillors having been declared bankrupt or having compounded by deed with their creditors, shall extend to every arrangement or composition by a mayor, alderman,

Mayors, &c.
disqualified
by arrange-
ments.

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Justices of the peace becoming bankrupt or arranging with creditors.

Punishments under this act cumulative.

or town councillor with his creditors under 'The Bankruptcy Act, 1869,' whether the same is made by deed or otherwise."

22. "If any person being assigned by her Majesty's commission to act as a justice of the peace is adjudged bankrupt, or makes any arrangement or composition with his creditors under 'The Bankruptcy Act, 1869,' he shall be and remain incapable of acting as a justice of the peace until he has been newly assigned by her Majesty in that behalf."

23. "Where any person is liable under any other act of parliament or at common law to any punishment or penalty for any offence made punishable by this act, such person may be proceeded against under such other act of parliament or at common law or under this act, so that he be not punished twice for the same offence."

Brokers.—By "The London Brokers Relief Act, 1870," if a judge in bankruptcy, in any action, suit or other proceeding prosecuted or depending before such judge, and to which a London broker is a party, certifies (as he is thereby empowered to do) that such broker has been guilty of fraud, and that he ought to be disqualified from acting as a broker altogether, or for such period as such judge shall name in the certificate, such broker shall be accordingly disqualified and his name removed from the list of brokers (*d*).

(*d*) 33 & 34 Vict. c. 60, s. 6.

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