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FOR THE  
*Common Law Judges' Chambers*

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A *Law*.

# HANDY BOOK

FOR THE



# COMMON LAW JUDGES' CHAMBERS.

BY

**GEO. H. PARKINSON.**

CHAMBER CLERK TO THE HON. MR. JUSTICE BYLES.

LONDON:

**BUTTERWORTHS, 7, FLEET STREET,**

*Law Publishers to the Queen's most excellent Majesty.*

---

1861.

**LONDON :**  
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**TO**  
**THE RIGHT HON. LORD WENSLEYDALE,**  
**ETC., ETC., ETC.,**

**THE FOLLOWING PAGES**

**ARE**

**(BY HIS LORDSHIP'S PERMISSION)**

**HUMBLY AND GRATEFULLY**

**DEDICATED.**



## PREFACE.

---

THE vast amount of business recently introduced into the chambers of the Common Law Judges, by the operation of the Procedure Acts, 1852, 1854, and of numerous other modern Statutes, has rendered the books of Practice, exclusively relating to the chamber jurisdiction of the Judges, of little, if any, use to the persons for whom they were originally intended.

The design of the following pages is to give to those not in possession of the large and expensive works upon the general practice of the Courts, &c., plain and simple instructions respecting the documents upon which the more important chamber applications are grounded, and the method observed in obtaining the required Order or fiat of the Judge.

To Attornies and their clerks, many of whom are in the habit of attending almost constantly at chambers, it is believed that the work will be of no inconsiderable value; and this opinion is

strengthened by a recollection of the innumerable inquiries daily made upon points of practice considered therein, both of the author and of his brother clerks.

It was not within the scope of so small a volume to deal with *all* the applications made to a Judge at chambers, but it is believed that few of the more important have been omitted, and none of those provided for by recent legislative enactments.

One matter wholly omitted, respects applications to *amend* legal proceedings,—the subject has not been treated of, owing to the almost unlimited power which the Judges now have to order *all* necessary amendments, either upon application during the trial, or by summons and order.

COMMON PLEAS JUDGES' CHAMBERS,  
*January, 1861.*

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## F E E S

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- To compel Attorney to deliver his Bill.
- Particulars of Demand, &c.
- To ascertain the Profession, &c. of Plaintiffs.
- To plead several Matters.
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---

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- To proceed against a Defendant living out of the Jurisdiction.
- To appear and defend under the Bills of Exchange Act.
- To defend as Landlord in an Action of Ejectment.
- To sign Judgment in Ejectment.
- For a Capias to hold to Bail.

**For a Prisoner to attend on the Trial of a Cause, when either in Civil or Criminal Custody.**

**To attach Debts due to Judgment Debtor.**

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**To file Warrant of Attorney when more than twelve months old.**

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**Applications under the Railway and Canal Traffic Act.**

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**All Applications for Discovery.**

**All Interpleader Applications.**

**For Summary Relief in Ejectment.**

**To issue Execution against a Shareholder.**

**All Orders of Reference.**

A

HANDY BOOK

FOR THE

**Common Law Judges' Chambers.**

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THE *origin* of the Common Law Jurisdiction exercised by a Judge of either of Her Majesty's Superior Courts of Common Law at Westminster, sitting *in camera* at his own residence or elsewhere, it is impossible to trace. From the earliest period in which the constitution and practice of the Courts of Law appear to be tolerably settled, the Judges are found singly transacting business of lesser moment relating to the Courts of which they were individually members, and especially that description of business necessary to bring an Issue in due form before the Court by which it was to be tried. Recent legislative enactments have not only most fully recognised such power, by confirming much of the authority the Judges at chambers were supposed previously to possess, but have widened and extended their jurisdiction by investing them with authority over matters otherwise out of the sphere of their cognizance.

Origin of  
chamber  
jurisdiction.

Statutory  
enactments.

Of these enactments the most important are, first, that which enables a Judge (*a*) to make orders in proceedings in any one of the three Superior Courts

9

(*a*) 11 Geo. 4 & 1 Will. 4, c. 70.

B

in matters over which the Courts have a common jurisdiction; and, secondly, a statute (*a*) of the present reign, which gives still more unlimited power, and declares:—"That every Judge of the Courts of Queen's Bench, Common Pleas, and Exchequer, shall have equal jurisdiction, power and authority to transact *out of Court* such business as may, according to the course and practice of the Court, be so transacted by a single Judge, relating to any suit or proceeding in either of the said Courts, . . . although the said Courts have no common jurisdiction therein, in like manner as if the Judge transacting such business had been a Judge of the Court to which the same by law belongs."

Under the provisions of these two statutes, and of those of a multitude of others, principally passed during the last twenty years, (which will be referred to as the proceedings under them are respectively described,) each Judge, both in term and vacation, in town and on circuit, hears and determines matters relating as well to the conduct of causes in the Superior Courts before and after verdict, as to proceedings not so immediately under the notice of such Courts.

On circuit.

Sitting as "a Judge at chambers" *on circuit*, the Judge will only deal with proceedings arising out of causes to be tried upon his own particular circuit, save in the case of certain urgent applications, such as to hold to bail, &c. ; and in the same way, a Judge at chambers *in town* will not interfere respecting the order of trial of any cause set down for argument, unless such cause is to come on for hearing before himself, but will direct the parties to attend before

(*a*) 1 & 2 Vict. c. 45.

the Judge sitting at *Nisi Prius*, whether the trial be in town or on circuit.

Modern legislation, dealing with the requirements of rapidly increasing commerce and manufacture, has so plentifully supplied the Superior Courts with matter for legal argument and determination, that the time formerly at their disposal for the adjudication upon mere matters of practice and subsidiary proceedings, no longer exists, and these have been transferred in consequence to the less solemn but equally valuable decision of a Judge at chambers.

Sitting apart from the Court then, a Judge has, in certain cases, an *original*, in certain other cases, a *delegated* jurisdiction: an original jurisdiction where the Court has no power to adjudicate,—as in an application to hold to bail, to charge stock, to order a special case to be stated without pleadings, &c., in all of which cases the Court itself has no power to entertain the application; a delegated jurisdiction in cases where the Common Law or a statute has placed powers *generally* in the hands of the Court without any special limitation, with respect to which the rule is, that they may be exercised either by the Court or by a Judge at chambers (a).

Original  
jurisdiction  
of a chamber  
Judge.

Delegated  
jurisdiction.

Where a statute mentions "the Court" with any words of restriction, as *e. g.*, "by motion to the Court in term time," a Judge at chambers cannot exercise the power; and where "a Judge" alone is spoken of, the Court will not adjudicate, although they will, at the Judge's request, and sometimes indeed at the instance of the parties alone, hear the argument on either side after it has been determined at chambers,

(a) *Smeeton v. Collier*, 1 Exch. 457.

and express their opinion for the guidance of the Judge in reviewing the matter. (*Smith v. Bird*, 3 D. P. C. 641.)

“The Court or a Judge thereof.”

Where “the Court or a Judge thereof” has the statutory power, application should in almost every case be made *first* to the Judge alone, the Court strongly objecting to be troubled except by way of appeal, in matters which a Judge has power to determine, and in such cases as these the Court has both an *original* and an *appellate* jurisdiction. There is another class of cases in which the application is directed to be made in term time to the *Court*, and in vacation to a *Judge*. In such cases as these it is hardly necessary to observe that the statutory directions as to the adjudicating tribunal should be strictly observed.

Appeal from Judge at chambers.

Where the decision of the Judge is unsatisfactory to either of the parties, there is in all cases (except where the right is expressly taken away by statute), a power of appeal to the Court above, who will vary or rescind the order in whatever manner, and with whatever directions as to costs, they may please. This power of appeal to the Court above is however waived, where the party dissatisfied with the order made, takes out a summons to show cause why the *Judge himself* should not rescind it. In whatever manner such a summons is disposed of, the Court will not, after its hearing, entertain any appeal from the Judge, whom the dissatisfied party has voluntarily put in the place of the Court. Where a Judge has refused an order, any attempt to obtain it by application at chambers to a different Judge is deemed highly reprehensible, and has at all times met with severe censure.

The acts performed by a Judge at chambers are well recognized by the Court of which he is a member, which, upon application, will at all times visit any disobedience of them, or any contempt shown towards the Judge's person or authority, with the same punishment as if the delinquent had been guilty of disobedience or contempt towards the Court itself. Acts recognized by the Court.

Thus, if an order is made at chambers for the payment of money, execution may be had upon it; if for the performance of any specific act, an attachment will issue in the case of disobedience, or if the Judge, who has *de jure* no power to commit to prison while sitting at chambers, commits any one daring to insult him, the tipstaff will at once remove the offender to the Queen's Prison, and the Court will, without any further inquiry, confirm the committal (a).

With respect to *costs*, the Judge has, at chambers, in all cases, the same power of awarding or withholding them as the Court itself; the usual practice, in the former case, being, in consequence of the smallness of the amount of costs in chamber proceedings, for the Judge himself to fix a sum certain, and so save the trouble and expense of a reference for taxation before the Master. Costs.

It must also be observed, that sitting at chambers the Judge uses an *equitable* authority in deciding the matters brought before him, and allows himself a latitude in departing at times from rule and precedent, which, although almost unknown in the Common Law Courts, is of the greatest advantage in facilitating the determination of the real matters in dispute between the parties. Equitable authority.

(a) *R. v. Faulkner*, C. M. & R. 525.

### ATTENDANCE OF THE JUDGES AND THEIR CLERKS AT CHAMBERS.

For the purpose of transacting the business hereafter to be considered, a single Judge of each of the three Courts of Common Law at Westminster attends in chambers every day in Term at 3 p.m.; and in Vacation at 11 a.m.: and sits until the business is disposed of.

Circuit and Long Vacation.

During the circuits one Judge only (commonly called the *town* Judge) attends daily at chambers at 10 a.m., and transacts the business arising in all three Courts; and a similar arrangement is made during the Long Vacation: the attendance during that period, however, owing to the smaller amount of business to be transacted, being usually limited to two days in the week.

In addition to these sittings, important applications of a pressing nature are sometimes heard (by special appointment) at the Judge's own residence, at his private room at Westminster, or elsewhere.

Judges' Clerks.

The Judges' Chamber Clerks, whose duty it is to issue summonses, swear parties to affidavits, draw up in proper form all orders made by the Judge or agreed to by the parties without attendance before the Judge, and issue orders in less important matters upon their own authority, have their attendance at chambers regulated by the following Rule, which, although referring in terms to the Masters' offices only, has been taken to apply to the Judges' chambers also.

“ The Masters' offices in the several Courts shall be open, in Term time, from eleven o'clock in the forenoon until five o'clock in the afternoon, and not in the evening; and in the Vacation from eleven o'clock in the forenoon until three o'clock in the

afternoon, except between the tenth day of August and the twenty-fourth day of October, when they are to be open from eleven o'clock in the morning until two o'clock in the afternoon, except on Good Friday, Easter-eve, Monday and Tuesday in Easter week, Christmas Day and the three following days, and such of the four following days as may not fall in the time of Term, but not otherwise; namely, the Queen's birthday, the Queen's accession, Whit-Monday, Whit-Tuesday, when the offices are to be closed." (*Reg. Gen. H. T.* 1853, *Reg.* 173.)

In the following pages we have divided all the applications made at chambers into three general classes:— Division of work.

I. EX PARTE APPLICATIONS GRANTED AS A MATTER OF COURSE WITHOUT AFFIDAVIT.

II. EX PARTE APPLICATIONS UPON AFFIDAVIT.

III. APPLICATIONS ATTENDED UPON SUMMONS, BY BOTH PARTIES OR THEIR REPRESENTATIVES.

Before proceeding to the consideration of the several matters of business included under these three heads, it may be well to premise, that no order made by a Judge at chambers is of any force until actually drawn up and served upon the opposite party or his recognized attorney (*a*), while any considerable delay in the service of an order will be deemed a waiver of the same (*b*). With respect, also, to applications to *set aside* or rescind Judges' Orders, it is a general rule that such an application cannot be made after the end of the Term following

(*a*) *Wilson v. Hunt*, 1 Chitty, 647.

(*b*) *Normandy v. Jones*, 3 Dowling & Lowndes, 143.

the date of the order, and that in all cases it must be made without unnecessary delay and in reasonable time.



## I. EX PARTE APPLICATIONS MADE WITHOUT AFFIDAVIT.

### I. To SWEAR AFFIDAVITS.

Commis-  
sioners.

Each of the Clerks at the Judges' chambers is a Commissioner to take affidavits under the statute (29 Car. II. c. 5, s. 2) throughout the whole of England and Wales, and the town of Berwick-upon-Tweed, in each of the three Courts of Common Law at Westminster; and the provision introduced into the commissions granted to Country Commissioners that no affidavits shall be taken within ten miles of London, as well as that in the authority of a London Commissioner appointed under a recent statute to administer oaths only at his own office or residence, or at the office or residence of the deponent, does not exist in the commissions granted to the Judges' Clerks.

The following are the general rules which have been framed relative to the taking of affidavits :

#### *Reg. Gen. H. T. 1853.*

Rules re-  
lating to  
affidavits.

138. The addition and true place of abode of every person making an affidavit shall be inserted therein.

139. In every affidavit made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat (*a*).

140. No affidavit shall be read or made use of in any matter depending in Court, in the jurat of which there shall be any interlineation or erasure.

(*a*) For Jurats of Affidavit, &c., see Appendix No. 1.

141. Where any affidavit is sworn before any Judge or any Commissioner, by any person who from his or her signature appears to be illiterate, the Judge's Clerk or Commissioner taking such affidavit shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and also that the said party wrote his or her mark or signature in the presence of the Judge's Clerk or Commissioner taking the said affidavit.

144. An affidavit sworn before a Judge of any of the Courts shall be received in the Court to which such Judge belongs, though not entitled of that Court, but not in any other Court, unless entitled of the Court in which it is to be used.

*By 1 & 2 Vict. c. 110, s. 112*—The power of Commissioners for taking affidavits in the Superior Courts is extended to the taking of affidavits required in the Insolvent Debtors Court; by 19 & 20 Vict. c. 108, s. 58, the same power is extended to affidavits to be used in County Courts, and other statutes have enlarged the power to nearly all the Inferior Courts.

It was for some time doubted whether a Commissioner appointed under the statute of Charles II. had power to take an affidavit respecting the registry of a judgment in Middlesex or Yorkshire, under the 5th Anne, c. 18. It has, however, been determined by the Judges that such power exists, and that a Commissioner's signature to the jurat of such an affidavit is sufficient.

All Crown affidavits, as well as all affidavits, declarations, &c., relating to proceedings not in any

of the Courts, must be sworn before the Judge himself, and such is the case also with the taking of the Oath of Allegiance, on being naturalised or accepting certain offices under the Crown, taking the oath of Sheriff or Under-Sheriff, and delivering on oath in the Exchequer Estreats, &c. (a)

County  
Palatine.

One or more Clerks in each Chamber has, in addition to the commissions already referred to, others for the administration of oaths connected with causes in the Courts of the County Palatine.

Affidavits  
made during  
the assizes.

By ancient custom, unconfirmed, we believe, by any direct authority, a Judge in a Circuit town has, after the opening of the commission, *exclusive* authority to administer oaths (save those in Chancery), and the commissions already referred to become void during the assizes.

Swearing the  
affidavit.

The principal matters to be observed upon swearing an affidavit are—to avoid all erasures or interlineations whatever in the jurat,—to have every alteration in the body of the instrument, however minute, marked with the initials of the Commissioner, for which purpose they should be carefully *ticked off* beforehand, and to omit the words *London* or *Westminster* in the jurat, if the affidavit be sworn at Chambers, Rolls' Garden being in neither one nor the other.

#### FILING AFFIDAVITS.

Rule.

By Rule 147 of the Reg. Gen. H. T. 1853, it is ordered, that “all affidavits used before a Judge *out of Court* shall be filed with the Masters of the

(a) The Oaths of Allegiance above mentioned may be taken before a Judge of any one of the Courts; those of the Sheriff and Under-Sheriff, together with the swearing of Estreats, must be before a Baron of the Court of Exchequer.

said Courts, and shall be alphabetically indexed, and such affidavits shall be delivered to the Masters of the respective Courts, in order to be filed, ten days next after that on which the matter is disposed of."

Acting under this rule, it is the duty of the parties attending before the Judge to deliver over to the clerk in attendance every affidavit read, *wholly or in part, or referred to*, and the Judge's clerk keeps the same during ten days for gratuitous public inspection, or for office copies thereof to be made if the parties require them; after which period he carries the affidavit to the proper office to be filed.

How affidavits are filed.

The neglect of the rule requiring affidavits to be filed is continually productive of the greatest delay and inconvenience. The only method of compelling its performance is to take out a summons calling upon the party making default "to show cause why he should not forthwith file the affidavit used by him, sworn by —;" and if the insertion of the affidavit in the order made by the Judge be required, such order cannot be drawn up or acted upon until the summons is disposed of.

Compelling opposite party to file affidavit.

If it be required to produce before a Judge *at Chambers*, any affidavit remaining in the custody of the Judge's Clerk or filed at the Master's office, it is simply necessary to bespeak its production at the time required,—if it is to be produced *in Court*, sitting at *Nisi Prius*, the Judge's Clerk (if it remain in his possession), or other proper officer, must be subpœnaed to produce it, by an ordinary subpœna *duces tecum*; if it is to be used before the Court sitting in *Banc*, a simple notice to produce it will be sufficient.

Production of filed affidavit.

## APPLICATION FOR COMMISSIONS TO ADMINISTER OATHS IN COMMON LAW.

Ancient  
practice in  
swearing.

Anciently every affidavit used in a cause had to be sworn before the Court out of which the writ issued, before a Judge thereof, or before one of the Justices of Assize, while on his circuit.

29 Car. 2,  
c. 5.

Great inconvenience arising from this restricted number of persons before whom oaths could be taken, the 29 Car. II. c. 5, gave authority to any two of the Judges of each Court in Westminster Hall, of whom the Chief Justice or Chief Baron respectively should be one, to issue commissions under the seal of their respective Courts, as need should require, empowering "what and as many persons as they shall think fit and necessary, in all and every the several shires and counties within England and Wales, and Berwick-upon-Tweed, to take and receive all and every such affidavit and affidavits as any person or persons shall be willing and desirous to make before any of the persons so empowered in or concerning any cause, matter or thing depending or anywise concerning any of the proceedings in the Court."

Isle of Man,  
&c.

By the 6th Geo. III. c. 50, s. 2, this power is extended to the Isle of Man, and by 3 & 4 Will. IV. c. 42, s. 42, the same power to appoint Commissioners by English Judges is extended to the appointment of such Commissioners in Scotland and Ireland, to take affidavits in those countries to be used in England.

No convey-  
ancer to be  
a Commis-  
sioner.

By rule 148 (Reg. Gen. H. T. 1853) it is ordered, that "No commission for taking affidavits shall be issued to any person practising as a conveyancer, unless such person be also an attorney or solicitor of one of the Courts at Westminster; and no such

commission shall issue without an affidavit made by the person intended to be named therein, that he is not and does not intend to become a practising conveyancer, or that he is an attorney or solicitor duly enrolled in one of the said Courts, and hath taken out his certificate for the current year."

Under this statute and rule, the practice has been to grant in each commission power to take affidavits throughout *five* counties, including all the separate jurisdictions within them, such five counties being usually adjoining one another. The cities of London and Westminster, and all places within a radius of ten miles therefrom, are excluded from all commissions, except those already mentioned, issued to the *Judges' clerks*.

Commissions  
how granted.

To obtain a commission to administer oaths in Common Law the ordinary practice, until very lately, was to prepare an affidavit of the applicant's being an attorney or solicitor, and of his having taken out his current certificate, with an averment also that he was not and did not intend to become a practising conveyancer (*a*).

Upon this affidavit being produced before the clerk of one of the Puisne Judges an "approval" issued, signed by the Judge; and this being taken to the chambers of the Lord Chief Justice or Lord Chief Baron of the Court, was the authority upon which his clerk acted in drawing up the commission.

At present, however, the application is attended with a little more formality.

"A petition to the Lord Chief Justice or Lord Chief Baron and others the Justices or Barons of the Queen's Bench," "Common Pleas" [or]

(*a*) Appendix No. 2.

“ Exchequer,” must first be prepared and left at a Puisne Judge’s chambers, containing the following allegations :—

1. The length of time the applicant has practised as an attorney.
2. The parish, street, and number of applicant’s residence.
3. Whether in partnership ; if so, the partner’s name, and whether he is a Commissioner.
4. A statement of any public appointments held by the applicant, and the reasons rendering the issuing of a commission to him desirable (*a*).

The petition must be accompanied by—

1. A certificate, signed by the magistrates, &c., of petitioner’s respectability, and of the truth of the allegations in the petition (*b*).
2. An affidavit of the applicant’s certificate for the current year having been taken out (*c*).
3. A list of the counties proposed to be inserted in the commission.

Upon these documents (if satisfactory) the Judge will indorse his fiat for a commission, and his clerk will draw out the “approval.” The clerk to the Chief Justice will, upon the approval being presented to him, prepare the commission, and file petition, certificate, affidavit and approval in the Chief Justice’s chambers.

London Com-  
missioners.

The Statute 22 Vict. c. 16, makes arrangements for the appointment of *London Commissioners*, to take affidavits *within* a radius of ten miles from Serjeants’ Inn Hall.

- (*a*) Appendix No. 3.    (*b*) Appendix No. 4.  
(*c*) Appendix No. 5.

The manner of obtaining these commissions differs little from that of obtaining the corresponding country documents.

The petition already described must contain—

1. The length of time the applicant has practised as an attorney, not being less than *five years*.
2. An averment that his place of business is within ten miles of Serjeants' Inn Hall.
3. The parish, street, and number of his place of business.
4. If in partnership his partner's name, and whether the partner be a Commissioner (*a*).

The petition must be supported by—

1. A certificate signed by two attornies (of not less than five years' standing), with the additions of their addresses, as to the applicant's respectability (*b*).
2. An affidavit by the applicant of his having taken out his certificate to practise for the current year (*c*).

In the case of a town commission these documents are usually left at the *Chief's* chambers. His clerk will obtain the approval and make out the commission without further trouble to the applicant.

It is usual for attornies to take out a town or country commission for *each* of the three Courts. If the above-mentioned formalities be observed in obtaining the *Queen's Bench* commission, the production of that commission or of the approval for

(*a*) Appendix No. 6.

(*b*) Appendix No. 7.

(*c*) Appendix No. 5.

its issue will be sufficient of itself to obtain approval and commission in the Common Pleas and Exchequer.

Cost of commissions.

Each commission bears a 10*s.* stamp; and the total cost for a set for country *or* town is about 5*l.*

#### ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN.

3 & 4 Will. 4,  
c. 74, s. 79,  
&c.

By the 3 & 4 Will. IV. c. 74, ss. 79, 80 and 81, it is enacted:—

“That every deed to be executed by a married woman . . . shall, upon her executing the same or afterwards, be produced and acknowledged by her as her act and deed *before a Judge of one of the Superior Courts at Westminster or a Master in Chancery,*” &c.

Examination.

“And such Judge . . . before he shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender or extinguishment shall be made by her under this Act, shall examine her 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 consent 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.”

Indorsement on deed.

“When a married woman shall acknowledge any such deed as aforesaid, the Judge . . . taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the

margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect, *videlicet* :—

“This deed marked [*here add some letter or other mark for the purpose of identification*] was this day produced before me and acknowledged by ——— therein named to be her act and deed, previous to which acknowledgment the said ——— was examined by me, separately and apart from her husband, touching her knowledge of the contents of the deed and her consent thereto, and declared the same to be freely and voluntarily executed by her.”

“And the same Judge shall also sign a certi- Certificate.  
ficate of the taking of such acknowledgment, to be written or indorsed on a separate piece of parchment, which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect, *videlicet* :—

“These are to certify that on the ——— day of ——— in the year one thousand ———, before me, the undersigned Sir ———, Knight, a Justice of the Court of Common Pleas, at Westminster, appeared personally ———, the wife of ———, and produced a certain indenture marked ———, bearing date the ——— day of ———, and made between [*insert the names of the parties*], and acknowledged the same to be her hand and deed; and I do hereby certify that the said ——— was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me, apart from her husband, touching her knowledge

of the contents of the said deed, and that she freely and voluntarily consented to the same."

Filing certificate, &c.

"And 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, shall be lodged with some officer of the Court of Common Pleas at Westminster . . . and such officer shall examine the certificate and see that it is duly signed . . . and duly verified by affidavit as aforesaid; and shall also see that it contains such statement of particulars as to the consent of the married woman, as shall from time to time be required in that behalf; and if all the requisites in this Act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas."

20 & 21 Vict. c. 57.

Reversionary interest, &c.

Stat. 20 & 21 Vict. c. 57, extends the power of disposition by a married woman to "every future and reversionary interest, whether vested or contingent, of such married woman or her husband in her right in any personal estate whatsoever to which she shall be entitled under any instrument made after the 31st December, 1857 (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as if she were a *feme sole*, and also to release and extinguish her right or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in

possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid, unless the husband concur, &c., nor unless the deed be acknowledged by her, &c."

The 2nd section provides that every deed to be executed in England or Wales by a married woman, for the purposes of this Act, shall be acknowledged by her and be otherwise perfected in the manner in and by the Act 3 & 4 Will. IV. c. 74.

The 3rd and 4th sections except from the operation of the Act, "any reversionary interest to which she shall be entitled by virtue of any deed, will or instrument by which she shall be restrained from alienating or affecting the same;" and also, "any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage." Exceptions.

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By Reg. Gen. Hil. T., 4 Will. IV., it is ordered, that "the affidavit verifying the certificate to be made pursuant to the said Act, and which certificate shall be in the form contained in the said Act, shall 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, or (if more than one person join in the affidavit) that one or more of the deponents, 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 Affidavit to be made by an attorney.

place 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 (or, if more than one, of each of such married women), whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and when 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 reason 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."

"And it is hereby further ordered, that the affidavit shall state the parish or several parishes or place, or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested, shall by deed be described to be situate.

"And it is hereby further ordered, that the affidavit shall be in the form hereunto annexed (a), subject to such variations as the circumstances of the case shall render necessary.

"And it is hereby further ordered, that the certificates and affidavits verifying the same shall, within one month (b) from the making the acknowledg-

(a) *Vide* Appendix No. 8.

(b) Which it has been determined means a *lunar month*.

ment, be delivered to the proper officer appointed under the said Act, and that the officer shall not, after that time, receive the same without the direction of the Court or a Judge."

Although deeds ought, under the above statute and rules, in strictness, to be acknowledged before a Justice of the Court of Common Pleas, a Judge in attendance at the chambers of either of the other Courts will receive the acknowledgment, if no Common Pleas Judge be sitting.

The ordinary period of taking acknowledgments is at the hour appointed for the chamber business to commence before the Judge, and the married woman should be in attendance a few minutes earlier. If the lady arrives whilst the ordinary business is proceeding, she will probably be kept in attendance for an unlimited period.

The usual course of procedure is, first of all to submit the indorsement on the deed, the certificate, and the affidavit verifying the same, to the clerk of the Judge in attendance, who will see that they are regular. The married woman and the attorney being then introduced into the Judge's presence, the attorney is called upon shortly to explain to the Judge the nature of the instrument which the party is required to acknowledge.

The attorney then withdraws, and the Judge inquires privately of the lady if she has already had the deed explained to her, whether she understands the same, &c. ; and if her replies be satisfactory the attorney is re-admitted, and the Judge signs the indorsement and certificate in his presence. Should the person acknowledging appear never to have had the deed explained, the Judge will probably order

Acknowledgments when taken.

How taken.

the same to be done, and require a further attendance at a future day.

**Execution of deed.** The deed may be executed by the lady in the actual presence of the Judge, or previously to the acknowledgment being taken—the latter is the most usual course.

**Affidavit.** The affidavit verifying the certificate, &c., which is directed, by the rule already recited, to be sworn by “a practising attorney,” may be made at any time subsequent to the execution of the deed, and preceding the filing of the certificate of acknowledgment.

**Not to be in first person.** It should be remembered that the certificate and affidavit are always drawn out on parchment, and that the rule of 1853, directing all affidavits to be in the *first person*, does not apply to this statutory deposition.

**Colonial property.** When the property in respect of which the acknowledgment is made, is situate in a colonial possession, the provisions of the 3 & 4 Will. IV. c. 74, are usually made to apply to the acknowledgment of the deed, subject to the modification of a special statute, of which there is generally one for each colony; and in order to show that the particular enactments of such statute have been complied with, as well as to prove the Judge’s authority in the proceeding, the attorney must be prepared to produce the special statute at the time the instrument is acknowledged.

**Filing certificate, &c. over date.** In pursuance of one of the rules already mentioned, the proper officer will not receive the certificate of acknowledgment, nor file the same, if the date precedes by twenty-eight days the day upon which it is brought to be filed, and a Judge’s

order must be obtained in order to compel him to do so.

If the certificate be under twelve months old, such order is issued as a matter of course upon application to the Judge's clerk, the cost of the order, 5s., being considered as a *fine* for neglect in not before completing the transaction. If, however, a longer period than twelve months has elapsed since the deed was acknowledged, the application for leave to file the certificate must be accompanied by an affidavit that the property has not changed hands since the execution of the deed, and that all the parties mentioned therein are still living, or that their death has in no particular manner altered the possession of, or title to, the estate (a).

If over one year old.

Upon production of the *original* order to the proper officer, he will file the certificate and affidavit with the order annexed to them.

Applications to file certificates of acknowledgment of English deeds, in which error or imperfection exists in the certificate, affidavit, or both, are comparatively rare in consequence of the ease with which such faults may be amended by application to the Judge or Commissioners by whom the certificate is signed, in a private manner, to amend the same. Where, however, the imperfection exists in a *colonial* certificate, an *ex parte* application must be made before the Judge at chambers, who will either direct an order to issue for the filing of the documents, or refer the parties to the Court for its higher determination.

Errors, &c. in certificate or affidavit.

As a general rule, the strictness with which imperfect certificates or affidavits of acknowledgment

(a) Appendix No. 9.

Notarial  
certificate.

are regarded both by the officer whose duty it is to file the same, as well as by the Judge subsequently applied to for the necessary order, is considerably relaxed when the *notarial certificate*, which usually accompanies all foreign and colonial acknowledgments, is in a perfect and regular form; this, with the special commission annexed to, and returned with, the other documents, offers considerable facilities in identifying the names of the Commissioners, or acknowledging party, where initials have been used in the place of full christian names, or where an erroneous spelling has been adopted.

Erasures in  
jurat.

It has been decided by the Court of Exchequer, that the rule (Reg. Gen. H. T. 1853, Reg. 140), forbidding the use of affidavits in the jurat, of which any interlineation or erasure exists, does not apply to the jurats of affidavits annexed to certificates of acknowledgment.

#### APPLICATION FOR ORDER TO COMPEL THE ATTENDANCE OF WITNESSES BEFORE AN ARBITRATOR.

Statute.

This application is grounded upon 3 & 4 Will. IV. c. 42, s. 40, which enacts, that—"when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, *to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order*, and the disobedience to any such rule or

order shall be deemed a contempt of Court, if in addition to the service of such rule or order an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall also be served either together with or after the service of such rule or order: provided that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial: provided also, that the application made to such Court or Judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or Judge that such person cannot be found: provided also, that no person shall be compelled to produce under any such rule or order any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order."

To obtain the order spoken of in the above section for the attendance of witnesses, it is necessary to produce to the Judge's clerk at chambers, a certificate signed by the plaintiff's or defendant's attorney, that a certain person therein named has been appointed arbitrator; that he has chosen a day and hour in the certificate mentioned, for proceeding with the reference at a certain place also to be mentioned in the certificate, and that A. B., C. D., &c. are necessary and material witnesses on behalf of the party applying for the order (a).

Certificate that witness is necessary.

Four witnesses only (as in a subpoena) will be

(a) Appendix No. 10.

C

introduced into each order, and the documents (if any) to be produced by each or any one of them will be endorsed upon the order, either by the Judge's clerk issuing the same, or by the attorney who applies for it.

When order  
may issue.

It should be remembered, with reference to this proceeding, that no order for the attendance of a witness or witnesses can be issued until after the arbitrator or umpire has been *actually appointed*; and also that, under the provisions of the statute, no witness will be bound to attend in pursuance of any Judge's order served upon him, unless at the time of, or subsequent to, such service, he shall have actually delivered to him an appointment, signed by one of the arbitrators, of the time and place of meeting.

An erroneous impression prevails, that where a cause is submitted to arbitration after the trial has commenced, the witnesses who have been regularly subpœnaed to attend the trial will, upon due notice of time and place of reference, be bound to attend the arbitration: it is hardly necessary to say this is not so; under such circumstances the subpœna becomes determined directly a verdict is given or a juror withdrawn.

#### EXAMINATION IN ENGLAND OF WITNESSES IN A SUIT IN A FOREIGN TRIBUNAL.

Statute.

By 19 & 20 Vict. c. 113, it is enacted, "that when, upon application for the purpose, it is made to appear to any one of her Majesty's Courts of Common Law at Westminster, or to any Judge of any such Courts, that any Court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending,

is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of the Court applied to, or of the Court to which the Judge applied to belongs, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly, and by the same or any other order, to command the attendance of any person or persons to be named in such order, or the production of any writings or other documents to be named in such order, and to give all directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such Court or Judge in a cause depending in such Court, or before such Judge.

The statute *suggests* a particular method to be adopted for satisfying the Court or Judge of the existence of the matters necessarily preceding the issue of the order, such as the existence of the suit or matter in the foreign tribunal, the necessity of the attendance of witnesses, &c.

A certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by her Majesty, *or in case there be no such diplomatic agent*, then of the consul-general or consul of any such foreign power at London, received and admitted as such by her Majesty, that any matter in relation to which an application is made under this Act, is a *civil or commercial* matter pending before a Court or tribunal in the country of which he is the diplomatic

Ambassa-  
dor's certifi-  
cate.

agent or consul, having jurisdiction in the matter so pending, and that such Court or tribunal is desirous of obtaining the testimony of the witness so certified. Such certificate is to form the groundwork upon which the order is founded, and if it cannot be, or is not produced, *other evidence* (the Statute does not particularise what) is directed to be received of the matter so directed to be certified (a).

Administra-  
tion of oath,  
&c.

There is also given by the same Statute to the examiner the power of administering an oath, false testimony after taking of which is to be deemed perjury, and to the witness the privilege of demanding such conduct money, and payment for expenses and loss of time, as would be demandable upon attendance at an ordinary English trial, as well as of refusing to answer any question tending to criminate himself, or any question which he is not compellable to answer in an ordinary Court of Law, and also of declining to produce any writing or document that he would not be compellable to produce in such Court.

Order.

The orders issued under the statute are precisely similar to those drawn up for the examination of a witness unable to attend upon a trial, and the examination and cross-examination taken down in writing and duly signed by the examiner will be returned as in the case of such latter orders. Should the clause directing the actual attendance of the witness before the examiner be omitted in the order directing the examination, it will be necessary, in the event of his refusal, to attend to obtain an order for his attendance, for which a separate certificate of the *attorney* will be required, as in proceedings under the 3 & 4 Will. IV. c. 42, s. 40.

(a) Appendix No. 11.

APPLICATION TO OBTAIN COSTS IN ACTIONS  
UNDER £20 WHERE THE DEFENDANT HAS  
NOT APPEARED.

In order to avoid the trouble and expense of a summons, attendance upon the return thereof, affidavit, and order to obtain costs, in the more frivolous cases in the Superior Courts of Common Law, in which the defendant has not *appeared* to the writ of summons, certain special rules framed during Easter Term, 1857, direct:—

That plaintiffs, suing in contract for 20*l.* or less, Rule.  
may, if they claim costs, indorse on the writ of summons the following notice:—

“Take notice, that if judgment be signed for default of appearance, the plaintiff will without summons apply to a Judge for his costs of suit, unless before such judgment you shall give notice to him or his attorney that you intend to oppose such application.”

“And it is further ordered, that if the defendant give such notice the plaintiff shall proceed by summons and order.”

“But if the defendant give *no* such notice, the plaintiff may produce such notice to a Judge at Chambers for an order for costs *ex parte*, and if the Judge shall sign his name to the indorsement, such signature *shall be an order for costs*, and the Master may tax them thereon accordingly. In case of any application for costs without such indorsement, the plaintiff shall not be entitled to more costs than if he had made such indorsement, unless a Judge shall otherwise order.”

The application for costs under this rule may be made at any time when the Chambers are open, When application is to be made.

whether a Judge be in attendance or not, the Judge's name being *stamped* on the writ by his clerk.

Before obtaining the order, the party applying for costs will be asked:—

1. If judgment has been signed.
2. If such judgment was signed for non-appearance.
3. If the defendant has given any notice of his intention to oppose the application.

And, upon satisfactory answers being made, the order will issue.

Where writ is lost.

Where the *original* writ, upon which alone in strictness the fiat can be given, is *lost*, the Judge will sometimes, upon special application upon an affidavit of the facts, order the fiat to be given upon the *copy* of the writ, but such an application is very unusual, and will more frequently be met with a direction from the Judge for the issue of a summons calling upon the defendant to show cause "why the plaintiff should not recover his costs," in like manner as if no special indorsement had been made.

Judgment paper.

In the Chambers of the Judges of the Courts of Queen's Bench and Exchequer, the production of the *judgment paper* is actually required before granting the fiat.

#### DELIVERY OF SPECIAL CASES, DEMURRERS AND ERROR BOOKS TO THE JUDGES.

The practice respecting the delivery of demurrer books and special cases to the Judges is regulated by the 16th Rule of the (Reg. Gen. H. T. 1853), which directs that:—

Rule as to demurrers, &c.

"Four clear days before the day appointed for

argument the plaintiff shall deliver copies of the demurrer book, special cases, special verdict or appeal cases, with the points intended to be insisted upon, to the Lord Chief Justice of the Queen's Bench or Common Pleas, or Lord Chief Baron of the Exchequer, as the case may be, and the Senior Puisne Judge of the Court in which the action is brought, and the defendant shall deliver copies to the other two Judges of the Court next in seniority, and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies.

“ If the statement of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statements of the points to the other two Judges, either by marking the same in the margin of the books delivered, or on separate papers.”

With respect to *Error Books* it is ordered by rule Error books. 68 of the same series of rules that :—

“ Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the Judgment Roll of the Court below, to the Judges of the Queen's Bench on error from the Common Pleas or Exchequer, and to the Judges of the Common Pleas on error from the Queen's Bench, and the defendant in error shall deliver copies thereof to the other Judges of the Court of Exchequer Chamber before whom the case is to be heard, and in default by either party the other

party may on the following day deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies."

Order to deliver "nunc pro tunc."

Where either party neglects to deliver his "paper book" four clear days before the same is appointed to be argued, in pursuance of the above rule, and his opponent has not delivered books for him, he can rectify his omission only by applying to a Judge for an order to deliver the papers *nunc pro tunc*, an order which is given almost as a matter of course. An order is also required in every case before any *amendment* or *addition* can be made to a paper book already delivered, and where such an order is obtained an arrangement should be made with the Judges' clerks at Westminster to produce the books delivered, which must have the amendment duly marked in them; as in no case is it usual to deliver the amendments on a separate paper.

"Four clear days."

The *four clear days* are construed to mean four days clear of the day upon which the papers are delivered, and of the day the cases are set down for argument. Hence Monday would be the last day upon which "paper books" to be used in argument on the succeeding Saturday could be delivered. It is doubtful whether, in strictness, Sunday, Christmas-day, Good Friday, or any day of public fast or thanksgiving, ought not to reckon as one of such four days; in practice, however, they do not. If any of the paper books be undelivered at the time the matter is called on for argument, the case will be struck out.

The portion of the rule relating to the writing of **Points**. the points upon *the margin* of the book, or delivering them *with the papers*, is by no means strictly enforced, and, in practice, points, and any other documents necessary to be delivered, will be received by the Judge's clerk at any time preceding the day upon which the case is set down for hearing; although if they remain undelivered, accidentally or otherwise, when the argument commences, it is at the parties own risk.

Except under very peculiar circumstances (and then only by a special application to each Judge) Return of paper books. no paper books of any description are *returned* to the parties, whether the case be argued, settled, or struck out of the list. This practice, however, is frequently departed from so far as relates to the return of books, papers, plans, or acts of parliament *accompanying* the case, and delivered for the information of the Judges; these may usually be obtained when the case is determined by application to the Judges' Westminster clerk. The case itself is reserved, in consequence of the Judge's notes and private observations being usually written upon it.

#### APPLICATION FOR A JUDGE'S NOTES OF A TRIAL AT NISI PRIUS.

Immediately after obtaining a rule *Nisi*, it is usual to bespeak of the Judges' clerk at chambers or Westminster, a copy of the Judge's notes taken on the trial of the cause. If the action be pending in the same Court of which the Judge who presided at *Nisi Prius* is a member, it will be simply necessary to bespeak of his clerk the production of the Where in same Court as Judge who tried cause.

Where in  
another  
Court.

original notes in Court at the time required, and to pay a fee of 5s. for such production. Should the notes, however, be required in *another* Court, a copy will be prepared by the Judge's clerk, to which the Judge will append his observations and signature, and this copy, being handed over to the junior Judge of the Court in which the argument or the rule is pending, will be read by him in open Court, and form the report of the original trial at *Nisi Prius*.

Notes not  
supplied to  
parties, &c.

In no case are the notes, or any copy thereof, supplied to the attorney or counsel on either side, though an exception is sometimes made to this rule in relation to the Judge's direction to the jury, and to notes of evidence taken by the Judge, upon which it is proposed to state a *special case* to be determined by the Court above. In both these instances the Judge in his discretion will, upon the application of counsel, sometimes direct his clerk to prepare a copy of the notes for the information of the parties to the cause.

Fees.

The attorney bespeaking a copy of the Judge's notes should be particularly careful to disburse the amount due to the Treasury for their copying, prior to the day appointed for the argument of the rule. If this be not done the copy notes will not be forthcoming when required, and considerable delay and difficulty will be caused.

### COMMITTAL OF A DEFENDANT TO THE QUEEN'S PRISON.

In all cases where a defendant has been taken in execution on a *ca. sa.* he has a right to remove

himself from the custody of the sheriff into that of the keeper of the Queen's Prison.

By doing so, he neither admits the legality of his arrest, nor in any way places himself in a worse position with respect to obtaining his discharge for irregularity, &c. than if he had remained in the sheriff's custody.

In order to remove a defendant into the Queen's Prison, a writ of *habeas corpus cum causa* must be prepared, indorsed by the Judge in attendance at chambers (which indorsement is given as a matter of course), sealed, and served upon the sheriff or his proper officer. The writ is made returnable *immediately* at chambers, and it is the duty of the officer having the prisoner in charge, at once, on reception of the writ, to conduct him to the Judge's chambers, and to produce to the clerk in attendance the writ itself with the sheriff's return annexed to it. The clerk will indorse upon the return a committal of the prisoner "to the custody of the keeper of the Queen's Prison in execution with the cause (or causes) within mentioned, there to remain until, &c.," which will be signed by the Judge, and the prisoner being delivered up by the sheriff's officer to the tipstaff in attendance will at once be removed to the Queen's Prison, the keeper of which retains, as his authority for the detention, the writ, sheriff's return, and Judge's fiat thereon indorsed.

How defendant is removed.

When the defendant is once actually in the custody of the keeper of the Queen's Prison, he may be detained at the suit of any other judgment creditor, or "charged in execution" as it is termed, in a very simple manner and without the issue of any further writ of execution or habeas.

Detainer.

Charging in execution.

Under the Common Law Procedure Act, 1852 (sect. 127), it is enacted, that "such person may be charged in execution by a Judge's order made upon affidavit (a), that judgment has been signed and is still unsatisfied to an extent exceeding 20*l.*," and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer.

Such an order is granted by the Judge's clerk at all times in Term and vacation upon the production of a proper affidavit, and the *original* order must be left at the prison, and not a copy merely. With respect to thus charging a defendant in execution, the 124th rule of the Reg. Gen. H. T. 1853, provides, that "the plaintiff shall proceed to trial or final judgment against a prisoner in the Term next after issue is joined, or at the sittings or assizes next after such Term, unless the Court or a Judge shall otherwise order, and shall cause the defendant to be charged in execution within the Term next after such trial or judgment."

It should be remembered that the order directed by the Statute is only operative when the defendant is in "the prison of the Court;" if he remains in the custody of the sheriff, either at a lock-up house or in the sheriff's prison, the only method of charging him in execution is by issuing a *ca. sa.* and leaving it with the under-sheriff to operate as a detainer, should the defendant be released from the sheriff's custody as to the first action. If whilst such *detaining ca. sa.* remains with the *first ca. sa.* in the sheriff's hands, the defendant sues out a habeas in order to be committed to the Queen's

(a) Appendix No. 37.

Prison, the sheriff will include *both* writs of execution in his return, and the defendant will be committed to custody until legally discharged from the operation of both.

Where the defendant is confined upon a *criminal* charge, in Newgate, or in any prison under the jurisdiction of the sheriffs of *London* and *Middlesex*, he can only be detained by a special order of a Judge, obtained under the Statute 52 Geo. III. c. 209, s. 52, which enacts, "that neither the sheriffs of London, nor the sheriffs of Middlesex, shall be chargeable with any process of detainer for debt or other civil matter which shall issue against any prisoner on a charge of felony or otherwise than by civil process in their or his custody, unless an order of the Court or of some Judge of the Court out of which such process of detainer as aforesaid shall issue shall be annexed to such process, and shall be delivered with the same unto such sheriffs or sheriff." Where the defendant is in the custody of the sheriffs of London and Middlesex.

The ordinary plan is to issue the *ca. sa.*, to obtain the sheriff's warrant thereupon, and then to make an *ex parte* application, upon affidavit, for the order.

The affidavit need only contain averments of the recovery and existence of the judgment and of the imprisonment in Newgate of the defendant. The order must be delivered to, and will be filed by, the governor of the prison, together with the warrant of the sheriff.

It is by no means uncommon for a judgment creditor to sue out a *ca. sa.* and leave it at the office of the sheriff, not to be executed against the Lodgment of ca. sa.

defendant, but merely to await his arrest in some other action, and *then* to operate as a detainer against him, the rule being that when a defendant is legally in custody of the sheriff he is in that custody upon *all* the detainers previously or subsequently lodged against him, and cannot be discharged until they are satisfied, and such *previously* left writs will be included in the sheriff's return to a habeas in the same manner as the others.



## II. EX PARTE APPLICATIONS UPON AFFIDAVIT.

### 1. SUING OR DEFENDING BY INFANTS.

An infant cannot sue or defend either in person or by attorney. He must do so through his *prochein amy*, or *guardian*, who is either the father or some relation or friend undertaking the conduct of the case of the infant litigant.

Appointment  
of prochein  
amy or  
guardian.

In order to appoint a prochein amy or guardian, a petition from the infant should be drawn up addressed to the Lord Chief Justice or Lord Chief Baron of the Court in which the action is brought, and which petition ought to be signed by the infant (*a*). A consent to his appointment as prochein amy or guardian must also be prepared and signed by the person to be put in place of the infant (*b*), and an affidavit verifying the signature of the peti-

(*a*) Appendix No. 12.

(*b*) Appendix No. 13.

tion and of the consent must be made by some third party (a).

Upon the production of these three documents to a Judge's clerk at chambers, a fiat will be given, directing the proper officer to draw up a rule for the admission of the person named as guardian or prochein amy in the particular suit. Should the action be in the Court of Common Pleas no rule will be required; but the Judge's clerk will issue *an appointment* drawn out on parchment of the proposed next friend, and such person will *ipso facto* become the legal representative of the infant.

If it be more convenient to the parties the infant and prochein amy or guardian may *personally* attend before a Judge at chambers, and the infant may prefer a verbal request for the required appointment, upon which, if acceded to, an order will at once issue, in the same manner as if a petition with the before-mentioned affidavits had been prepared.

Personal application of infant.

The proper period for an application to sue by prochein amy is after service of process, and before declaring in the cause. The proper time to apply for liberty to defend by guardian is after process has been served and prior to entering an appearance, and if the infant *appears* in person or by attorney the plaintiff may apply to strike it out.

When the application is to be made.

By the 5th Rule of the General Practice Rules RULE. of Hilary Term, 1853, "a special admission of prochein amy or guardian to prosecute or defend for an infant, shall not be deemed an authority to

(a) Appendix No. 14.

prosecute or defend in any but the particular action or actions specified."

Petition by  
father.

In a case where an infant was only twenty-one months old the Court admitted the father to sue as prochein amy, upon a petition signed by *him on behalf of the infant*, and on the production of an affidavit by the attorney stating the facts of the case, and that, in his opinion, the infant had a good cause of action (*a*).

#### APPLICATION TO SUE IN FORMA PAUPERIS.

Former  
practice.

The ancient practice of the Courts was to admit in a public manner, in open Court, under the provisions of 11 Hen. VII. c. 12, plaintiffs desirous of doing so, to sue in formâ pauperis.

This public admission has long been dispensed with, and until 1853 it was only necessary for a person proposing to sue in formâ pauperis to produce to one of the Judges' clerks at chambers a petition to the Lord Chief Baron and Barons, or Lord Chief Justices and Justices of the Court in which the action was brought, to be allowed to prosecute the suit in the manner required (*b*), and an affidavit that he, the petitioner, was not worth 5*l.* in the world, except his wearing apparel, and the matter in question in the cause (*c*). Upon these documents the order was granted.

Case to be  
submitted to  
counsel.

At the present time, in addition to the petition and affidavit above mentioned, "No person shall be permitted to sue in formâ pauperis unless a case laid before counsel for his opinion, and his opinion

(*a*) *Eades v. Booth*, 8 Q. B. 718.

(*b*) Appendix No. 15.

(*c*) Appendix No. 16.

thereon, with an affidavit of the party or his attorney that the same contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the Court or Judge to whom application may be made" (a).—*Reg. Gen. H. T., Reg. 121.*

The order to sue in formâ pauperis may be obtained <sup>Order.</sup> at any stage of the proceedings, and, once obtained, permits the plaintiff, upon its production, to obtain, free of all costs and charges whatever, all summonses, orders and other proceedings which, during the progress of the action, he may require; and "no fees shall be payable by a pauper to his counsel and attorney, nor at the offices of the masters or associates, or at the Judges' chambers or elsewhere, by reason of a verdict being found for such pauper exceeding 5*l.*"—*Reg. Gen. H. T. 1853, Reg. 121.*

A copy of the order, when obtained, should be <sup>Copy order.</sup> served upon the opposite party; and it is necessary for the plaintiff or his attorney at all times to have the means of ready access to the original order, as the clerks and officers, whose assistance he requires from time to time, will not issue gratuitously any proceeding unless upon the actual production of such order at the time of the application. A separate order must be obtained in each cause, and will be granted in all ordinary actions, except, perhaps, "qui tam" (b) and "slander;" and it is doubtful whether not in these cases also.

"Where a pauper omits to proceed to trial, pur- <sup>Omitting to</sup> suant to notice, he may be called upon by a rule to <sup>proceed to</sup> trial.

(a) Appendix No. 17.

(b) *Hawes v. Johnson*, 1 Y. & J. 10.

show cause why he should not pay costs, though he has not been dispaupered (*a*), and why all further proceedings should not be stayed until such costs shall be paid."—*Reg. Gen. H. T., Reg. 122*. And the expense of an unsuccessful motion by the pauper against his attorney for making him, through negligence, liable to pay these costs, must be met by the pauper, notwithstanding his order to sue in formâ pauperis (*b*).

Amending  
proceedings.

It should be remarked, also, that a pauper is not entitled to *amend* his proceedings as a matter of right, without tendering the costs occasioned by such amendment to the opposite party (*c*). And also, that if he proceed vexatiously or act with unnecessary delay, the Court will dispauper him (*d*), but when so dispaupered he is not liable for costs previously incurred (*e*).

#### APPLICATION FOR LEAVE TO PROCEED IN AN ACTION, WHERE PERSONAL SERVICE OF THE WRIT OF SUMMONS CANNOT BE EFFECTED.

Scarcely any alteration of the law in modern times has tended to introduce more *ex parte* applications into the chambers of the Common Law Judges, than the provisions made by the first Common Law Procedure Act (15 & 16 Vict. c. 76, s. 17) respecting the method of proceeding in an

(*a*) *Bell v. Port of London Assurance Company*, 1 L. M. & P. 691.

(*b*) These costs are costs of the day, *Gore v. Morphew*, 8 Dowl. 137.

(*c*) *Foster v. Bank of England*, 6 Q. B. 878.

(*d*) *Taylor v. Lowe*, 2 Str. 983; *Bedwell v. Coulstring*, 3 D. & L. 767.

(*e*) *Slowman v. Aynel*, Fortes. 320.

action when personal service of the writ of summons upon the defendant is found to be impracticable.

It is provided by the above-mentioned statute, Statute. that "the service of the writ of summons, wherever it may be practicable, shall as heretofore be personal; but it shall be lawful for the plaintiff to apply from time to time on affidavit to the Court out of which the writ of summons issued, or to a Judge; and in case it shall appear to such Court or Judge that reasonable efforts have been made to effect personal service, and that either the writ has come to the knowledge of the defendant or that he wilfully evades service of the same and has not appeared thereto, it shall be lawful for such Court or Judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge may seem fit."

It is necessary, from the wording of the Statute, to show "reasonable efforts" to serve the writ, *as well as* knowledge or wilful evasion of the writ by the defendant, and an affidavit showing knowledge on the part of the defendant but failing to disclose "reasonable efforts" to effect personal service, will in general be deemed as imperfect as one showing "reasonable efforts" to serve but omitting to depose to any knowledge or evasion on the part of the defendant. "Reasonable efforts" to serve the writ.

An affidavit, for instance, disclosing a single call at the defendant's residence, the leaving a copy writ there, and the subsequent application of the defendant for time to pay the debt, with an admission from himself that he had received the copy

writ, has been deemed in numerous cases insufficient, as not disclosing any reasonable efforts to serve the process; and for the same reason an affidavit that the writ was inclosed in a letter to the defendant, who replied thereto, acknowledging the receipt of both letter and writ, has been rejected. In such cases as these, however, the Judges have sometimes allowed the plaintiffs to proceed with a stipulation introduced into the order, that no more costs should be recovered on account of substituted service than if the writ had been personally served upon the defendant.

The question as to what are and what are *not* "reasonable efforts" must, of course, be determined by the circumstances of each particular case. The ordinary course is to prove *three* distinct attempts to serve the writ at the defendant's residence, intimation of the time at which the attempts would be made having been previously given, (as in the old practice relating to the writ of distringas,) and these three calls are usually considered sufficient, especially if the copy writ be left on the first or second of them with the wife, daughter or near relation of the defendant, who, on the last call, gives satisfactory information as to the ultimate disposal of the copy writ so left.

Where defendant appears after effort to serve.

A difference of opinion exists as to the course to be pursued in cases where the copy writ being delivered at the residence is taken to a parlour, bedroom or elsewhere, and delivered to the defendant, who appears at once before the process server and acknowledges its receipt. The general opinion seems to be, that a second copy writ ought to be served upon him, although the process server being,

in ordinary cases, only provided with *one*, this course is usually impracticable. The same difficulty arises where the defendant, subsequently to the writ being left at his dwelling-house, comes to the plaintiff or to his attorney and confesses his knowledge of the action. In both these cases, however, the order is continually granted where other attempts to serve, more or less numerous, are deposed to.

Although the Judge, to whom application is made, is empowered to put the plaintiff under whatever *conditions* he may think fit, it is rarely that any conditions are imposed save the proviso usually but not invariably introduced into "orders to proceed," that such procedure shall not take place until the expiration of three days from the time when a copy of the order shall have been left at the defendant's residence, or at the place where the efforts to serve the writ were made.

Terms  
ordered by  
Judge.

Affidavits, describing calls at the *place of business* of the defendant, or at any place other than the defendant's residence, and not explaining how calls at the residence came to be omitted or abandoned, have usually been deemed insufficient.

Calls at the  
place of  
business, &c.

If the plaintiff or his attorney neglect to have the order drawn up immediately, it will be necessary for him, upon the day when he applies for it, to make a fresh search for the defendant's appearance and to amend and reswear his affidavit, bringing the averment of the defendant's non-appearance down to the day upon which he applies for the order.

Fresh aver-  
ment of non-  
appearance.

It is hardly necessary to remind the reader that no application to proceed as if personal service had been effected should be made before the number of

days limited in the writ for the defendant's appearance has fully expired. If such be done, the order will be refused, and a fresh attendance at chambers, at a proper period, with a new affidavit of search for appearance, will be necessary (a).

**PROCEEDINGS AGAINST A BRITISH SUBJECT OR FOREIGNER RESIDING OUT OF THE JURISDICTION OF THE COURTS.**

The application to a Judge at chambers to proceed against a British subject or foreigner, residing out of the jurisdiction of the Courts, is regulated by the 18th and 19th sections of the 15 & 16 Vict. c. 76.

The application is an *ex parte* one, made upon an affidavit, which must disclose to the satisfaction of the Judge:—

Affidavit.

1st. Either that the defendant is a British subject or alien.

2ndly. That there is a cause of action, which arose within the jurisdiction of the Superior Courts, or in respect of the breach of a contract made within the jurisdiction.

3rdly. That a writ of summons has been issued in the form prescribed by the said statute, and either that such writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service, and that it came to his knowledge, and that he wilfully neglects to appear to the writ, or that he is living out of the jurisdiction of the Court in order to defeat and delay his creditors (b).

(a) Appendix No. 18.

(b) Appendix No. 19.

Upon an affidavit, disclosing these particulars, Order. an order will issue directing the plaintiff to file a declaration against the defendant; to serve the defendant with a notice to plead in — days, together with particulars of demand and a copy of the order, and permitting the plaintiff, in case the defendant do not plead within the time limited by the order, to prove the debt sued for before the Master, and to sign final judgment for the amount found by the Master to be due.

The affidavit of the foreign service of the writ Foreign affidavit, before whom sworn. upon the defendant, or any other affidavit required under the above provision, may, if necessary, be sworn before any consul-general, consul, vice-consul or consular agent (15 & 16 Vict. c. 76, s. 23); but such affidavit must purport to be signed by such consular-general, &c., and must show some proof of his official station, which is generally afforded by affixing the seal of his office to the affidavit before it is transmitted to England.

The only difference made by the statute in proceedings against a British subject and a foreigner Proceedings against a foreigner. is with respect to the writ of summons and the service thereof. The forms of the two writs are set out in Schedule A., Nos. 2 and 3, to the 15 & 16 Vict. c. 76; and the statute directs, that in the case of a British subject the writ itself shall be served, while, in the instance of a *foreigner*, a notice alone of the writ having been sued out is required, and such notice is directed to be in the following form:—

“ To — late of [*Brighton, in the county of Sussex*] or now residing at [*Paris, in France*].

“ Take notice, that A. B., of — in the county of — England, has commenced an action at law against you, C. D.,

in her Majesty's Court of Queen's Bench, by writ of that Court, dated the — day of — A.D. 18—; and you are required, within — days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the said Court to the said action; and in default of your so doing the said A. B. may, by leave of the Court or a Judge, proceed thereon to judgment and execution.

[Here state amount of claim as required by 8th section, but allowing the defendant the time limited for appearance to pay debt and costs.]

(Signed)

A. B., of — &c.

or

E. F., of — &c.

Attorney for A. B."

If a wrong writ issued.

If, either in the case of a British subject or of a foreigner, the writ issued be accidentally the ordinary writ of summons for service *within* the jurisdiction, and the defendant appear thereto, he will be held to have waived the irregularity, and cannot afterwards move to set aside the proceedings (a).

So, also, where an order was made, giving the plaintiffs leave to proceed on a writ served upon a British subject abroad, the Court would not set the judgment, signed in default of appearance, aside on the ground that the cause of action did not arise within the jurisdiction, that matter having been decided on granting leave to proceed. It was said: "It is not required that there should be a cause of action, but that the Court or Judge should be satisfied that there is one (b).

Days for appearance, &c.

The number of days given to the defendant for appearance, in the order, will bear reference to the distance he is from England, and to the means of access to the foreign part in which he resides.

Colonies.

Should the defendant be residing in one of the

(a) *Forbes v. Smith*, 10 Exc. 717.

(b) *Hatton v. Whitehouse*, 4 W. R. 463.

British colonies, the affidavits required may be made before a Justice of the Peace, whose official nature must be certified by a notary public.

**APPLICATION FOR LEAVE TO APPEAR IN AND DEFEND AN ACTION BROUGHT UPON A BILL OF EXCHANGE, &c.**

The 18 & 19 Vict. c. 67, (The Bills of Exchange Act,) for the purpose of preventing fictitious or frivolous defences from being set up in actions brought upon bills of exchange and promissory notes, and thereby of stopping much delay in judicial proceedings, especially in those commenced just before or in the Long Vacation, overthrew an ancient principle of the law, that every defendant had a right to appear and to answer the matter alleged against him in the writ directed to him in the Sovereign's name. That Statute enacts that—  
 “ All actions upon bills of exchange or promissory notes, commenced within six months after the same shall have become due and payable, may be by writ of summons,” &c. ; “ and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the Court, or an order for leave to proceed, as provided for by the Common Law Procedure Act, 1852, and a copy of the writ of summons and the indorsements thereon, in case the defendant *shall not have obtained leave to appear* and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in Schedule B. to this Act annexed, (on which judgment no proceeding in error shall lie,) for any sum not exceeding the sum indorsed on the writ, to—

D

gether with interest at the rate specified (if any) to the date of the judgment, and a sum for costs to be fixed by the Masters of the Superior Courts, or any three of them, subject to the approval of the Judges thereof, or any eight of them, (of whom the Lord Chief Justices and the Lord Chief Baron shall be three,) unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may, upon such judgment, issue execution forthwith.

“ II. A Judge of any of the said Courts shall, upon application within the period of twelve days *from such service (a)*, give leave to appear to such writ and to defend the action, on the defendant paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit.

“ III. After judgment, the Court or a Judge may, under special circumstances, set aside the judgment, and, if necessary, stay or set aside execution; and may give leave to appear to the writ and to defend the action, if it shall appear to be reasonable to the Court or Judge so to do, and on such terms as to the Court or Judge may seem just.

“ IV. In any proceedings under this Act it shall be competent to the Court or a Judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court; and

(a) Appendix No. 20.

further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof."

V. (Gives the same remedy for recovering expenses of "noting" as for recovering the amount of the bill.)

IX. (Directs that the Act may be applied to all Courts of Record throughout England and Wales.)

In order better to carry into effect the provisions of this Act, three several rules were framed. The first, in Michaelmas Term, 1855, related to costs, and is as follows:—

" ——— costs to be allowed in cases in which the plaintiff has signed final judgment for default of appearance:—

" Above 20*l*. £ s. d.

" Agency on country cases, including mileage . . . . 4 0 0

" Town cases . . . . 3 8 0

" Under 20*l*.

" Agency on country cases, including mileage . . . . 3 2 0

" Town cases . . . . 2 14 0"

The second rule (November 26, 1855) sets forth the several indorsements to be made upon writs issued under the provisions of the Act.

" This writ was issued by E. F., of &c., attorney for the plaintiff [*or by A. B.*], who resides at [*mention the city, town or parish, and also the name of the hamlet, street and number of the house of the plaintiff's residence*].

" The plaintiff claims ——— pounds, principal and interest, [*or ——— pounds, balance of principal and*

interest,] due to him as the payee [*or indorsee*] of a bill of exchange [*or promissory note*] of which the following is a copy.

[*Here copy bill of exchange or promissory note, and all indorsements upon it.*]

“ And also — shillings for noting (*if noting has been paid*) and £ — for costs. And if the amount thereof be paid to the plaintiff or his attorney within FOUR days from the service hereof further proceedings will be stayed.”

### “ NOTICE.

Notice to be indorsed on writ.

“ Take notice, that if the defendant do not obtain leave from one of the judges of the Courts within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the Court out of which this writ issues, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £        for costs, and issue execution for the same.

“ Leave to appear may be obtained on an application at the Judge’s Chambers, Serjeants’ Inn, London, supported by affidavit, showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.”

*Indorsement to be made on the Writ after Service thereof:—*

“ This writ was served by X. Y. on L. M. (the defendant), on Monday, the — day of —, 186—.

“ By X. Y.”

The third, and only remaining rule having immediate reference to proceedings under this Act, is dated January 30, 1858.

“IT IS HEREBY ORDERED that where a defendant obtains leave to appear according to the said Act, and enters appearance to any such writ according to the said rule of Michaelmas Term, 1855, the plaintiff may include in his declaration, together with a count on the bill of exchange or promissory note (as the case may be), a count upon the consideration, if any, between the plaintiff and defendant for the bill of exchange or promissory note, and deliver a particular of demand accordingly.”

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It has been decided (*a*), by the Court of Exchequer, that a *banker's cheque* is, for the purposes of this Act, a promissory note, and that the holder thereof is entitled to a summary remedy under the Statute. Banker's cheque.

It has also been decided (*b*) that a defendant has a right to set up *any* defence to a bill of exchange which is not merely fictitious, and cannot be deprived of the right under this Act. Defence.

The practice at chambers with respect to proceedings under the 2nd section of the Statute, *i. e.*, the obtaining leave to appear by a defendant, is extremely simple. An affidavit averring that the defendant has been served with the writ of summons, and disclosing a legal or equitable defence to the action, is all that is required. To this, a copy of the writ of summons ought in strictness to be annexed, although this is not essential. The Practice. Affidavit.

(*a*) *Eyre and another v. Waller*, W. R. Exc. p. 450.

(*b*) *Matthews v. Marsland*, W. R. Exc. p. 254.

Judges at chambers appear to construe very liberally the words of the Statute,—“legal or equitable defence, or such facts as would make it incumbent on the owner to prove consideration,” probably because of the hardship which might be inflicted upon the defendant should he be deprived of the right of proving his defence, however slight the same might be. Nevertheless, an averment that the defendant “has a defence on the merits,” without setting out the particulars of it, is wholly insufficient; as is also a simple averment of no consideration having been received.

The affidavit upon which the application is grounded should be left with the Judge’s clerk the day previous to that on which the order is required, or at all events an hour or two before the expected arrival of the Judge; and the order obtained upon it must be delivered, together with an appearance drawn up in its proper form, to the officer at the Appearance Office, who will cause such appearance to be entered in the book kept for that purpose.

Neglect to sign judgment.

The defendant by the writ is called upon to appear within a certain number of days limited therein, but should he fail to do so, and the plaintiff neglect to sign judgment at the expiration of those days, he may enter an appearance pursuant to order after the exigency of the writ has expired, and such appearance will not be set aside.

Setting aside judgment.

The power given under the third section of the Statute for the Court or Judge to set aside the judgment, and, if necessary, stay or set aside execution, and give leave to appear, is very rarely exercised,—only, it is believed, where a very strong defence has come to light after the signing of such

judgment, or where the application to appear and defend has been delayed by unavoidable circumstances.

The provisions of the Statute are by the 19 & 20 Vict. c. 108, s. 4, in the case of debts upon bills of exchange and promissory notes not exceeding 20*l.*, extended to the County Courts.

**APPLICATION FOR LEAVE TO DEFEND BY LANDLORD ON A WRIT OF EJECTMENT BROUGHT AGAINST A TENANT IN POSSESSION.**

The 15 & 16 Vict. c. 76, s. 209, in substance enacts, that "every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff, or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, &c.;" and also that "any person, not named in the writ of ejectment as defendant in such writ, shall, by leave of the Court or a Judge, be allowed (a) to appear and defend on filing an affidavit, showing that he is in possession of the land, either by himself or his tenant;" and power is also given to the Court or a Judge to "strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants" (sect. 176).

The order to appear and defend as landlord is given as a matter of course by the Judge's clerk, and upon obtaining it the party is "to enter an appearance according to the Common Law Pro-

(a) Appendix No. 21.

cedure Act, 1852, entitled in the action against the party or parties named in the writ as defendant or defendants, and forthwith to give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he sues in person." (Reg. Gen. H. T. 1853, Reg. 113.)

And a person so appearing shall state in his appearance that he appears as landlord, and such person shall be at liberty to set up any defence which a landlord has heretofore been allowed to set up and no other, 15 & 16 Vict. c. 76, s. 173.

Terms.

If a landlord shows the Court or Judge, in the ordinary manner, that he is in possession of the land by himself or tenant, he has then *a right* to the order to defend, and no terms can be imposed upon him in respect of his appearance and defence. (*Butler v. Meredith*, 24 L. J. Exc. 239; *Doe d. Hudson v. Jameson*, 4 Man. & Ry. 570.)

#### SIGNING JUDGMENT IN EJECTMENT WHERE DEFENDANT HAS NOT BEEN PERSONALLY SERVED WITH THE WRIT.

Personal service

Personal service of the writ of ejectment must be service upon the *tenant in possession*, and in the affidavit required to be filed before judgment for non-appearance can be signed the person served must be expressly called "A. B., the tenant in possession"—*occupier, tenant* (simply), &c., will not be sufficient.

Where a defendant has not been personally served, the order of a judge must be obtained before judgment for non-appearance can be signed, and in an action against several defendants, judgment for non-appearance can only be signed against

those who have been personally served with the writ, while an order must be obtained to proceed against the remainder. In the case of joint tenants, personal service upon *one* is sufficient, and when the property sought to be recovered is severable so far as the rights of the defendants are concerned, immediate judgment may be had against those who were personally served and have not appeared.

upon one defendant.

If *personal* service has not been effected, *due* service must be shown before the order to proceed will issue, the averment being that the deponent served *A. B. the tenant in possession*, by, &c. The particular acts constituting "due service" have never yet been defined, although the principle is well recognized, that there must be sufficient facts to warrant an inference that the writ has come to the defendant's knowledge. Hence an averment that the writ was given to the wife at the defendant's residence, or to the wife, she and her husband then living together, is sufficient; while delivery to a son, daughter, parent, relation or friend, even at the defendant's dwelling, is not enough, unless there be also an averment that the writ came to the defendant's knowledge, and that he wilfully evades service of the same, or except there is reasonable evidence *to infer* that the writ so came to his knowledge.

Due service.

If the premises be entirely vacant and unoccupied, a copy of the writ may be posted upon the "door of the dwelling-house, or other conspicuous part of the property;" and after waiting sixteen days, a Judge's order may be applied for, in order to proceed to sign judgment, 16 & 17 Vict. c. 76, s. 170.

Vacant possession.

*The vacant possession referred to in the above*

section, is determined to be an entire and absolute abandonment on the part of the defendant, and every other former inmate, of the premises sought to be recovered ; and therefore if any individual, or any articles of furniture, remain there, there is no *vacant possession* within the meaning of the statute, and it will not be sufficient in such a case to stick up the copy writ on the premises, even if the defendant be subsequently discovered and informed of the proceeding.

Signing judgment in ejectment for non-payment of rent.

Where an application is made to a Judge for an order to sign judgment, for non-appearance in an action of ejectment *for the non-payment of rent*, the contents of the affidavit upon which the order is asked for must be in accordance with the enactments contained in the 15 & 16 Vict. c. 76, s. 210.

There must be in such affidavit—

Affidavit.

1st. A distinct averment that *one half year's* rent was due before the service of the writ in respect of the demised premises.

2ndly. An averment “ that no sufficient distress was to be found on the demised premises, counter-vailing the arrears then due,”—which averment will not be dispensed with, even in the case of vacant possession, where the plaintiff swears that the premises are “ wholly deserted.”

3rdly. A right, shown on the part of the lessor, to re-enter the premises in case of the non-payment of rent within a stated time, and this is usually shown by reciting the particular covenant of the lease or agreement relating to such re-entry.

4thly. An averment of personal service of the writ of ejectment upon the defendant, or of *due* service upon his wife, &c., as explained heretofore,

*or* of an impossibility legally to serve the said writ, *or* of no tenant being in actual possession of the demised premises; and in the two last-mentioned cases, an additional statement that a copy of such writ was affixed upon the door of the demised messuage; "or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements or hereditaments comprised in such writ of ejectment."

5thly. A statement that due search has been made by the deponent in the proper office, and that no appearance can be found entered by, or on behalf of, the said defendant (a).

#### APPLICATION FOR A WRIT OF CAPIAS TO HOLD A DEFENDANT TO BAIL.

The application for a Capias to arrest the Defendant during the progress of the cause, is grounded upon the provisions of the 1 & 2 Vict. c. 110, s. 3, <sup>1 & 2 Vict. c. 110, s. 3.</sup> (The Abolition of Arrest on Mesne Process Act,) which declares, that "if a plaintiff in any action in a Superior Court shall, by affidavit, show to the satisfaction of a Judge of such Court that he has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or defendants, one or more of them, is or are about to quit England unless he or they are forthwith apprehended, it shall be lawful for such Judge, by a

(a) Appendix No. 23.

special order, to direct that such defendant or defendants shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages."

Defendant's  
necessary  
ignorance of  
application.

The application under this section of the Statute is always made *ex parte*, it being highly expedient to the interests of the plaintiff that the defendant should be kept in entire ignorance of it; and it is for this reason, probably, that the adjudication upon the issuing of the writ is directed to be by a Judge, and not by *the Court*, the proceedings of the latter being always conducted in a more open and public manner.

Application  
entertained  
at any time.

As a general rule, the Judges will entertain an application for a *capias* on account of its pressing importance, when they would not attend to any other chamber business, whilst sitting in Court, at their private residence, &c.

Great care  
required in  
framing affi-  
davit, &c.

It is hardly necessary to premise, that in a proceeding involving the defendant's liberty, the utmost degree of accuracy is required in the affidavit upon which the order is grounded, and the true test of the sufficiency of the averments in such affidavit, so far as their *strength* is concerned, and assuming that upon the deductions to be drawn from them the writ ought to issue, is, can *perjury* be assigned against the deponent if the allegations be false?

Formal errors  
not to in-  
validate pro-  
ceedings.

Whilst, however, great strictness in the *substantive* portions of the affidavit is required, the more formal parts are regarded with less attention, and the description of the defendant by initials, or even by a wrong name, or without any christian name, no longer invalidates the proceedings, provided it appears that due diligence has been used to obtain

knowledge of the proper name. (Reg. Gen. H. T. 1853, Reg. 82.)

The affidavit (which, if a writ of summons has been already issued, should be entitled in the cause) and may be made by any person, whether a party to the suit or not, must contain averments :—

1st, That the defendant is indebted to the plaintiff in a sum exceeding 20*l.*, and must set forth the nature of that debt (*a*).

The cause of action stated in the affidavit should be the same as that afterwards alleged in the declaration; and if it be otherwise, the order may be rescinded, and the defendant discharged out of custody. The declaration may, however, contain *other* causes of action than that mentioned in the affidavit, so long as it contains *that one*. The existence of the plaintiff's right of action at the time of the application must also be positively sworn to, and such right must not be an accruing one, but a right complete and perfect.

Where the action is for unliquidated damages, strictly speaking, the plaintiff should aver that he has sustained damage exceeding 20*l.*; but his omission to do so will not be fatal to the application, if the facts disclosed enable the Judge to form that opinion, and to satisfy himself that a Jury, if they found a verdict for the plaintiff, would accompany it with an amount of damages sufficient to bring the application within the provisions of the statute.

The averment that the defendant "is indebted to the plaintiff" must be distinct and clear, as must be also the assertion that the plaintiff "has a cause of action against the defendant;" if the latter be not

(*a*) *Langton v. Wetherell*, 14 M. & W. 104.

sworn to, it may be that the debt spoken of is payable *in futuro*, and no *capias* ought to issue.

Defendant  
about to quit  
England.

2ndly. It must be deposed, that the defendant "is about to quit England unless he be forthwith apprehended." The mere statement that the plaintiff "believes," "verily believes," "has heard," "has certain knowledge," &c., that the defendant is going abroad, is insufficient; it must clearly appear upon what his belief is grounded, and if it be upon the information of a third party, that person's name, together with the time and place of the conversation during which the plaintiff gained his knowledge, must be set out.

It should be shown that the defendant is about to quit England *forthwith*, facts showing a general intention to quit the country at some future time are insufficient; and it is desirable, where practicable, to disclose the name of the ship, and time of her passage, by which the defendant has made arrangements to travel.

The quitting England for any purpose is sufficient cause upon which to ground an arrest against such a defendant as above mentioned, nor need his intention to evade payment be disclosed in the affidavit.

The only exceptional cases are those of persons leaving England for a limited period in the carrying out of their ordinary business, and who, it may be reasonably presumed, have an intention to return in due course. The practice of excluding such individuals, however, from the ordinary operation of the statute is by no means uniform, some of the Judges making no exception whatever in their favour.

It is unnecessary that the probable absence from

the country should be long continued, if the defendant is likely to be out of the jurisdiction, when in the ordinary course of the suit execution would issue, he is a proper person to be held to bail.

3rdly. Although an order for a *capias* may be applied for at *any* stage of the proceedings, a writ of summons must actually have been sued out against the defendant before the application will be granted, and an averment to that effect must be contained in the affidavit. The affidavit of debt, and of intention to leave England, may indeed, if convenient, be prepared before any writ of summons is issued, and may be sworn to, and in such case ought not to be entitled in any cause; but before the order for the *capias* can issue, the writ of summons must have been actually sealed, in order that the applicant may come under the statutory description of "a plaintiff in a cause," and as this is the only object in enforcing the prior issue of the writ, it is unnecessary that it should have been *served* upon the defendant when the application is made—merely issuing it being sufficient.

Where the defendant has been arrested in the country, under the provisions of the 14 & 15 Vict. c. 52, s. 1, "The Absconding Debtors' Act," and the plaintiff, under the enactment contained in that statute, within seven days after the defendant's arrest seeks to obtain an order for a writ of *capias* from a Judge of a Superior Court, *an office copy* of the affidavit under which the warrant for arrest has been obtained, certified in due form by the officer in whose custody the original affidavit is, will be received in place of the ordinary affidavit of defendant's debt and intention to leave the country,

and upon reading such office copy (if deemed sufficient), and an affidavit of the issuing of a writ of summons, the Judge will direct the writ of *capias* to issue (a).

**The order.** If the application to hold to bail be successful, the Judge will indorse upon the affidavit the amount for which bail is to be taken, and his clerk will draw up an order for the plaintiff "to be at liberty to issue, within ten days from the date (thereof), one or more writ or writs of *capias* into one or more different counties, as the case may require, against the defendant, to hold him to bail for £ (the sum fixed by the Judge)."

This order is not served upon the opposite side, but upon its being taken with a properly prepared writ to the Master's office, the writ will be sealed, and the officer sealing it will retain the Judge's order as his authority for doing so. The writ itself is then ready for the hands of the sheriff.

**Inspection of affidavit.**

The affidavits or affidavit used will be filed by the Judge's clerk, and inspection of them will not be granted to any applicant, until the defendant is actually in custody, nor any information given as to whether an order for a *capias* has or has not issued, in order that the defendant, who might otherwise defeat the operation of the writ by immediately leaving England in a secret manner, may be kept in entire ignorance of the whole proceeding.

**Discharge of defendant.**

The 6th section of the statute, under the provisions of which all the proceedings just enumerated are taken, directs:—"That it shall be lawful for any person arrested upon any such writ of *capias*,

(a) Appendix No. 24.

to apply at any time after such arrest to a Judge of one of the Superior Courts at Westminster, or to the Court in which the action shall have been commenced, for an order or rule on the plaintiff in such action, to show cause why the person arrested should not be discharged out of custody, and that it shall be lawful for such Court or Judge to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Judge or Court shall seem meet: provided that any such order made by a Judge may be discharged or varied by the Court on application made thereto by either party dissatisfied with such order."

Where a defendant has been improperly arrested, as upon a Sunday, or in a county into which no writ has been issued, &c., or where the affidavit, order, or writ, is in the fact of it defective, the application under the above section, which must be "to discharge the defendant out of custody," and not to rescind the order or set aside the writ, should be made usually to a Judge at chambers with as little delay as possible, and affidavits of facts not deposed to in the affidavit on which the *capias* issued may be used. In one case (*Pegler v. Heslop*, 1 Exc. 437), the Court of Exchequer permitted the defendant to deny the plaintiff's right of action, although this was subsequently not allowed in *Copeland v. Child*, 1 B. C. C. 176; the truth of the averment, that the defendant was forthwith about to leave England, is frequently made a matter of dispute, in applications for a discharge, and the fact of his having a house full of furniture, or money

Improper  
arrest.

at his bankers, &c., are all taken as evidences negating such intention. A simple denial that the plaintiff, or person making the original affidavit, *was* informed either by the defendant or a third person that the defendant was about to leave England is, however, altogether insufficient for a discharge, even if accompanied with attempted proofs that he *could not* have been so informed.

Irregularity  
in affidavits,  
&c.

Where the discharge is asked for, on the ground of *irregularity* in the affidavit, order, or writ, the 135th rule of Reg. Gen. H. T. 1853, comes into operation, which directs that "no application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh *step after* knowledge of the irregularity." And the summons taken out must conform to the provisions of the 136th rule, which directs that "where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated therein." The "reasonable time" mentioned in the first of the above rules has been declared to mean the time limited for putting in bail.

Costs.

Where the summons is dismissed without any order, the defendant will have to pay all the costs of the application.

#### APPLICATIONS CONNECTED WITH BAIL BONDS, &c.

A defendant who has been arrested by the sheriff upon a *capias*, if he obtain his discharge by entering into a bail bond, has eight days' time in which to put in *special bail*, *bail over*, or *bail to*

*the action*, as it is indiscriminately called. If he has not executed a bail bond, but remains in the sheriff's custody, he may put in special bail at any time before execution issues, although final judgment may actually have been signed against him.

The number of special bail admitted is usually, but not invariably, *two*, and the largeness of the debt will alone permit the introduction of a greater number: five and six have on special occasions been allowed; but where more than two are required, the Judge's special order must be obtained. (Reg. Gen. H. T. 1853, Reg. 91.)

In the country, bail may be put in before a Commissioner, or before a Judge of assize; in *London*, before a Judge of one of the superior Courts of Common Law at Westminster; or, if they be all absent from town, before a Commissioner appointed under the provisions of the 1 & 2 Vict. c. 45.

The obligation entered into by special bail is, that the defendant in the action shall, if condemned, satisfy the costs and condemnation, or render himself into the custody of the keeper of the Queen's Prison; and they also agree, that if he fail to perform one or other of these engagements, then that they themselves will become jointly and severally liable.

In order, therefore, that the bail may, if it becomes necessary, be compelled to satisfy the plaintiff, only those persons are legally fitted to become bail who have the pecuniary means of discharging their obligation, and who are not privileged by rank or office from arrest, while, to prevent the likelihood of their eluding the process of the Court,

Number of special bail.

Putting in bail.

Who may be bail.

freeholders or householders alone, and they within the jurisdiction of the Court, are eligible.

The law has also excepted from becoming bail (except under particular circumstances hereafter to be mentioned), practising attorneys and their clerks, sheriffs' officers, bailiffs, and persons concerned in the execution of process. (Reg. Gen. H. T. 1853, Reg. 94.)

For what  
reason bail  
is put in.

There are two distinct cases in which special bail is put in, and in each case for an entirely different purpose.

The first is, where the defendant, having been arrested, and having given a bail bond to the sheriff and been discharged thereupon, is desirous of again entering into custody for the purpose of protecting the bail given to the sheriff from the operation of the bail bond if enforced against them, or where his bail to the sheriff are desirous of his so doing; the office of the special bail put in in such a case as this is simply to *render* the defendant into custody, and such bail are technically known as "*bail to render*," and are employed where bail to the action willing to liberate the defendant during the progress of the cause cannot be obtained.

The second use of special bail is, as before explained, to secure to the plaintiff the satisfaction of his judgment if recovered, either by payment, or by the imprisonment of the debtor, and to allow the debtor in the meantime to be at large.

Bail to  
render.

Bail to render may be put in either by the defendant himself, by the bail accepted by the sheriff, or by the sheriff himself. The defendant, being once legally out of custody, cannot again be incarcerated by any other method than that of putting in

special bail, whose prisoner the defendant immediately becomes, and who may at any time release themselves from their obligation by rendering him into custody.

In the case of bail to render, "the exception respecting attorneys, &c., made in the 93rd Rule, does not extend, and as no justifying is required from such bail, *any* person is eligible, even if, as is frequently the case, *hired* for the purpose.

There are *three* distinct methods used in practice for putting in and perfecting bail.

Three  
methods of  
putting in,  
&c. bail.

1st. Simply putting in the bail before a Judge or Commissioner, without any affidavit of their fitness or capability, leaving the plaintiff in the action, after due notice, to object to them; and if he does not do so, subsequently disclosing their condition, &c., upon oath.

2ndly. Putting in the bail, and at the same time filing affidavits respecting their circumstances and pecuniary stability, usually called affidavits of sufficiency.

3rdly. After giving due previous notice to the defendant, putting in and perfecting bail at one and the same time.

Whichever of the above methods be adopted, a parchment form, called the "bail piece," must be obtained at the stationers, and properly filled up, with the names of the bail, and the nature and amount of their responsibility (*a*), and this document, together with the bail themselves, must be conveyed to the Judge's chambers.

Putting in  
bail.

The bail can only be taken, it should be remem-

(a) Appendix No. 25.

bered, when the Judge is *personally* in attendance.

If the bail be in an action in the Queen's Bench or Exchequer, they will be addressed by the Judge's clerk in the following manner:—

"You A. B. and C. D. do jointly and severally undertake that if E. F. [*the defendant*] shall be condemned in this action at the suit of G. H. [*the plaintiff*], he shall satisfy the costs and condemnation or render himself into the custody of the keeper of the Queen's Prison, or you will do it for him. Are you content?"

If the action be in the Common Pleas, the form is somewhat different:—

"You A. B. and C. D. do severally acknowledge to owe to E. F. [*the plaintiff*] the sum of £ — a-piece, to be levied upon your several goods and chattels, lauds and tenements, upon condition that if G. H. [*the defendant*] be condemned in the said action, he shall pay the condemnation, or render himself a prisoner to the Queen's Prison for the same, and if he fail so to do, you A. B. and C. D. do undertake to do it for him. Are you content?"

The bail severally consenting to the conditions above expressed, and signing the bail piece, though their signatures are not absolutely necessary to its validity, a memorandum of the bail having been put in is written on the bail piece by the clerk, to which the Judge's signature is attached, the bail piece is left at the proper office, and the bail are *put in*.

Render of  
defendant.

The defendant if at large is now legally in the custody of his bail, and they may (should they be put in simply for the purpose of rendering) at once arrest the defendant, and commit him to the custody of the keeper of the Queen's Prison, or of the keeper of the gaol of the county in which he is taken, at

the option of the party arresting, and such arrest may take place, irrespective of the privileges allowed to the defendant in ordinary arrests, on a Sunday, whilst proceeding to Court as a witness, &c.

If the render be to the Queen's Prison, the bail piece must be produced at chambers, and have indorsed upon it the following form of "committitur" or "render piece," which must be signed by the Judge.

"The within-named C. D., having been rendered <sup>Render</sup> in discharge of the within-named bail, is hereby <sup>piece.</sup> committed to the custody of the keeper of the Queen's Prison, there to remain until, &c."

The defendant being taken with the bail piece and render piece to the Queen's Prison will be received as a prisoner there, and the documents will be kept by the keeper as his authority for the imprisonment. If the render be to the county gaol, <sup>Render to</sup> the proceedings are regulated by the provisions of <sup>county gaol.</sup> the 11 Geo. IV. & 1 Will. IV. c. 70, s. 21 (a), which in substance enacts:—"that on application by a defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered into his custody in discharge of the bail, and on such lodgment and render a notice thereof, and of the de-

(e) Re-enacted by rule 106, Reg. Gen. H. T. 1853.

defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent, or any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated without entering any exoneretur.

A notice of the putting in of the bail for the purpose of rendering need only be given to the plaintiff where the render is intended to take place *after* the expiration of the eight days limited in the bail bond; if in such case *no* notice be given, the plaintiff, being ignorant of bail having been put in at all, may proceed, upon the expiration of the eight days, to put the bail bond in force, after having taken an assignment thereof from the sheriff.

We have already mentioned that special bail, for the purpose of rendering the defendant, may be put in either by the defendant, the sheriff's bail, or the sheriff himself; it should be observed, however, that the latter parties cannot proceed to put in bail adversely to the defendant until after the expiration of the eight days already mentioned.

Perfecting  
bail.

We now proceed to consider the further steps taken towards *perfecting* bail where the intention is *not* to render the defendant.

Notice that  
bail is put in.

The bail having been put in, as already described, and the bail piece filed with the clerk, notice thereof must be given to the plaintiff or to his attorney (*a*), either immediately, or at all events before the expiration of the period limited in the bail bond, for the

(*a*) Appendix No. 26.

bail are not legally put in until such notice is given; and if the notice be delayed beyond the eight days, the plaintiff may proceed upon the bond, although bail have "*de facto*" been put in.

In order that the plaintiff may obtain all reasonable information respecting the bail, it is ordered by the 97th rule of Reg. Gen. H. T. 1853, that "every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number of the house (if any) where each of the bail resides, and all the streets or places, and numbers (if any) in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder."

Description,  
&c. of bail.

The *description* of the bail alluded to in the rule comprises his name and addition of degree, trade and calling; and the 92nd of the rules last mentioned directs, that "no bail of whom notice shall be given shall be changed without leave of the Court or a Judge."

If the notice be incorrect, or do not comply with the provisions made respecting it by statute or rule, the plaintiff may urge the irregularity at the time the bail justify, and it will probably be fatal as against them, or at all events be the means of allowing the plaintiff time to inquire into the affairs of the persons proposed as bail.

After the receipt of the notice that bail has been put in, the plaintiff has *twenty* days to except to the sufficiency of such bail.

Excepting to  
the bail.

These twenty days are to be exclusive of the day upon which notice has been given. (Rule 174.)

The exception to the bail, if in town, is made by entering in a book kept for that purpose, in the

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office where the bail piece is filed, a memorandum of exception; if in the country, it is made by indorsing such memorandum upon the bail piece itself, and by subsequently giving a written notice thereof to the defendant's attorney (a).

The twenty days just mentioned are, in country cases, to reckon from "next after the bail piece is transmitted, and notice thereof given as aforesaid" (Rule 100); and the bail piece is directed to be transmitted within eight days after the bail have been put in. (Rule 95.)

Justifying  
the bail.

Within *four* days after the receipt of the notice of exception, the defendant is bound to justify the bail put in, before a "Judge at Chambers" (Rule 103); and if he omit so to do, the plaintiff may take an assignment of, and proceed upon, the bail bond.

Notice of  
justification.

Previously to justifying, the defendant must give a written notice of his intention so to do, to the plaintiff's attorney (b), mentioning the time and place where the justification will take place, and this notice will be sufficient if given *two* days before the time of justification (Reg. Gen. H. T. 1853, Reg. 102); and it is directed with respect to the receipt of any *prior* notices of justification, which have not been followed up by the defendant's justifying, that "whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names

(a) Appendix No. 27.

(b) Appendix No. 28.

of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared or shall have been rejected." (Reg. Gen. H. T. 1853, Reg. 111.)

Upon the day, and at the hour mentioned in the notice, the defendant's attorney, together with the bail if town bail, or with their affidavits if country bail (*a*), and with the bail piece previously entered into (which must be bespoke from the office where it is filed), must appear at the judges' chambers, and if the plaintiff or his attorney be there to oppose the justification, he will be admitted before the judge in attendance; if the plaintiff or his attorney be *not* there, he will have to remain in attendance for one hour after the appointed time, and then upon the production of affidavits of justification, or upon the bail answering satisfactorily the questions put to them on oath by the judge's clerk respecting their being householders, &c., and as to their sufficiency, and upon producing also affidavits of service of the notice upon the plaintiff's attorney, and of his non-attendance, &c., the order for the allowance of the bail will be drawn up.

Where, however, all parties attend before the Judge, the bail will be separately sworn upon the *voir dire*, and be examined as to their fitness by the defendant, the plaintiff, or the Judge, and allowed or disallowed accordingly, and no *affidavit* of justification will be necessary.

The matters contained in the Rules of Court, &c., upon which questions as to the sufficiency of the bail may be founded, are principally—

(*a*) Appendix No. 29.

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1. That each bail is worth "double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail," the exception being when the sum sworn to exceeds 1,000*l.*, "when it shall be sufficient for the bail to justify in 1,000*l.* beyond the sum sworn to." (*Reg. Gen. H. T., Reg. 101.*)

2. That the bail have not been indemnified by the defendant or his attorney. (*Ibid. Reg. 93.*)

3. That the persons, or either of them, proposed as bail are not nor is a practising attorney, or clerk to a practising attorney, or a sheriff's officer, bailiff or person concerned in the execution of process." (*Ibid. Reg. 94.*)

4. That the persons, or either of them, are or is housekeepers or a housekeeper, freeholders or a freeholder.

The plaintiff's right to except to the bail extends to cases where "bail to the sheriff becomes bail to the action, and where he has taken an assignment of the bail bond." (*Ibid. Rule 86.*)

If the bail justified are *country* bail, and justify in the usual manner upon affidavit, the plaintiff or his attorney will be allowed to except only upon affidavit, and will not be sworn or give his exceptions *vidé voce*.

Application  
for time to  
examine into  
bail.

The plaintiff's attorney may, if he think fit, upon justification being offered, or at its termination, apply for further time to examine into the truth of the averments made by the bail, and such time will in general be granted, especially if any misdescription of the bail or other irregularity has occurred in the previous notices received by him; and where such further time is given, the plaintiff's attorney should

draw up an order allowing the same and serve it upon the defendant, and the adjourned justification will take place at the period mentioned in the order without any fresh notice from either side.

Where, however, the defendant himself, or his attorney, requires further time to justify the bail put in, he must obtain the same upon summons and affidavit of the facts, and if obtained must serve the plaintiff's attorney with a notice of the time and place of justification, or with a *fresh* notice if one has already been given. Application for time to justify.

If the bail be *allowed* by the Judge a proper memorandum of allowance must be first written upon the bail piece and signed by the Judge: an order will then be drawn up by the Judge's clerk, directing the proper officer to issue a "Rule of Allowance;" the bail piece itself must be transmitted to the office from whence it came, and the rule drawn up must be immediately served upon the plaintiff or his attorney, otherwise the defendant will be deemed to have waived all proceedings respecting the putting in and perfecting of his bail. Memo-randum of allowance. Order of allowance. Rule.

Should the bail be *rejected*, for whatever cause it may be, they are still at liberty to *render* the principal without entering into any fresh recognizance (*Reg. Gen. H. T. 1853, Reg. 104*); and if they fail so to do, the plaintiff may at once proceed to attach the sheriff or to take an assignment of and sue upon the bail bond; *one* bail cannot justify alone, and consequently the rejection of one is the rejection virtually of both, and the plaintiff may proceed as if such had been the case; and if he do not do so, but permit the defendant to put in and Bail if rejected.

**New bail.** justify *fresh* bail, that can only be done by commencing proceedings *de novo*, with the entry by the allowed bail and another, or by two fresh bail, into a new recognizance. It must be mentioned, also, that after the rejection of one or more bail, *fresh* bail cannot be put in unless by order of a Court or Judge. (*Reg. Gen. H. T., Reg. 92.*)

We have hitherto considered only the first of the three methods of putting in and perfecting bail.

Putting in bail with affidavits of sufficiency.

The second way of doing so is, by putting in the bail in the manner we have already described, and at the time of doing so filing with the bail piece affidavits of *sufficiency* of the bail; and upon notice given to the plaintiff of bail having been put in, delivering with such notice *copies* of the affidavits so filed (*a*), or omitting to *file* such affidavits, but sending the originals to the plaintiff or his attorney (*b*).

Upon receipt of notice of bail having been put in, and of such affidavits or copy affidavits, the plaintiff is bound to give one day's notice if he except to the bail, and in default of his so doing the bail are considered as justified after the Judge's order and rule of allowance have been obtained, as already described.

**Advantages.** The real advantage of this second method of putting in bail is grounded upon the provisions of Rule 98 (*Reg. Gen. H. T. 1853*), which directs that if the plaintiff excepts to such bail he shall, if such bail be allowed, *pay the costs of justification*, unless the Court or a Judge shall otherwise order; and in practice the Judge does not interfere to pre-

(*a*) Appendix, No. 26 (*b*).

(*b*) Appendix No. 26 (*a*).

vent the payment of costs by the plaintiff if the bail be allowed, unless there has been some previous informality of which the plaintiff can take advantage, either in the affidavits or in the notice: if such informality do not affect the qualification or identity of the proposed bail, the Judge will allow them to justify, making the costs of justification costs in the cause. If the bail, however, after the delivery of such affidavits, be *rejected*, the defendant will be made to pay the costs of opposition, whether the affidavits be right or wrong.

To entitle the defendant to the costs of justification under the rule an affidavit will be required, averring that the affidavits of sufficiency, or true copies thereof, accompanied the notice of bail having been put in, and that the plaintiff afterwards objected to such bail.

The *third* way in which bail proceedings may be conducted, is by putting in and justifying the bail at one and the same time.

Putting in bail and justifying at the same time.

It is ordered by rule 96 (*Reg. Gen. H. T. 1853*), that "A defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose before eleven o'clock in the morning and exclusive of Sunday. If the plaintiff is desirous of time to inquire after the bail, and shall give *one* day's notice thereof *as aforesaid* to the defendant, his attorney, or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be

postponed accordingly, and all proceedings shall be stayed in the meantime."

Where a defendant, therefore, wishes to avail himself of the provisions of this rule, he has only to give the required notice to the plaintiff's attorney (*a*), and at its expiration appear with the prepared bail bond—the bail (or their affidavits if country bail)—and put in and justify in the ordinary manner, provided the plaintiff do not claim his privilege of extending the time granted by the first part of the rule for one, two, or three days.

Affidavits of  
sufficiency.

If, as is always advisable, the defendant accompany his notice of putting in and justifying at the same time, with affidavits of the sufficiency of the proposed bail, the plaintiff will, if he opposes their justification unsuccessfully, have to pay the costs of opposition (provided all previous proceedings be regular), and the defendant will be the gainer by a large amount of time saved, as well as by the costs of opposition.

When de-  
fendant is in  
custody.

Where the defendant is actually in custody (unless charged in execution), he may put in and perfect bail at any period, and be discharged thereupon, whether he is in prison owing to his not having given bail to the sheriff, or has been rendered in the ordinary manner.

A prisoner justifies without waiting for any exception, and it is compulsory upon him to justify whether required by the plaintiff to do so or not: he may if he please put in and justify at the same time upon giving *two days'* previous notice to the plaintiff.

Discharge of  
defendant.

The 123rd rule of the Reg. Gen. H. T. 1853,  
(*a*) Appendix No. 30.

directs that every rule or order of a Judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith, *where the defendant is in a county gaol*; and such writ of supersedeas is also necessary where the defendant is still in custody of the sheriff and has not removed himself into the Queen's Prison, although after such change of custody has been effected the production of a Judge's order to the keeper of the Queen's Prison will be deemed sufficient to procure his discharge.

Another proceeding we need mention in connection with bail, in which a Judge's order is required, is that of entering an *exoneretur* upon the bail piece (a). Where, before the bail are fixed, the defendant becomes legally discharged from the debt, or exempted from imprisonment in respect of the same, as if he obtains a bankrupt's certificate or be discharged under the Insolvent Debtors Act, or be made a Peer or a Member of the House of Commons, or if by the act of God or of the law, it becomes physically impossible for the bail to perform the conditions of the recognizance, as if the principal die or be transported, it is necessary that an *exoneretur* be entered upon the bail piece, in order to absolve the bail from their obligation therein contained. This is done by taking out a summons calling upon the plaintiff to show cause "why an *exoneretur* should not be entered upon the bail piece," and drawing up an order to that effect and serving it upon the proper officer in

(a) Appendix No. 31.

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whose custody the bail piece is, who will indorse it thereupon.

Changing  
and adding  
bail.

The 92nd rule of the Reg. Gen. H. T. 1853, directs that the bail, of whom notice has been given, shall not be changed without leave of the Court or a Judge; if therefore prior to justification from any circumstances it be desirable to change the bail, *ex parte* application to add and justify others must be made upon affidavit of the circumstances; and leave will not be granted if it appear that the bail previously put in could not have justified. Where an order is obtained to "add and justify bail," *two* days' notice only of such justification need be given to the plaintiff, and the original bail piece may be used for the new bail, their names being inserted with the word "added" written against them. No fresh exception, as against such added bail, need be given by the plaintiff.

After the bail have actually justified they may at any period, before they are fixed, be changed by order of the Court or of a Judge, and fresh bail put in and justified in their room.

Render of  
defendant  
in criminal  
custody.

If the defendant be in criminal custody and the bail are desirous of rendering him, a writ of habeas must be sued out, returnable before the Judge at chambers; and the defendant having been brought up thereupon may be rendered in the usual way, and the Judge will at once recommit him to his former custody.

#### BAIL IN ERROR.

By the 15 & 16 Vict. c. 76, s. 151, it is enacted: "that upon any judgment hereafter to be given in any one of the Superior Courts of Common Law

at Westminster, execution shall not be stayed or delayed by proceedings in error or supersedeas thereupon, without the special order of the Court or a Judge, *unless* the person in whose name such proceedings in error be brought, with two (or by leave of the Court or Judge more than two) sufficient sureties, such as the Court (wherein such judgment is or shall be given) or a Judge shall allow of, shall within *four* clear days after lodging the memorandum alleging error, or after the signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same Court, in double the sum adjudged to be recovered by the said judgment (except in case of a penalty, and in case of a penalty in double the sum really due and double the costs), to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein) all and singular the sum or sums of money and costs adjudged, or to be adjudged, upon the former judgment, and all costs and damages to be also awarded for the delaying of execution, and shall give notice thereof to the defendant in error, or his attorney."

After bail in error is put in, the opposite party has Excepting. twenty days to except to the same, and within four days after exception the bail must justify (when that is required) before a Judge at chambers, both in term and in vacation. The rules respecting putting in and justifying bail in error, and the notices connected therewith, are similar to those

connected with putting in and perfecting bail to the action.

It has been decided that bail in error is only necessary where the *defendant* commences proceedings in the Court of Error (*a*).

#### ATTENDANCE OF WITNESS (BEING A PRISONER) UPON A TRIAL.

Habeas  
corp. ad test.

By the 44 Geo. III. c. 102, s. 1, it is provided, that any of the Judges or Barons in England or Ireland may at his discretion award a writ or writs of habeas corpus for bringing any prisoner or prisoners detained in any gaol or prison before any of the Superior Courts of Law in England or Ireland or any sitting of *Nisi Prius*, or before any other Court of Record in England or Ireland, *to be there examined as a witness or witnesses, &c.*, in any cause or causes, matter or matters, civil or criminal, whatsoever."

The proceedings under this Statute embrace those directed by 1 & 2 Phil. & Mar. c. 13, s. 7: "No writs of habeas corpus, &c., shall be hereafter granted to remove any prisoner out of any gaol, &c., except the same writs be signed with the proper hands of the Chief Justices, or, in his absence, one of the Justices of the Court out of which the same writs shall be awarded or made, &c."

How the  
writ of hab.  
corp. ad test.  
issues.

The writ of *habeas corpus ad testificandum* can be issued only by a Judge, and not by the Court. The usual practice is to attend at chambers with the writ properly filled up, but unsealed, together with an affidavit stating the assizes or sitting for

(a) *James v. Cochrane*, 23 L. J., Exc. 126, and 9 Exc. 552.

which the cause is entered, the place where the prisoner is confined, his materiality as a witness (without whose evidence it will not be safe to try the cause), and the willingness of the prisoner to attend the trial (a). Upon the faith of this affidavit the Judge will sign the writ, and the proper officer, on view of the signature, will attach the seal of the Court thereto.

An important modification of the law relating to the attendance of persons in criminal custody as witnesses either in Courts of Justice or before arbitrators, so far as the expense of bringing up witnesses on habeas is concerned, has been effected by the 16 Vict. 30, s. 9, which enables a secretary of state or a Judge of any one of the Superior Courts, upon application by affidavit, to issue a *warrant* or *order* for bringing up any prisoner or person in *criminal* custody, to be examined as a witness in the same manner as if a habeas corpus had issued for that purpose.

The affidavit (b) upon which such an order is grounded is almost precisely similar to that required for the issue of a habeas, with the additional averment that the person whose evidence is required is in *criminal* custody. The order is served upon the governor of the gaol in which the proposed witness is confined, and if after due service thereof, and a tender of conduct money, the order is disobeyed, the governor is liable to attachment.

Although the Statute of Geo. III. above cited provides for the attendance of witnesses only before "any of the Superior Courts of Law in England or

(a) Appendix No. 32.

(b) Appendix No. 33.

Ireland, any sitting of *Nisi Prius*, any other Court of Record in England or Ireland, and any grand, petit or other jury," a habeas will issue to bring a prisoner up as a witness before an arbitrator (*Graham v. Glover*, Q. B. 14 Nov. 1855) (a); and where a prisoner is in criminal custody a Judge's order will in a like case issue.

#### OBTAINING POSSESSION BY JUDGMENT CREDITOR OF DEBTS DUE TO JUDGMENT DEBTOR.

Until the passing of the Common Law Procedure Act, 1854, a judgment creditor had no way of obtaining possession of *debts* due from any third party to the judgment debtor. Over bills of exchange, promissory notes, bonds, &c., he had some power, over simple contract debts none.

17 & 18 Vict.  
c. 125, ss.  
60 to 67.

The statute just mentioned (17 & 18 Vict. c. 125) by section 60 to 67 inclusive, gave a simple and efficient remedy for the recovery of such debts:—

“It shall be lawful for any creditor who has obtained a judgment in any of the Superior Courts to apply to the Court or a Judge, for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a Master of the Court, or such other person as the Court or Judge shall appoint; and the Court or Judge may make such rule or order for the examination of such judgment debtor, and for the production of any books or documents, and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a Master under this Act.

“61. It shall be lawful for a Judge upon the *ex*

(a) Unreported.

*parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney, stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor, shall be attached to answer the judgment debt; and by the same or any subsequent order, it may be ordered that the garnishee shall appear before the judge or a Master of the Court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.

“62. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the Judge shall direct, shall bind such debts in his hands.

“63. If the garnishee does not forthwith pay into Court the amount due from him to the judgment debtor or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the Judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process to levy the amount due from such garnishee towards satisfaction of the judgment debt.

“64. If the garnishee disputes his liability, the Judge, instead of making an order that execution

shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt or for the amount due to the judgment debtor if less than the judgment debt, and for costs of suit, and the proceedings upon such suit shall be the same as nearly as may be as upon a writ of revivor issued under the 'Common Law Procedure Act, 1852.'

"65. Payment made by, or execution levied upon, the garnishee under any such proceedings as aforesaid, shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceeding may be set aside or the judgment reversed."

Oral examination.

It will be seen from the first section above recited, that the application for the oral examination of the judgment debtor is optional with the judgment creditor, so that if by any means the existence of particular debts can be discovered without such examination, the garnishee order may be applied for in the first instance.

Where oral examination is necessary, the proceeding is by summons and order, and it would seem that in the case of non-attendance on the summons, or disobedience to the order, the judgment debtor may be attached for contempt, as directed in the 51st section of the act (a).

Having by examination or otherwise arrived at the debt or debts due to the judgment debtor, an affidavit must be prepared (b), setting forth shortly

Affidavit for attachment of debt.

(a) Appendix No. 34.

(b) Appendix No. 35.

the existence of a judgment obtained by the plaintiff against the defendant, with its date and amount, and with an averment that the same is wholly or in part (and if in part to what amount) unsatisfied; and setting forth also that A. B., or A. B., C. D., &c., is or are respectively *indebted* to the defendant, and that he or they are within the jurisdiction of the Court. It is unnecessary to set forth the nature or amount of the debt due from the garnishee.

Upon this affidavit the Judge's clerk at chambers Order nisi. will draw up the order *Nisi*, which, first of all, attaches all debts in the hands of the garnishee with the amount of the judgment recovered, and then calls upon the garnishee to appear on a day mentioned (usually about eight days after date of the order *Nisi*), and show cause why he should not pay to the judgment creditor the debt due from him to the judgment debtor, or such part thereof as will satisfy the judgment recovered.

If the garnishee consent to pay, or if he attend before the Judge and an order is made upon him for payment to the judgment creditor of the debt due from him to the judgment debtor, or part thereof, an order absolute will be prepared, which Order absolute. will at all time afterwards be a sufficient discharge to the garnishee of the money paid by him, even if the judgment upon which it is paid be subsequently set aside or reversed (*o*).

Difference of opinion exists as to the payment Costs. of the costs of garnishee proceedings, some learned Judges holding that where the amount in the hands of the garnishee due to the judgment debtor exceeds the amount remaining due upon the judgment debt,

(a) 17 & 18 Vict. c. 185, s. 65.

the order may direct that the garnishee shall pay to the judgment creditor a certain amount for costs in addition to the amount payable on account of the judgment debt, and that such garnishee may even deduct *his own* costs.

In the greater number of cases, however, nothing whatever is said about costs in the order.

Decisions  
on the  
Statute.

Since the passing of the Statute, a number of decisions have been pronounced upon its several provisions, especially respecting the particular description of *debts* attachable.

Unrevived  
judgment.

An executor, who has not revived the judgment obtained by his deceased testator, cannot attach debts due to the judgment debtor under these sections. (*Baynard v. Simmons*, 5 Ell. & B. 59.)

A verdict recovered against the judgment debtor is not *before judgment signed* a debt under this Statute. (*Jones v. Thompson*, W. R., Q. B. 443; 27 L. J., Q. B. 234.)

Bond.

A bond for unliquidated damages is not a debt within the meaning of the Statute. (*Johnson v. Diamond*, 24 L. J., Exc. 217.)

Superannua-  
tion.

A superannuation allowance granted by the East Indian Directors is a gratuity and not a debt. (*Innes v. The East India Company*, 2 Jur., N. S. 189.)

Order of a  
Court of  
Equity.

Where, subsequently to service of an order *Nisi* under the Statute to attach "all debts owing or accruing," the garnishee was directed by the Court of Chancery to pay certain money to the judgment debtor, the Court refused an application to restrain the garnishee from obeying the order to pay to the judgment debtor. (*Clark v. Perry*, 3 W. R. 366.)

Money paid into Court is not attachable. (*Jones v. Brown*, 29 L. J. 79.) Money paid into Court.

If a garnishee disputes his liability and the judgment creditor will not proceed, the garnishee is entitled to have order discharged with costs. (*Wintle v. Williams*, 3 H. & N. 288.) Discharge of order.

A debt due to the wife of the judgment debtor under specialty given to her *dum sola* is not attachable. (*Dingley v. Robinson*, 26 L. J., Exc. 55.) Debt due to wife, *dum sola*.

The general lien of an attorney on a judgment for costs due from his client does *not* prevail over an attachment under these clauses. (*Hough v. Edwards*, 1 H. & N. 171.) Attorney's lien.

If the judgment creditor receives a debt which has been attached from the garnishee with notice of the lien of the judgment debtor's attorney, he will have to repay it to the attorney. (*Eisdell v. Coningham*, 20 L. J., Exc. 213.) Notice of lien, &c.

If a judgment be recovered against *three*, the debts owing to *two* may be attached. (*Miller v. Wynn*, 7 W. R. 524.) Debts due to one or more defendants.

A creditor who has obtained a judgment in the County Court, upon the judgment so obtained loses his right to proceed by attachment of the debt under this Act. (*Jones v. Jenner*, 4 W. R. 651.) Judgment in County Court.

A legacy in the hands of an executor can only be attached where there has been an account stated, so as to enable the legatee to sue the executor. (*Macdonald v. Hollister*, 3 W. R., Exc. 522.) Legacy.

Although an order may be obtained that *all* debts owing or accruing shall be attached, yet the garnishee cannot be made to pay a debt which has been assigned away by the judgment debtor before Assigned debt.

judgment was obtained by the judgment creditor against the judgment debtor. (*Hirsch v. Coates*, 14 W. R. 656.)

Attachment by Lord Mayor's Court.

It is questionable whether a notice of attachment out of the Lord Mayor's Court in London, is any answer to a garnishee order under this Act. (*Newman v. Rook*, 4 C. B., N. S. 434.)

With respect to section 62, it has been held:—

Operation of the Bankrupt Act.

That from the time of the service upon the garnishee of an order of attachment the debt due is bound in the hands of the garnishee, but is subject to the provisions of the Bankrupt Act, 12 & 13 Vict. c. 106. (*Holmes v. Tutton*, 24 L. J., Q. B. 346; *Turner v. Jones*, 1 H. & N. 878.)

As to section 63:—

Protection of garnishee.

If before regular service of the summons, the garnishee pays the debt he is protected. (*Cooper v. Brayne*, 27 L. J., Exc. 446.)

As to section 64:—

Real ground for disputing debt.

To entitle the garnishee to be proceeded against by a writ in the mode described in this section, he must satisfy the Court or a Judge that he has a real ground for disputing his liability for the debt. (*Newman v. Rook*, 4 C. B., N. S. 434.)

Service of order, &c.

As to the *service* of the garnishee summons and order, *vide Bird v. Wretton*, W. R., C. B. 211; 30 L. T. 258.

Discharge of order Nisi.

If, upon showing cause against a garnishee order it appears to the Judge that payment cannot be enforced, and the judgment creditor who makes the application will not take a writ, the Judge may discharge the order altogether. (*Windle v. Williams*, *Re Smith*, W. R., Exc. 501; 3 H. & N. 388.)

The provisions in the 1 & 2 Vict. c. 110, s. 16 (hereafter to be mentioned more particularly), that a judgment creditor, who has obtained a *Charging Order* upon stock in which the judgment debtor has a beneficial interest, and who after charges such judgment debtor in execution, shall thereby relinquish all benefit of such charge, appears only to apply to proceedings under that Act; and it would seem that advantage may be taken of the garnishee powers of the Common Law Procedure Act, although the defendant be charged in execution upon the judgment.

Charging defendant in execution.

By the 23 & 24 Vict. c. 126, s. 29, it is provided, "that in proceedings to obtain an attachment of debts the Judge may, in his discretion, refuse to interfere where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious. By the same Statute it is provided, that in cases where it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the Judge may order such third person to appear before him and state the nature and particulars of his claim upon such debt, and upon such statement may make or refuse his order, or make such order as he may deem fit.

Judge's option to refuse order.

Debt belonging to third person.

#### CHARGING STOCK AND SHARES IN PUBLIC COMPANIES IN WHICH THE JUDGMENT DEBTOR HAS A BENEFICIAL INTEREST.

It is enacted by the 1 & 2 Vict. c. 110, ss. 14, 15, that "if any person against whom any judgment

Statute.

shall have been entered up in any of her Majesty's Superior Courts at Westminster, shall have any government stock, funds or annuities, or any stock or shares of or in any public company in England, whether incorporated or not, standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts; on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor: provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

“And in order to prevent any transfer of such stock the Judge's order shall, in the first instance, be made *ex parte* and without any notice to the judgment debtor, and shall be an order to show cause only; and in the case of government stock, &c., the order shall restrain the Governor and Company of the Bank of England from permitting a transfer in the meantime, and until such order shall be made absolute or discharged; and in the case of stock of a public company the order shall in like manner restrain such public company from permitting a transfer thereof; and if, after notice of such order to the person or persons to be restrained thereby, &c., and before the same order shall be

discharged such corporation or person or persons shall permit any transfer to be made, the corporation, person or persons permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment, and no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and unless the judgment debtor shall, within a time to be mentioned in such order, show to a Judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute.

“ Provided that any such Judge shall, upon the application of the judgment debtor or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.”

There being considerable doubt whether this Statute extended to a simple *beneficial interest*, present or contingent, of a judgment debtor in stock, &c., the 3 & 4 Vict. c. 82, s. 1, has provided, “ That the aforesaid provisions of the said Act (1 & 2 Vict. c. 110) shall be deemed and taken to extend to the *interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent*, as well in any such stock, funds, annuities or shares as aforesaid, as also in the *dividends, interest or annual produce of any such stock, funds, annuities or shares.*”

There is in the same Statute a limited power given of charging stock, funds, annuities, or shares stand-

Stock, &c.  
standing in  
name of  
Accountant-  
General.

ing in the name of the *Accountant-General of the Court of Chancery*. The proceedings to be taken by the judgment creditor are the same as those we have mentioned, but the order, whether nisi or absolute, is not to prevent the Bank of England, or any public company, from permitting a transfer *under the direction* of the Court of Chancery, or to have any greater effect than if the judgment debtor had charged such stock, &c., "in favour of the judgment creditor, with the amount mentioned in the order."

Practice.

Affidavit.

By virtue of the provisions of these two Statutes, the Judges are continually called upon to make orders charging various descriptions of monetary securities. A judge at chambers *alone* can entertain the application, although the Court may afterwards review his order, and, if necessary, rescind it (a). The affidavit used to obtain the order nisi (b) must set forth the recovery of the judgment, with the time of signing the same, and for what amount, and that such judgment or part thereof remains unsatisfied, and must then state concisely how and to what extent the defendant is interested in the stock sought to be charged, together with the amount of such stock, and the particular way in which it stands in the bank books; it is of great importance that the last particular should be fully attended to, as the Bank authorities may, if the description be erroneous, aver that they have no sum of stock which they can, under the terms of the order, charge.

(a) *Brown v. Bamford*, 9 M. & W. 42; *Witham v. Lynch*, 1 Exc. 391; *Fowler v. Churchill*, 11 M. & W. 57; *Morris v. Manesty*, 7 Q. B. 674.

(b) Appendix No. 36.

The order nisi is usually made returnable in a Order nisi. month from the date, and must be served upon the judgment debtor, and the secretary or other proper officer of the company in whose custody the funds are. Where the stock, &c., is in the names of trustees, it is usual to serve them also with a copy of such order (a). The stock, &c., is charged with the judgment debt immediately upon the order nisi being served, and remains charged until the order is rescinded or otherwise got rid of.

There have been a good many decisions respecting what can and cannot be charged under the Statute, as "stock, funds, annuities, and shares," as well as to the particular effect a stop order has in relation to the interests of other parties having a prior or subsequent claim upon the encumbered property; the following, it is believed, are the principal reported cases:—

A pension granted by the East India Company in requital for past services, is in the nature of a *gratuity*, and cannot be charged. (*Morris v. Manesty*, 7 Q. B. 674.) Decisions respecting what can and what cannot be charged.

Stock standing in the name of the Accountant-General of the Court of Chancery to the separate account of a party against whom a judgment debt has been recovered may be charged, though the order only affects the interest of the debtor, and does not affect prior incumbrances. (*Hulkes v. Day*, 10 Sim. 41.)

Where under a will it is doubtful whether a defendant takes a beneficial interest in Government Stock, such order may be made charging the stock

(a) As to the service of the summons and order, see *Bird v. Wretton*, 30 L. T. 258.

conditionally, *i. e.*, for so much of the dividends as were payable to the defendant for his own use and benefit. (*Fowler v. Churchill*, 2 Dowl. N. S. 562.)

When proceedings were pending in equity to set aside a deed under which defendant took an interest in stock, which interest had been charged by a Judge's order, the Court refused to set the order aside. (*Rogers v. Holloway*, 12 L. J., C. P. 182.)

The Court of Exchequer considered it doubtful whether an order charging an annuity paid by the Lord Chancellor out of the "Suitors' Fund," under 46 Geo. III. c. 128, was valid. (*Witham v. Lynch*, 1 Exc. 391.)

A banking co-partnership making returns to government, is a "public company" within the meaning of the Act, and the shares may be attached. (*Macintyre v. Connell*, 1 Sim. N. S. 235; *Graham v. Connell*, 19 L. J., Exc. 361.)

Shares in a joint stock company, of which the defendant is the registered proprietor, are shares standing in his own name, in his own right, notwithstanding a transfer of them. (*Fuller v. Erle*, 21 L. J., Exc. 314.)

Where the stock stands in the names of trustees, the Bank is bound to hold its hand until the order nisi is made absolute, and its duty then is to pay to the trustees, who alone have the distribution of the fund, and are bound to take cognizance of the order. (*Fowler v. The Bank of England*, 11 Mees. & W. 323.)

It is only necessary to add the provisions contained in the 16th section of the Act under which

the proceedings we have been considering are legalized:—

“ If any judgment creditor who, under the powers of this Act, shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.”

Charging defendant in execution.

#### APPLICATIONS CONNECTED WITH WARRANTS OF ATTORNEY.

By several statutes (3 Geo. IV. c. 39; 12 & 13 Vict. c. 106, s. 136; 17 & 18 Vict. c. 36, &c.), it is enacted, that every warrant of attorney, *cognovit actionem*, and bill of sale of personal chattels, shall, within twenty-one days from and after execution, be filed in the Court of Queen's Bench, with a proper officer in such Court; and if such warrant, &c. be *not* filed as aforesaid, then that in case of the subsequent bankruptcy or insolvency of the person executing the same, such warrant, &c. shall be deemed fraudulent, null and void, to all intents and purposes whatsoever; and if any such warrant shall have been given, subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such

Filing warrants.

warrant, &c. shall be written, before the same shall be filed; and in all cases an affidavit of the due execution of such warrant, &c., and of the time of executing the same, shall be filed with the original warrant.

If the warrant be in the Queen's Bench, the original document, *or* a true copy, may be filed; if in any other Court, a copy must be filed. In the case of a cognovit in the Queen's Bench, the original itself must be filed; if in another Court, a copy only is required (*a*).

An important matter connected with the filing of warrants of attorney, &c., is, that if such be *not* done, no judgment can be signed upon them. (Reg. Gen. H. T. 1853, Reg. 25.)

Warrant over  
one and under  
ten years old.

If the warrant, &c., be under one year old, and have been duly filed in pursuance of the Act, judgment may be entered up upon it as a matter of course, and without any permission from a judge. If it be over one, and under ten years old, before judgment can be signed the permission of the Court or of a Judge must be obtained (Reg. Gen. H. T. 1853, Reg. 26); and it is in the discretion of the Court or Judge to grant an order absolute upon the *ex parte* application (such being indeed the usual case), or to order a rule nisi or summons to show cause to issue. (*Edwards v. Holiday*, 9 Dowl. 1023.)

In ordinary cases, it is sufficient to support an *ex parte* application to sign judgment on a warrant of attorney, &c., above one and under ten years old, to show by affidavits,

(*a*) Cognovits have now scarcely an existence, being superseded by "Orders to stay," which must, when necessary, be filed in like manner as cognovits, according to the practice of the Courts.

1st. The existence of the debt, and the plaintiff's **Affidavit** right to sign judgment.

These averments ought, strictly speaking, to be made by the plaintiff himself, although an affidavit by the plaintiff's attorney, having charge of the matter of the warrant, has been deemed sufficient.

2nd. The due execution of the warrant by the defendant.

The correct mode of showing this is by an affidavit of the attorney who witnessed the signing of the instrument, and it is doubtful whether if such evidence can be obtained any other will be received (a).

3rd. That defendant is alive, which is usually proved by verifying a letter received by him a short time previously.

If the warrant be over ten years old, it is necessary, in order to sign judgment upon it, to proceed Warrant over ten years old. by summons and order, and the affidavits, in case of non-appearance of the defendant, will be similar to those required on the *ex parte* application above mentioned.

#### FILING NEWSPAPER RECOGNIZANCES.

The application to enter into and file newspaper recognizances is made in the chambers of the Court of Exchequer at any time when a Baron is in attendance. During vacation, or when all the Barons are absent from their chambers, the application may be made in one of the other Courts.

A parchment form of the recognizance must be procured from the law stationer, and filled up with

(a) Appendix No. 39.

the name and address of the party to be bound; a paper should be obtained at the same time and place to be signed by the clerk of the Judge taking the recognizance (a).

The recognizance is entered into much in the same manner as special bail, the Judge's clerk reading it over to the party, and asking him if he is content, and also if the signature at the foot of the obligation is his name and handwriting. If all be regular, the Judge signs the parchments, and his clerk the certificate of the recognizance having been taken. This certificate is taken away by the parties, and the recognizances are left at the Judges' chambers, from whence it is conveyed to the office of the Queen's Remembrancer to be filed.

#### APPLICATION TO REMOVE A PLAINT OR A JUDGMENT FROM A COUNTY, OR OTHER INFERIOR COURT, INTO A SUPERIOR COURT.

Proceedings  
at common  
law.

At common law, the proceedings of an Inferior were removable into a Superior Court, in a large number of cases unnecessary to enumerate, the writ used for the purpose of removal being, as it now is, except where the defendant is in custody—the writ of *certiorari*.

43 Eliz. c. 5. The Statute 43 Eliz. c. 5, directs this writ to be sued out at any stage of the proceedings in the Court below, prior to judgment, and orders its delivery to the Judge of such Court before the jury are sworn.

21 Jac. 1, c. 23, s. 2. The Statute 21 Jac. I. c. 23, s. 2, limited to a certain extent the Act of Elizabeth, by directing

(a) Appendix No. 40.

that in all cases where the Judge of the Court below was a barrister of three years' standing, the writ should be delivered before issue of fact or law was joined; and, moreover, that only such causes should be removed, the demands in which amounted to 5*l.*, or concerned the freehold or inheritance, or title of land, lease or rent.

The 19 Geo. III. c. 70, s. 4, makes provision <sup>19 Geo. 3, c. 70, s. 4.</sup> for the issue of a certiorari *after* final judgment for the purpose of suing out execution in the Superior Court, and orders that such writ shall be obtained, upon affidavit "that judgment has been obtained, that due search has been made, and that neither the person nor sufficient goods of the judgment debtor are within the jurisdiction of the Superior Court.

The next statutory provision on the subject is the 1 & 2 Vict. c. 110, s. 22, which directs, in substance, <sup>1 & 2 Vict. c. 110, s. 22.</sup> that in all cases where the Judge of the Court below is a barrister of seven years' standing, any one of Her Majesty's Judges of the Courts of Common Law at Westminster may direct the final judgment, or any rule or order of such Court, whereby any sum of money, &c. is payable to any person, to be removed into a Superior Court upon application by or on behalf of the person recovering such judgment, &c., and upon production of the record of such judgment, &c., under the seal of the Inferior Court and signature of the proper officer thereof; and it further directs, that such judgment so removed shall "immediately be of the same force, charge and effect as a judgment recovered in, or a rule or order made by, such Superior Court," and "all the reasonable costs and charges attendant upon such application and removal shall be recovered in

like manner as if the same were part of such judgment, or rule, or order."

9 & 10 Vict.  
c. 95, s. 90.

With respect to the newly-established County Courts, by the 9 & 10 *Vict. c. 95, s. 90*, it is ordered, "that no plaint entered in any Court holden under this Act (*i. e.*, any County Court) shall be removed or removable from the said Court into any of her Majesty's Superior Courts of Record, by any writ or process, unless the debt or damages claimed shall exceed 5*l.*, and then only by leave of a Judge of one of the said Superior Courts in cases which shall appear to the Judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs, giving security as to debt or costs, or such other terms, as he shall think fit." This enactment is, however, very much modified by the

19 & 20 Vict.  
c. 108, s. 38.

19 & 20 *Vict. c. 108, s. 38*: "any action commenced in a County Court for a claim not exceeding 5*l.* may be removed by writ of certiorari into a Superior Court, if such Superior Court or a Judge of a Superior Court shall deem it desirable that the cause shall be tried in such Superior Court; and if the party applying for such writ shall give security to be approved of by one of the Masters of such Superior Court, for the amount of the claim and the costs of the trial, not exceeding, in all, 100*l.*, and shall further assent to such terms, if any, as the Superior Court or Judge shall think fit to impose.

19 & 20 Vict.  
c. 108, s. 49.

The last Statute referring to the subject we need notice refers to the removal of a *judgment* from a County Court. The 19 & 20 *Vict. c. 108, s. 49*, enacts:—"If a Judge of a Superior Court shall be satisfied that a party against whom judgment for

an amount exceeding 20*l.*, exclusive of costs, has been obtained in a County Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment of the County Court into one of the Superior Courts, and when removed it shall have the same force and effect, and the same proceedings may be had thereon, as in the case of a judgment of such Superior Court, but no action shall be brought upon such judgment."

Under the provisions of the above cited statutes, a certiorari to remove a *plaint from a County Court*, before a judgment, may be obtained at the instance of the plaintiff, or of the defendant. Removal of a  
plaint from a  
County  
Court.

The application should be made at chambers *ex parte* and upon affidavit (a). It should clearly appear that the claim is actually pending in the County Court, and in order to avoid the special conditions as to costs attached to the removal of causes under 5*l.* by the 19 & 20 Vict. c. 108, s. 38, that it exceeds 5*l.*, and then the particular reasons for its removal must be disclosed, the most usual being, that "a difficult question," or "difficult questions of law are likely to arise upon the trial." Affidavit.

Where it appears desirable, the Judge may, upon application to remove a *plaint*, direct a summons to issue and be served upon the opposite side, to show cause why "the *plaint* should not be removed," and upon its return may make the order, which otherwise he would have made upon the *ex parte* application. Summons  
and order.

(a) Appendix Nos. 41 and 41(a).

Removal by  
*defendant.*

It should be mentioned, that where the claim in the plaint sought to be removed is under 20*l.* the action cannot be removed by the *defendant*, unless he give bail for the payment of debt and costs if judgment in the Court above shall be given against him, and the fact of the claim exceeding 20*l.*, or a statement of his willingness to put in bail as above mentioned, should form part of the affidavit upon which his application is grounded.

It has been decided that the power of appeal in the 13 & 14 Vict. c. 61 does not in any way do away with the party's right to a certiorari, where they choose to avail themselves thereof.

Rule.

And by rule 117 (Reg. Gen. H. T. 1853):—"If a cause be removed from an inferior Court *having jurisdiction of the cause*, the costs in the Court below shall be costs in the cause."

The delivery of the writ of certiorari to the clerk of the inferior Court immediately stops all further proceedings in that Court connected with the trial of the cause.

Replevin.

19 & 20 Vict.  
c. 108, s. 67.

The removal of actions of *replevin* is regulated by the 19 & 20 Vict. c. 108, s. 67, which enacts that "any action of replevin brought in a County Court shall be removed into any Superior Court by writ of certiorari, if the defendant shall apply to such Superior Court or to a Judge thereof for such writ, and shall give security to be approved of by the Master of such Superior Court for such amount not exceeding 150*l.* as such Master shall think fit, conditioned to defend such action with effect, and unless the replevisor shall discontinue or shall not prosecute such action or become nonsuit therein, to prove before such Superior Court that the defendant had

good ground for believing either that the title to some corporeal or incorporeal hereditament, &c. was in question, or that the rent or damage in respect of which the distress shall have been taken exceeded 20*l.*, &c." The latter part of this provision does not appear to be particularly clear.

Where the application is for the removal of a *plaint* depending in an Inferior Court established prior to the District County Courts, the proceedings must agree with the general provisions of the Statutes of Elizabeth and James already mentioned.

Removal of a *plaint* from any inferior Court other than a County Court.

The removal of a *judgment*, not being a judgment in a County Court, is regulated by the Statute 19 Geo. III. c. 70, s. 4, cited above, and the affidavit used must disclose:—

Removal of a *judgment* from a Court not being a County Court.

1. That judgment has been recovered in the Inferior Court, specifying the amount, &c. Affidavit.
2. That search has been made, but that neither the person nor the goods of the judgment debtor are to be found within the limits of the inferior jurisdiction (a).

Where, however, the Judge of such Inferior Court is a barrister of seven years' standing, the judgment may, pursuant to the 1 & 2 Vict. c. 110, s. 22, be removed by a *Judge's order* alone, without any writ of certiorari; and to obtain such order an affidavit must be prepared, showing:—

Where *Judge's order* for removal sufficient without any writ.

1. The recovery of a judgment in the Inferior Court.
2. That such judgment is unsatisfied.
3. That the Court is an Inferior Court of Record, presided over by a barrister of seven years' standing (b).

(a) Appendix No. 42.

(b) Appendix No. 42 (a).

The order, if obtained upon this affidavit, and the production of the record or copy record of the judgment, duly verified under the seal of the Court, must be served upon the clerk or other proper officer of the Court, and will have all the power and effect of a certiorari.

Removal of a judgment from a County Court.

Where the application is for the removal of a judgment from a *County Court*, it must be clearly shown to the Judge upon affidavit:—

1. That a judgment for an amount exceeding 20*l.*, exclusive of costs, has been recovered.
2. That such judgment remains still in force and is unsatisfied.
3. That no goods or chattels of the defendant, which can be conveniently taken to satisfy such judgment, are within the jurisdiction of the Inferior Court (*a*).

No *record* of the judgment need, in such case, be produced, the clause (the 49th) of the 19 & 20 Vict. c. 108, being silent respecting it.

Removal of a judgment from the Common Pleas at Lancaster, &c.

Lastly. Where it is sought to remove a judgment from the Common Pleas at Lancaster, the Court of Pleas at Durham, or the Stannaries Court, the form of application must be regulated by the 4 & 5 Will. IV. c. 62, s. 31; the 2 & 3 Vict. c. 16, s. 28, and the 6 & 7 Will. IV. c. 106, s. 11, respectively. The general form of the affidavit required will be found in the Appendix (*b*).

No second application allowed.

The 19 & 20 Vict. c. 110, s. 4, enacts, "that when a Superior Court or Judge shall have *refused* to grant a writ of certiorari, &c., no other Superior Court or Judge shall grant such writ, &c., although the parties may appeal from the decision of a single

(*a*) Appendix No. 42 (*b*).      (*b*) Appendix No. 42 (*c*).

Judge to the Court, or make a second application to a single Judge on different grounds for the removal of such judgment."

Where the defendant, in a cause removed from a Superior Court by *habeas corpus*, is required to put in bail, the 116th Rule of the Reg. Gen. H. T. directs that "the same practice shall be used, as near as may be, as in putting in bail to an ordinary action; and in the event of no bail being put in within eight days after the *habeas corpus* allowed, a *procedendo* may issue."

Bail in removal by *habeas corpus*.

#### APPLICATIONS UNDER THE "RAILWAY AND CANAL TRAFFIC ACT, 1854."

By the 17 & 18 Vict. c. 31, s. 3, power is given to any company or person complaining against any railway company, canal company, or railway and canal company (or to the Attorney-General, upon the certificate of the Board of Trade so complaining) of anything done or of any omission made in violation or contravention of the Statute, to apply in a summary way by motion or summons to the Court of Common Pleas, or to any Judge thereof, and such Court or Judge is directed to hear and determine such complaint, and if he think fit to direct and prosecute by such persons as he shall think proper all necessary inquiries into the matter, and if it appear that anything has been done or omission made as aforesaid, the Court or Judge is to issue a writ of injunction restraining such company or companies from further continuing such violation or contravention of the Act and enjoining obedience to the same; and in case of disobedience to such writ an attachment may issue against one or more

Statute.

of the owners of the company, or against any owner, lessee, or contractor or other person failing to obey such writ, &c., and such Court or Judge may, in their or his discretion, direct such company to pay a daily sum not to exceed 200*l.* per diem during the time that such company shall fail to obey the writ, after a particular day to be named in the order, such money to be paid as the Court or Judge shall direct. A general power as to awarding costs is given to the Court and Judges, together with authority to frame general rules for the practical working of the Statute, and to direct a *rehearing*, if they or he shall think necessary, on the application of the party aggrieved by the decision.

Provisions  
of Statute.

The Acts enjoined upon all such companies by the Statute are:—

1. Affording according to their respective powers all reasonable facilities for receiving, forwarding, and delivering traffic, and returning carriages, trucks, boats, and other vehicles, without making or giving any undue or unreasonable preference or advantage to or in favour of any particular person, company, or description of traffic that may in anywise prejudice any other person or company.

2. Affording due and reasonable facilities on the part of every such company having or working railways or canals, which form part of a continuous line of railway, canal, &c., or which have the terminus, &c., of one near the terminus, &c., of the other; for receiving and forwarding all traffic arriving by one railway, &c., without unreasonable delay, preference, advantage, prejudice or disadvantage as aforesaid, and without obstruction to

the public desirous of using such railways, &c., and with reasonable accommodation to them.

Acting under the provisions of the Statute, the Judges of the Court of Common Pleas in Hilary Term, 1855, framed the following rules for the conduct of applications made to the Court or Judge:—

1. Every application made under this Act to the Rules. Court shall be for a rule calling upon the company or companies complained of, enjoining them to do, or to desist from doing, the thing required to be done, or the thing, the doing of which is complained of by the company or person making such application, and every application made under this Act to a Judge at chambers shall be by a summons calling upon the company or companies complained of to show cause in like manner, which summons shall be granted only upon affidavits, and upon a statement made to the Judge in like manner as upon an application to the Court for a rule to show cause.

2. If on the hearing of any such rule or summons the Court or Judge shall think fit to direct and prosecute inquiries into the matter thereof under the third section of the Act, the order for that purpose shall be in the following terms, or to the like effect, the rule or summons being enlarged until such further day as the Court or Judge shall think fit, in order that in the meantime such inquiries may be made and reported on:—

In the Court of Common Pleas.

In the matter of the complaint of A. B. [*or of the* ——— company], against the ——— company.

It is ordered that C. D. Esquire, engineer [*or as the case may be*] do forthwith make such inquiries into the matter of this

complaint as may be necessary to enable the Court [*or the honourable Mr. Justice —*] to determine the same, and do report thereon to the Court [*or to the said Mr. Justice —*] on or before the — day of — next.

Dated this — day of —, 186—.

3. OFFICE COPIES of all the affidavits filed by either party on the hearing of such rule or summons shall, at the expense of such party, be furnished to the person appointed to make such inquiries within three days after the making of such order as aforesaid.

4. The parties shall be entitled to be again heard by the Court or Judge upon the said report, but no fresh affidavits shall be allowed on such hearing unless by leave of the Court or Judge.

5. Every writ of injunction issued under this Act shall be in the following form or to the like effect:—

Victoria, &c.

To the — company, their agents and servants, and every of them, greeting.

Whereas A. B. [*or the — company*] hath lately complained before us in our Court of Common Pleas at Westminster of a violation and contravention by you the said company of "The Railway and Canal Traffic Act, 1854," that is to say, in [*state the act or omission complained of*], and whereas upon the hearing of such complaint the same hath been found to be true: We do therefore strictly enjoin and command you the said — company, and your agents and servants and every one of you, that you and every one of you do from henceforth altogether absolutely desist from [*state the matter for the injunction, where an act done is complained of*] or that you and every one of you do forthwith do [*state the matter for the injunction where an omission is complained of*] until our said Court shall make order to the contrary.

Witness — Knight, at Westminster, the — day of —, in the year of our Lord —.

6. If the Court or Judge shall think fit also to make an order directing the payment of a sum of money by the company or companies complained of, such order shall be in the following form or to the like effect:—

In the Common Pleas.

In the matter of the complaint of — against the — company.

It is ordered that the said — company do pay to the said — [or into Court, to abide the ultimate decision of the Court in the matter of the said complaint; or to the use of Her Majesty] the sum of £ — for every day after the — day of — instant that the said company shall fail to obey a certain writ of injunction dated this day, and issued against the said company, at the instance of the said —.

Dated this — day of —, 186—.

7. If such money be ordered to be paid into Court to abide the ultimate decision of the Court, the same shall, upon the ultimate decision of the Court being made, be paid out of the Court either to the party complaining or to the use of Her Majesty, or to the company by which the same was paid into Court, as the Court or Judge shall direct.

#### WRITS OF SUBPŒNA TO BE SERVED OUT OF THE JURISDICTION AND UNDER SPECIAL CIRCUMSTANCES.

The ordinary writs of *subpœna ad testificandum* and *subpœna duces tecum* issue from the proper officer as a matter of course, and without any special order or authority from the Court or Judge, and such writs are operative in all places within the jurisdiction of the Court from which they have issued.



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(a) Appendix No. 42 (d).

17 & 18 Vict.  
c. 44.

Provision is, however, made by the statute 17 & 18 Vict. c. 44, for the issue of both the forms of writs of subpoena to be served *out of* the jurisdiction of the English Courts, so that the same be served within the United Kingdom.

That statute, after referring to the inconvenience sometimes sustained in procuring the attendance of witnesses who, although within the United Kingdom, are not within that portion of it over which the jurisdiction of the Court in which the action is brought extends, directs that "in any action or suit in the Superior Courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, if it shall appear to the Court in which such action is pending, or (*if such Court is not sitting*) to any Judge of any of the said Courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such Court or Judge, upon his or their discretion, if they or he shall so deem fit, to order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum*, or *warrant of citation*, shall issue in special form, commanding such witness to attend such trial, wherever he shall be within the United Kingdom; and the service of any such writ or process in any part of the United Kingdom shall be as valid and effectual, to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it issues."

Sect. 2.

Subsequent sections of the statute provide, that no such writ shall issue *without* a special order, and that every writ issued under the statute shall

have a memorandum at the foot, that it was issued Sect. 2.  
 pursuant to special order, and that no person shall  
 be punished for not appearing pursuant to the writ, Sect. 4.  
 unless his reasonable expenses were at the time of  
 service tendered to him ; also that the law relating Sect. 5.  
 to the issue of commissions for examination of  
 witnesses without the jurisdiction, or the admissi-  
 bility of the evidence at the trial, shall not be Sect. 6.  
 affected by the new enactment.

If the witness be duly served, and the writ issued  
 in proper form after obtaining the necessary order,  
 and if such witness do not appear upon the trial, Sect. 3.  
 then "on proof of service and default to the satis-  
 faction of the Court out of which the writ issued,  
 such Court may transmit a certificate of such default  
 (under seal of the Court or hand of one of the  
 Judges thereof) to any of the Superior Courts of  
 Law at Westminster or Dublin, or to the Court of  
 Session or Exchequer in Scotland, according as the  
 service took place in England, Ireland or Scotland,  
 and the Court to which such certificate is sent may  
 thereupon proceed against and punish the person  
 making default in like manner as they might have  
 done if such person had neglected or refused to  
 appear in obedience to a writ of subpœna or other  
 process issued out of the Court to which the certi-  
 ficate is sent."

It is only necessary to remark on the above  
 Statute, that leave to issue a subpœna as therein  
 directed will be granted only upon affidavit (a),  
 and that the application cannot be made to a Judge  
 at chambers, when the Court is sitting in bank.

(a) Appendix No. 42 (d).

Subpœna to  
produce  
original  
record.

By *Reg. Gen. H. T. 1860, Reg. 32*, "No subpœna for the production of an *original record* shall be issued, unless a rule of Court or order of a Judge shall be produced to the officer issuing the same and filed with him, and unless the writ shall be made conformable to the description of the document mentioned in such rule or order."

The application for such an order is *ex parte*, although the Judge may direct a summons to issue calling upon the public officer to show cause why he should not produce the required document. If the attendance of the officer himself is required with the document, he must be expressly informed thereof, otherwise the Court will not grant an attachment in the event of his absence. In general records of the Court of Chancery will not be produced under a subpœna granted pursuant to this rule, without the authority of the Lord Chancellor or of the Master of the Rolls, which should be obtained by application to the chief clerk.

Records of  
the Court of  
Chancery.



### III.—APPLICATIONS ATTENDED UPON SUMMONS, BY BOTH PARTIES OR THEIR REPRESENTATIVES.

The ordinary mode of setting in motion the Judge's authority at chambers, where an *ex parte* application is inadmissible, is by taking out a *summons*, and, after duly serving it upon the opposite side, attending at its return for the purpose of obtaining an order thereupon.

“ A summons is in the nature of a rule *Nisi*, so far as it is the means of bringing the opposite party as it were before the Court, and so far it operates as a stay of proceedings, but not for all purposes. Thus *after judgment* a summons cannot (as it seems) be taken out to set aside a *fi. fa.* and the proceedings thereon on the ground of irregularity, or at all events if so taken out it is no stay of execution (*a*). Again, a rule *Nisi* operates as a stay of proceedings, where it does so operate at all (*b*), from the time it is served, but a summons only from the hour at which it is made *returnable*, so that if the time for pleading expires to-day, and a summons for further time served to-day be not returnable till after the judgment office opens on the morrow, the plaintiff may sign judgment notwithstanding the summons. Yet if he neglect to do so till the hour of the return, then he must wait till the summons has been either abandoned or disposed of.”

Nature of a summons.

As a general rule a summons does not operate as a stay of proceedings, unless it be a part of the application “ why in the meantime all further proceedings should not be stayed,” nor does an order unless it so expresses. The exceptions are—where the applicant has to take the next step, and the application relates to the time or mode of taking that step, as where the summons is for time to plead, for leave to plead several matters, to strike out a count, and to cases where a stay of proceedings is necessarily implied (*c*).

Where a summons operates as a stay of proceedings.

The summons (in almost every case) is issued as a matter of course by the Judge's clerk, and should

Return, &c. of summons.

(*a*) *Phillips v. Birch*, 4 Man. & Gr. 403.

(*b*) Reg. Gen. H. T. 1853 (rule 160).

(*c*) Vide Stephen's *Lush's Practice*, 2nd ed. p. 671.

be entitled in the cause, and bear date the day, month and year upon which it is issued, although it has been held, that, if the time of its return clearly appear, any other date is immaterial; as, if the return be *to-morrow at eleven o'clock*, the party summoned is bound to attend the Judge at eleven o'clock on the day after its reception.

The summons calls upon the opposite party, "his attorney or agent," or if the opposite party be an attorney, then upon "Mr. —, or his agent," to "attend me at my chambers in Rolls-gardens, Chancery-lane," *to-morrow at eleven o'clock* in the *forenoon*, to show cause why, &c., and is signed by the clerk with the Judge's name. It purports to be issued under the seal of the chambers, but there being no legal seal known to the Judge's chambers, the absence of this formality has no effect on the instrument itself. It is usually made returnable the following day, and unless by consent cannot be made returnable at an *earlier* period. Its return is, at the hour when the Judge will be in attendance, except in the case of summonses for time to plead, where the plaintiff is in a position to sign judgment the next day against the defendant; where such is the case the Judge's clerk has in vacation the power to make the summons returnable at an earlier hour, and the Judge himself will do so during term.

When a summons is made returnable, either by the Judge or by his clerk, at an hour when there is no Judge in attendance, it is usual, but not absolutely necessary, for the summoning party to inform his opponent that the summons cannot be heard at the hour of its return; but should the party summoned attend, the hearing will, with or without

consent, be adjourned until the hour of the Judge's arrival.

The summons should explicitly set out the nature of the relief sought at the Judge's hands, in order that if the other side *consent* thereto, or do not attend at the return thereof, or if the Judge, upon hearing, simply indorses the word "order," the summoning party may obtain the necessary order as a mere echo of the summons; for in neither of these cases is the Judge's clerk permitted, in drawing up the order, to extend or vary its terms upon any verbal explanations of the person requiring it.

How the summons should be drawn.

With reference to this last observation, it may be remarked, that by *Reg. Gen. H. T.* 1853, *Reg.* 136, it is ruled, that "where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated therein;" the object being that the party, whose irregularity is complained of, may be aware of the allegations he has upon attendance to answer.

It is by no means unusual for a summons to be taken out *in blank*, the general nature of the proposed filling up being previously made known to the clerk issuing the same, in whose discretion it remains to fill up the summons himself, (which, however, he is bound to do if the applicant desires it,) to issue the same in blank, or to decline to issue the document at all. The idea is very common, but altogether erroneous, that a summons can be taken out for *any purpose whatever*; the true test of its propriety is, whether an order can, in the event of an affidavit of service and non-attendance being presented, be drawn up upon it. If it cannot the

Summons issued in blank.

summons ought not to issue, although it does not necessarily follow that upon every summons not attended by the opposite party an order will be drawn up without an affidavit of merits.

Copy of summons.

The summons, having been duly obtained, must be copied, and a true copy served upon the opposite party. By Reg. Gen. H. T. 1853, Rule 164, and Rule East. T. 1856, "service of summonses, &c., shall be made before seven o'clock p.m.; if made after that hour the service shall be deemed as made on the following day, . . . except on Saturdays, when it must be made before two o'clock; if made after two o'clock the service shall be deemed as made on the following day. The service need not be personal, nor need the original be shown even if demanded. Should it be intended by either side to argue the matter by counsel, it is their duty to give notice thereof to the other side; and if such notice be omitted the Judge will (if desired so to do) postpone the hearing, and most likely make the party omitting to give notice pay the costs of attendance. It may be remarked, also, that should the Judge refuse or omit to *certify* for counsel, the Master will not allow their costs as between party and party. (Reg. Gen. H. T. 1853, Reg. 6.)

Service of copy.

Costs of counsel.

Although, in strictness, counsel are not heard at chambers during Term, this rule is almost daily broken through.

Affidavits.

Where affidavits are intended to be used upon the hearing of a summons, copies thereof must be delivered to the other side in sufficient time to permit others in opposition to be drawn up if it be deemed necessary, and time to draw up these opposing affidavits is demandable as a matter of right when

there have been no such copies delivered, or insufficient time allowed to prepare others in answer. Copies of the affidavits in reply are frequently given as a matter of courtesy, but cannot be demanded as of right.

Every summons required during the progress of a cause, should in strictness be taken out from the chambers of one of the Judges of the Court in which the action is brought; but, although it may not issue from a Judge of such Court, it will be no less imperative upon the party served with it to attend upon its return, *at the chambers of the Judge in whose name the summons is issued.*

Either upon the day before the return of the summons, or on the return day itself, the party taking it out should place upon the proper file, at the Judge's chambers, the original summons, a copy thereof, or, which is more usual, a paper containing the name of the attorney or title of the cause. At the hour of the Judge's attendance the file will be called over and the summonses numbered consecutively, according to their order of priority upon the file, and in such order will attend before the Judge. Should a party *omit* so to file his summons, &c., he will not receive a number until the file has been called over. Except during the Circuits, when *one* Judge only is in attendance for all the three Courts, there is no file for *Counsel*: they are usually heard one hour after the time fixed for the Judge's attendance; and the counsel themselves admitted into the Judge's room immediately upon their arrival.

It is also unnecessary to file summonses which have, on a previous occasion, been *adjourned* by

the Judge, the parties in such cases being admitted and heard before the disposal of the ordinary summonses.

Attendance.

Where both parties duly attend in person or by attorney, at the hour fixed for the return of the summons, and go before the Judge, he hears their respective statements, reads, or hears read or referred to, the affidavits used in support thereof, and then indorses upon the summons a minute from which his clerk afterwards draws up a formal order.

17 & 18 Vict.  
c. 125, s. 46.

Should it become necessary, the Judge may, upon "the hearing of any summons, upon such terms as he may think reasonable, from time to time order such documents as he may think fit to be produced, and such witnesses as he may think necessary to appear and be examined *vidé voce*, either before himself or before the Master, and upon hearing such evidence, or reading the report of such Master, may make such order as may be just. And the judge may by such order, or any subsequent order, command the attendance of the witnesses named therein for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order. . . . and the Master may adjourn such examination from time to time as occasion may require, and the proceedings upon such examination shall be conducted and the depositions taken down as nearly as may be in the mode now in use with respect to the *vidé voce* examination of witnesses under the Statute 1 Will. IV. c. 22."

Adjourn-  
ment by  
Judge.

It is hardly necessary to mention that the Judge has in all cases full power to *adjourn* the hearing of any summons, as often and to such days as may appear to him fit and proper.

Where a summons has been properly taken out, and duly attended by the party taking it out, but not by the opposite side, it is the duty of the person attending the summons to remain at the chambers *from which it issued* "half an hour next immediately following the return thereof (*Reg. Gen. H. T. 1853, Reg. 154*); and if no one during that time attends to oppose the application, an order will be drawn up as a matter of course, embodying the terms of the summons, upon the production of an affidavit of "service and non-attendance" (a).

Order on an affidavit of service and non-attendance.

Notwithstanding, however, that by a rule of Court (*Reg. Gen. H. T. 1853, Reg. 153*) it is declared, that "the party taking out a summons shall be entitled to an order on the return thereof, unless cause is shown to the contrary," there are particular cases in which something beyond a mere half-hour's attendance is required to sanction the issue of the order. Where, for instance, the summons asks for something, to the granting of which the Judge, as well as the opposite party, may object, as for leave to plead *Several Matters*, an application to the Judge is necessary; and where by statute, rule, or the ordinary practice at Chambers, certain matters must be deposed to in order to give the Judge authority to issue the order, in such case an affidavit of merits, as well as one of service and non-attendance, will be required.

Where the *opposing* party duly attends the return of the summons, and default is made on the part of the applicant, a simple attendance at the

Where party served alone attends.

(a) Appendix No. 43.

return thereof is alone required; after which, the summons may be treated as abandoned, and if it be considered desirable, a summons may be taken out by the attending party for his costs of attendance.

Where there is no Judge at chambers.

Where, upon attendance by both parties pursuant to the summons, no Judge is found at chambers, the application stands *ipso facto* adjourned until the hour of the Judge's arrival.

Where the further hearing of the summons is adjourned by the Judge himself, both parties are bound to attend at the day and hour of adjournment; and if either fail, the penalty for the omission will be the same as if a fresh summons had been taken out, and served for the adjourned hearing.

Adjournment by consent.

Where the parties by mutual consent adjourn the summons, similar rules govern such adjournment; the only difference between applications adjourned by the Judge and by parties being, that the parties to the former are admitted before the ordinary summonses are disposed of, and those to the latter only in the order in which their names have been placed on the file.

Consents to orders.

With reference to *consents* granted by the parties themselves or their attorneys, there are certain cases in which the bare consent of the opposite party to an order being drawn up is sufficient for the issuing of such order; there are others in which an affidavit verifying the consent is required, while in a third class of cases, in addition to such consent and affidavit, the Judge's fiat is deemed necessary before the order is issued.

It is almost impossible to place under one or other

of these three heads *all* the applications coming to the Judge's chambers; and where a consent has been given, and there is a doubt whether or not anything further is necessary in order to obtain an order, it is best to apply for information to a Judge's Chamber clerk.

All consents to the signing of judgment against a defendant must be by *Reg. Gen. H. T. 1853, reg. 155*, filed at chambers, and, as a general rule, *all* consents are so filed. Consents to signing judgment.

In actions where the defendant has appeared by attorney, no "such order (*i. e.*, order for signing judgment) shall be made unless the consent of the defendant be given by his attorney or agent." (*Reg. Gen. H. T. 1853, reg. 156.*)

Where the defendant has not appeared, or has appeared in person, no such order shall be made unless the defendant attends the Judge, and gives his consent *in person*, or unless his written consent be attested by an attorney acting on his behalf, except in a case where the defendant is a barrister, conveyancer, special pleader, or attorney. (*Reg. Gen. H. T. 1853, reg. 157.*) Consents by defendant in person.

The attendance of the defendant "before the Judge" spoken of in the above rule is really an attendance before the Judge's clerk simply, so that such consent can be given at any time when the chambers are open.

No consent is in any case effective until the order granted upon it is drawn up and served on the opposite party, and if the person to whom it is given prematurely act upon it, before drawing up the order, or service thereof, his proceeding may be set aside for irregularity.

Where a consent is given to a Judge's order of

any description, the party consenting precludes himself from making any subsequent objection to such order, excepting on the ground of its deviating from the terms of the consent itself.

How order enforced by opposite party.

Where the Judge upon the hearing makes the minute for an order, it is optional with the party taking out the summons to draw up such order or not, and should any part of the Judge's decision be in favour of the party summoned, his only method of obtaining the benefit thereof seems to be that of taking out a cross summons asking for the relief already granted. Even where the order is duly drawn up and signed by the Judge, it is not effective until actually served, after which the party served with it can compel its performance, if necessary, by attending at the Judge's chambers with the copy order served upon him, and taking out a duplicate order, a copy of which he in turn must serve upon his opponent.

Thus if an order be made at the instance of the plaintiff to refer a cause to the determination of the Master, and the plaintiff, after drawing up and serving such order, omits to further proceed upon it, the defendant can, if he pleases, draw up a duplicate order of reference—attend with such duplicate order before the Master, and obtain an appointment for hearing the referred cause, to which the plaintiff will be bound to attend.

The service of the order should be as early as possible, otherwise the opposite side may treat it as being abandoned. If in town, the service should be on the same day, and in all cases in which a Term elapses between the granting of an order and the proceeding thereupon, the order may be treated as abandoned.

## APPLICATION TO CHANGE THE VENUE.

In all transitory actions, the plaintiff has a right <sup>Transitory actions.</sup> to lay the venue where he pleases, and the defendant has also a right to apply for and to obtain an order, upon what is called the common affidavit (*a*), to change such venue to the county in which the cause of action really arose.

The only exceptions to the above general rule are:—

1. Where the assertion that “the cause of action, if any,” arose within a different county, is contradicted by the nature of the action itself.

2. Where the action is brought upon a bond, any instrument under seal, an award, a banker's cheque, or any description of bill or note.

3. Where the plaintiff, being an attorney, barrister, &c., has laid his venue in Middlesex, in which case he has a right to retain it in that county.

4. Where the plaintiff would be defeated or delayed by such removal of the venue.

With the above exceptions, an application by the defendant to change the venue in a transitory action may be made on the common affidavit at any time before issue joined, except the defendant be himself under terms “to take short notice of trial if necessary,” in which event the order will not be made, even although the application be to try in a county having earlier Assizes than that in which the venue is laid.

The affidavit should be made by the defendant <sup>Affidavit.</sup> himself, and where this is not done, the deponent

(a) See Appendix No. 44.

should state his own special knowledge of the truth of the allegations therein.

**Special affidavits.**

Where the application is made *after* issue joined, or in the exceptional cases just noticed, it must be supported by affidavits containing *special* circumstances relating to such removal, the sufficiency of which to effect the object in view will be determined by the Judge. These special affidavits should be drawn with care, and should contain *all* the matters with which the application is intended to be supported, as no affidavits in answer to the statements or affidavits of the plaintiff will be allowed.

**Local actions.**

With respect to local actions, the plaintiff must, at his peril, lay the venue in the county where the cause of action arose, and the same rule applies to all penal actions, and actions brought against public officers for anything done or omitted to be done in the execution of their office.

Where two or more local actions arising in different counties are joined under the authority of 15 & 16 Vict. c. 76, s. 41, the plaintiff may lay his venue in either county.

**Suggestion to be entered on the record.**

Although in a local action the venue cannot be changed unless by consent of the parties, a similar object can be effected in many cases by virtue of an important provision contained in 3 & 4 Will. IV. c. 42, the twenty-second section of which Statute enacts:—"That in any action depending in any one of the Superior Courts," the venue in which is by law local, the Court in which such action shall be depending, or any Judge of any of the said Courts, may, on the application of either party, order the issue to be tried or a writ of inquiry to be executed in any other county or place than that in

which the venue is laid, and for that purpose any such Court or Judge may order a *suggestion* to be entered on the record that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place (a).

The application made in order to take advantage of the power contained in the section must of course be supported by special affidavits, and must also be made after issue joined.

Where it is believed upon good evidence that a fair and impartial trial of a local action cannot be had in the county where the cause of action arose, application may be made for an order upon the sheriff to summon the jury for the trial of the issue from the next adjoining county, and the Judge has a Common Law power to order a *suggestion* that such fair and impartial trial cannot probably be had, and to order the jury to be summoned from such adjoining county.

Trial in the next adjoining county.

An *ex parte* application to change the venue will not under any circumstances be entertained, the 18th rule of the *Reg. Gen. H. T.* 1853, directing that "no venue shall be changed without a special order of the Court or a Judge, unless by consent of the parties."

It remains only to remark, that where the application to change the venue is made by the *plaintiff*, it must be supported by special affidavits in the ordinary way.

(a) Appendix No. 45.

**APPLICATIONS TO EXAMINE WITNESSES PRE-  
PARATORY TO TRIAL, &C.**

13 Geo. 3, c.  
63.

Commission  
to India and  
the colonies.

By the 13 Geo. III. c. 63, extended by the 1 Will. IV. c. 22, the examinations of witnesses residing in India, or in any colonies, islands, plantations and places under the dominion of the Crown in foreign parts, necessary upon any civil or criminal trial in this country, are obtainable by the issue of a *Commission* directed to a Court of competent jurisdiction in the country or place where the witnesses reside.

The application for such a commission must be to a Court of Common Law at Westminster, and not to a Judge at chambers, and need not therefore be otherwise than incidentally mentioned.

1 Will. 4, c.  
22.

Commission  
abroad.

The evidence of a witness residing out of the jurisdiction simply, as in France or Germany, must be obtained under a commission issued by virtue of the Statute of Will. IV., by a Court or Judge, and directed to an individual or to individuals appointed by such commission, authorizing such person or persons to examine the witnesses named in the commission on oath, by interrogatories or otherwise.

Witness  
within the  
jurisdiction.

Where the witnesses reside *within* the jurisdiction, but owing to permanent sickness or other permanent infirmity are unable to attend at the trial, or where they are about to leave the country prior to the trial, their examination is taken by virtue of a *rule of Court* or *order of a Judge*, directing the examination upon oath upon interrogatories or otherwise of such witness before the Master of the Court, or other person or persons to be named in such rule or

Judge's  
order.

order, at any place the Judge may appoint for that purpose, and the Judge is empowered "in and by the first rule or order, or in and by any subsequent rule or order, to command the attendance of any person to be named in such rule or order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order." <sup>1 Will. 4, c. 22.</sup>

The order directing the issue of a commission is obtained by summons and attendance in the ordinary manner, and upon production of the order at the proper office the commission will be drawn up. If the examination is to be upon interrogatories, <sup>Interrogatories.</sup> copies should be delivered in good time before the proposed examination to the opposite party, in order that cross interrogatories may be prepared.

In ordinary cases, no rule or order will issue in any of the above named cases before issue joined, nor in the case of the issuing of a commission will the Court or a Judge make an order varying the ordinary form of commission issued, without the consent of the parties thereto.

The order for the issue of a commission need not contain the names of the proposed Commissioners, though of course it is indispensable that they be agreed upon and inserted in the commission itself before the same is issued;—to prevent confusion, however, it is at all times best to be prepared with the names of the agreed Commissioners upon attending the summons, in order that the same may be introduced into the order, and where the examination is to take place under an order simply, the names of the examiners *must* be inserted therein before its issue.

**Cross-examination.**

The opposite party has in all cases a right to cross-examine, even if no mention is made of cross-examination, either in the commission or order; and if the Commissioner or person to whom the order is directed, decline to permit such cross-examination, the proceedings will be invalid, and the examinations returned in pursuance of the direction contained in the commission or order will not be admissible on the trial of the issue.

**What witnesses will be examined within the jurisdiction.**

When the application is for an order to examine witnesses within the jurisdiction, it must be satisfactorily shown to the Judge that the person whose evidence is sought is a necessary and material witness, and that, either he is about to quit the country, and will not, it is probable, be forthcoming on the trial of the cause, or that he is too ill to attend upon such trial, which latter is usually proved by a medical affidavit (*a*). The Judges, however, are not remarkably strict as to the proof of either of these facts prior to issuing the commission, inasmuch as it is provided by the Act already cited, that "no examination or deposition to be taken by virtue of this Act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge upon the trial of the cause, that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial; in all or any of which cases the examinations and depositions, certified under the hand of the Commissioners, Master, or other person taking the same, shall and may without proof

1 Will. 4, c. 22.

(*a*) Appendix No. 46.

of the signature to such certificate be received and read in evidence, saving all just exceptions."

The Statute of William makes the refusal of any person mentioned in the commission or order as a witness (or directed to attend as a witness by any subsequent order) to so attend and be examined, after being duly served with the order, a contempt of the Court out of which such commission has issued, or to which the Judge issuing the order belongs, but in order to bring the contumacious witness within the Statute, an appointment of the time and place of attendance for examination, in conformity with the terms of the commission, order, or Commissioners' appointment, signed by the person or persons, or any one of them, appointed to take the examination, must be also served together with, or after the service of such rule or order. It is also by the same Statute provided, that every person, whose attendance shall be required as a witness, shall be entitled to the like *conduct-money* and payment for *expenses* and *loss of time* as upon attendance at a trial, and there is also a provision that "no person shall be compelled to produce under any rule or order any writing or other document that he would not be compellable to produce at a *trial* of the cause."

Refusal of witness to attend, &c.

The costs of a commission to India, or to the colonies, are directed to be in the discretion of the Court out of which such commission shall issue, while the costs of the commission issued to a foreign country, or of the order for examination within the jurisdiction, are directed to be costs in the cause, unless the Court or a Judge shall otherwise order.

Witness refusing to make an affidavit.

In addition to the different forms of examination already mentioned, the 17 & 18 Vict. c. 125, s. 48, makes provision for the examination of "any person who *refuses to make an affidavit*," by directing that "any party to any civil action or other civil proceeding in any of the Superior Courts requiring such affidavit," may apply by summons for an order to such person to appear and be examined upon oath before a Judge or Master, to whom it may be most convenient to refer such examination, as to the matters concerning which he has refused to make an affidavit; and a Judge may, if he think fit, make such order for the attendance of such person before the person therein appointed to take such examination for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination and the costs of the application and proceedings thereon as he shall think just."

All the examinations hereinbefore mentioned are directed to be conducted according to the manner described in the already frequently cited Statute of 1 Will. IV. c. 22.

#### APPLICATIONS TO CONSOLIDATE ACTIONS.

It is a well recognized principle of the Common Law Courts, that multiplicity of actions are not to be encouraged, and therefore where several actions have been brought by a plaintiff against the same defendant, grounded on the same right of action, the Court or a Judge will, upon application, order them to be consolidated, or order one action only to

be tried, and the others to be stayed and abide the event of the trial; and will also very probably (if the proceedings appear oppressive) direct the plaintiff to pay the costs of consolidation. Where the actions are brought against several defendants, the willingness of the Court or Judge to order their consolidation appears to be considerably less, the great question taken into consideration being whether the causes of action could have originally been joined.

The application to consolidate should in all cases be made in as early a stage of the proceedings as possible, and the order should clearly express whether the actions are simply to be consolidated, or whether one is to be tried and the others to be determined by the event of the issue joined in the action tried.

Application  
to be made  
early,  
Order.

The 13th Rule of Reg. Gen. H. T. 1853 directs, Rule. that "Where money is paid into Court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others up to the time of paying money into Court."

There is a very special form of order issued from Special order. chambers at the request of the parties in cases of the consolidation of several actions brought on the same Policy of Sea Insurance against each of the underwriters, making provision for every possible event of the trial, &c. (a)

(a) Appendix No. 47.

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## APPLICATIONS TO RECOVER COSTS.

The different descriptions of applications made to a Judge at chambers for the plaintiff in any action to be at liberty to recover his costs of suit are very few in number.

We have already fully referred to the practice upon this subject under the Bills of Exchange Act, and the rules made thereon, and need here only mention, that where the special indorsement has not been made upon the writ pursuant to the rule requiring the same, the plaintiff's only remedy in case of the non-appearance of the defendant is by summons and order in the usual way, the costs attendant upon which he, the plaintiff, will in any event have to pay.

Executors  
and adminis-  
trators.

By the 3 & 4 Will. IV. c. 42, s. 31, executors and administrators suing in right of the deceased are placed, in case of failure by them in the action, on precisely the same footing as any other persons with respect to the payment of costs, the only reservation being, that by the special order of a Judge, the executor or administrator may be discharged from the payment of any costs. Such order will not, however, be made except in cases where the defendant has actually *lured* such executor or administrator into the action, and a mere silence on his part as to whether he has paid the debt owing to the deceased, or not, will in no way exonerate the plaintiff from payment of the costs.

The application for such an order as that just mentioned must be by summons, supported in the fullest manner possible by affidavit.

No costs in  
an action  
brought upon  
a judgment.

By the 43 Geo. III. c. 46, s. 4, no plaintiff who shall have recovered judgment by verdict or otherwise in any action *brought upon a judgment*

recovered in any Court in England or Ireland, shall be entitled to costs of suit, except the Court in which such action on the judgment shall be brought, or some Judge of the same Court, shall otherwise order.

This section, it must be remembered, although it applies to judgments obtained in Inferior Courts on which the plaintiff might have obtained execution by removal into a superior Court, does *not* apply to judgments recovered in any foreign or colonial Court, nor to other than judgments recovered by plaintiffs.

Judgments of foreign or colonial Courts.

The application for costs under the provision of the Statute must be supported by affidavits, from which it must appear that the plaintiff was unable to issue execution upon the original judgment in the ordinary manner, or was prevented, save in the manner which he adopted, from realising the amount of the judgment sued upon.

Affidavit.

The most usual applications at chambers, however, relating to *costs*, are those connected with the 9 & 10 Vict. c. 95, s. 58, the 9 & 10 Vict. c. 95, s. 128, the 13 & 14 Vict. c. 61, s. 11, and the 15 & 16 Vict. c. 54, s. 4.

The provisions of these Statutes shortly stated are as follows:—

That in all cases of actions commenced in a Superior Court after the 14th August, 1850, “in covenant, debt, detinue or assumpsit (not being an action for breach of promise of marriage,) in which the plaintiff shall recover a sum not exceeding 20*l.*, and in cases of actions in such Courts in trespass, trover, and case (not being an action for malicious prosecution, libel, slander or seduction), in which the plaintiff shall recover a sum not exceeding 5*l.*,

Actions within the jurisdiction of the County Courts.

the plaintiff shall have judgment to recover such sum only and no costs, except in the case of a judgment by default;" unless a Judge at chambers shall upon summons issue an order for the recovery of such costs.

**Affidavit.** To give the Judge the requisite authority to issue such an order, it must be shown to his satisfaction upon affidavit, either:—

9 & 10 Vict.  
c. 95, s. 128.

1. That the plaintiff dwells more than twenty miles from the defendant; *or*

2. That the cause of action did not arise wholly or in some material point within the jurisdiction of the Court within which the defendant dwells, or carried on his business at the time of the action brought; *or*

*Ibid.*

3. That an officer of the County Court is a party to the action (except in respect of any claim to any goods and chattels taken in execution of the process of the Court or the proceeds or value thereof); *or*

*Ibid.*

4. That the action is an action of ejectment, or an action in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise, shall be in question, or in which the validity of any devise, bequest or limitation, under any will or settlement, may be disputed, or for any malicious prosecution, or for any libel or slander, or for seduction or breach of promise of marriage; *or*

9 & 10 Vict.  
c. 95, s. 58.

5. That the action has been moved into a Superior Court by certiorari; *or*

6. That there was sufficient reason for bringing such action in the Court in which it *was* brought; *or*

7. That the County Court had no jurisdiction. In all of which cases the Judge will be at liberty to direct that the plaintiff do recover his costs of suit (a).

#### APPLICATION FOR PLAINTIFF TO GIVE SECURITY FOR COSTS.

The two particular cases in which the plaintiff will be compelled to give security for the defendant's costs are:—

1. Where the plaintiff resides out of the jurisdiction, and In what cases security will be ordered.
2. Where, owing to the plaintiff's insolvency or extreme poverty, the action is being carried on by another in his name. 15 & 16 Vict. c. 76, s. 142.

In either of these cases the Judge will, upon application by summons supported by affidavit (b), order all further proceedings in the cause to be stayed, until security for the defendant's costs is given, to the satisfaction of one of the Masters of the Court.

The application must be made after the defendant's appearance, and before issue joined between the parties, and as to the first of the two particular cases above cited there are certain restrictions. When application must be made.

Where the plaintiff resides out of the jurisdiction, owing to his holding some permanent appointment there, or where he is a soldier, sailor, or mariner trading between a port in and a port out of the jurisdiction, Plaintiff residing out of jurisdiction.

(a) For forms of affidavits vide Appendix, Nos. 48, 49, and 50.

(b) Appendix No. 49.

tion, he will not be compelled to give security. A distinction too is drawn between an *alien* and a *denizen* out of the jurisdiction, the former being required to give security in *every* case, the latter being relieved from the burden in the cases above-mentioned and also when a Peer of the Realm.

Assignees of  
a bankrupt.

Where the assignees of a bankrupt, after giving in due course under the Judge's order security for the defendant's costs, afterwards neglect or refuse to continue the action, the defendant may within eight days after such neglect or refusal plead the bankruptcy, 15 & 16 Vict. c. 76, s. 142; but it has been held, that this clause does not apply to actions commenced *after* the insolvency of the plaintiff. (*Stanton v. Collier*, 3 E. & B. 274.)

#### APPLICATION FOR DIRECTION TO A COUNTY COURT JUDGE TO PERFORM ANY OFFICIAL DUTY.

19 & 20 Vict.  
c. 108.

Prior to the passing of the Statute 19 & 20 Vict. c. 108, the only method of compelling a County Court Judge to perform any official duty, such as signing an appeal from his own decision to that of a Superior Court was by writ of mandamus obtained from the Court of Queen's Bench in the ordinary manner.

By section 43 of the Act just mentioned, it is directed, that "no writ of mandamus shall henceforth issue to a Judge or an officer of the County Court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any Superior Court or a Judge thereof, upon an affidavit of the facts, for a

rule or order calling upon such Judge or officer of a County Court, and also the party to be affected by such act, to show cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shown, the Superior Court or Judge thereof may by rule or order direct the act to be done, and the Judge or officer of the County Court, upon being served with such rule or order, shall obey the same on pain of attachment; and in any event the Superior Court or a Judge thereof may make such order with respect to costs as to such Court or Judge shall seem fit.

“44. When any Superior Court or a Judge thereof shall have refused to grant . . . such rule or order, no other Superior Court or Judge thereof shall grant such rule or order; but nothing herein shall affect the right of appealing from the decision of the Judge of the Superior Court to the Court itself, or prevent a second application being made for such rule or order to the same Superior Court or a Judge thereof, on grounds different from those on which the first application was founded.”

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#### APPLICATION FOR ATTORNEY TO DELIVER HIS BILL OF COSTS, &c.

The “Attorneys and Solicitors’ Act” (the 6 & 7 <sup>6 & 7 Vict. c. 73, s. 37.</sup> Vict. c. 73, s. 37) provides, that “it shall be lawful for any Superior Court, or a Judge thereof, in any case in which business by an attorney has been transacted in a Common Law Court, or in any Court whatever other than the High Court of Chancery, any other Court of Equity, or in any matter of

bankruptcy or lunacy, to make an order for the delivery by any attorney or solicitor, or the executor, administrator or assignee of any attorney or solicitor, of a bill of fees, charges and disbursements, which bill shall either be subscribed with the proper hand of such attorney or solicitor, or (in case of partnership) by any of the partners, &c., and to direct by such order the delivery up of deeds, documents or papers in his possession, custody or power, or otherwise touching the same."

Action not to be commenced within one month.

Until the expiration of one month following the delivery of such bill (whether the delivery has been voluntarily or pursuant to order) the attorney or solicitor is restrained from commencing any proceedings thereupon against the party chargeable, and during such month the party chargeable may take out a summons calling upon the attorney or solicitor to show cause why his bill should not be referred to the Master for taxation, and such bill will be referred accordingly without any money being brought into Court, and with a direction to the attorney or solicitor restraining him from commencing any action or suit touching such demand pending such reference.

Order of reference after a month.

In case no such application by the party chargeable shall be made within such month, then the order of reference may be made upon the application, either of the party chargeable *or* of the attorney or solicitor himself, with such directions and subject to such conditions as the Court or a Judge may think proper, and the Court or Judge may restrain the attorney or solicitor from commencing or prosecuting any action, &c. ; it is provided, however, that no such order shall be made

upon the application of the party chargeable, after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand made by such bill, or after the expiration of twelve months after such bill shall have been delivered, &c., except under special circumstances to be proved to the satisfaction of the Court or Judge.

By the same section there is a direction that every order above mentioned shall direct the taxing officer to tax the *costs of the reference*, and certify what, if any thing, is due both upon the original bill and for the costs of the reference between the parties; and a further direction that where upon the reference one-sixth of the bill of costs shall be taxed off, the attorney or solicitor shall pay the costs of the reference and taxation, and that where less than one-sixth shall be taxed off, then that the party chargeable shall pay such costs of reference and taxation, with a provision, however, that such taxing officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and that upon such certificate the Court or Judge may make such order as they or he may think right respecting the payment of the costs of such taxation, and lastly a power is given to the Court or Judge in all cases of reference for taxation, not being of the *special* nature already described, to give any special directions relative to the costs of such reference.

The application to tax should be made to the Court or a Judge of the Court in which the principal part of the business charged for in the bill has been transacted, although it seems that if no part of

Costs of reference to be taxed.

Application to tax.

the business has been connected with a suit in a Superior Court, the application may be made to any Superior Court or Judge.

The 43rd clause of the Statute referred to enacts, that all applications made to refer any bill, &c., shall be made "In the matter of" such attorney or solicitor, and also that the certificate of the taxing officer shall, unless it be set aside, be final and conclusive; and in case any such reference be made in any Court of Common Law, that it shall be lawful for such Court or a Judge thereof to order judgment to be entered up for the amount certified with costs, unless the retainer shall be disputed, or to make such other order thereon as such Court or Judge shall deem proper.

#### DISCOVERY OF DOCUMENTS.

Common  
Law.

The Superior Courts not unfrequently compelled the discovery of documents between the parties to a suit, prior to any statutory authority on the subject, and solely by virtue of their Common Law jurisdiction.

Their power, however, was very restrained in this particular, and as a general rule, limited by the two restrictions hereafter to be noticed, discovery was only allowed when the document was in the possession of the opposite party or his agent, and where disobedience to a "notice to produce" would entitle the party giving it to prove the document by secondary evidence.

The limitations just mentioned were:—

1st. That the person seeking the production of the instrument must be a party thereto in fact or interest, and

2ndly. That the adverse party must hold the document in question, upon a trust, express or implied, to produce when necessary for the use of the party demanding it.

Matters were in this condition when the 14 & 15 <sup>14 & 15 Vict.</sup> Vict. c. 99 passed, the sixth section of which Statute <sub>c. 99, s. 6.</sub> enacted that—

“ Whenever any action or other legal proceeding shall henceforth be pending in any of the Superior Courts of Common Law at Westminster or Dublin, or the Court of Common Pleas for the County Palatine of Lancaster, or the Court of Pleas for the County of Durham, such Court and each of the Judges thereof may respectively, on application made for such purpose by either of the litigants, compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped, in all cases in which, previous to the passing of this Act, a discovery might have been obtained by filing a bill or by any other proceedings in a Court of Equity, at the instance of the party so making application as aforesaid to the said Court or Judge.”

In an application under this section, it must <sup>Affidavit.</sup> clearly appear—

1st. That “an action or other legal proceeding” is actually pending in the Court.

2ndly. That certain documents relating immediately to the suit or proceeding are in the custody or under the control of the opposite party, and

H

3rdly. That the case is one in which a discovery would have been granted by a Court of Equity (a).

The general practice of the Courts under the authority of this Statute may be very shortly expressed. The real point considered appears to be whether the inspection required is *bonâ fide* necessary to the due conduct of the cause, or merely intended as a "fishing application," to discover the nature and strength of the case of the opposing party: if the former, all other matters being regular, the application is almost invariably granted, the costs of such application being made costs in the cause, and the costs of inspection and copying being paid by the applicant; if the latter, an order is invariably refused. It need hardly be added that the summons for inspection must always be supported by affidavit.

17 & 18 Vict.  
c. 125, s. 50.

By the 50th section of the 17 & 18 Vict. c. 125, the power of the Courts and Judges with respect to the inspection of documents is very greatly extended, that section provides that;—

"Upon the application of either party to any cause or other civil proceeding in any of the Superior Courts, upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or

(a) Appendix No. 50.

they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made the Court or Judge may make such further order thereon as shall be just."

The applications made under the latter Statute may be before plea pleaded, and should an order for inspection be made after the hearing and determination of such application, it will be no defence against such order to urge that the documents sought to be examined are such as the opposite party is privileged from producing, such defence being maintainable on the hearing of the summons for *discovery*." When applications are to be made.

The provisions of the Statute last cited have been generally recognised to apply simply to *discovery*, nor is the somewhat equivocal expression, "such further order thereon as shall be just," permitted to affect the integrity of the clause 6 of the 14 & 15 Vict. c. 99, under and in accordance with the provisions of which alone, an order for the inspection and copying of documents will be issued, except where such inspection is obtainable by virtue of the Common Law power of the Judges already mentioned.

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#### APPLICATION FOR AN INTERPLEADER ORDER.

There are two particular classes of cases in which an application to interplead is the proper method of proceeding:— When an interpleader order issues.

1st. Where a stakeholder has made upon him two or more conflicting claims to the stake in his possession, upon the respective merits of which claims he cannot or does not choose to decide.

2ndly. Where a sheriff, having seized goods in pursuance of a writ of *feri facias* issued for that purpose, has the claim of the judgment creditor to, or the property of the judgment debtor in, such goods disputed by one or more claimants, upon whose claims he has under no circumstances any legal authority to decide.

The application and remedy in both these cases are very similar.

1 & 2 Will. 4,  
c. 58.  
Stakeholder.

As to applications by stakeholders the Statute 1 & 2 Will. IV. c. 58, provides:—"That upon application made by or on the behalf of any defendant sued in any of the Superior Courts of Law at Westminster, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit (*a*) or otherwise, showing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court or any Judge thereof to make a rule or order calling upon such third party to appear and to state the nature and

(a) Appendix No. 51.

particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial; or (*with the consent* of the plaintiff and such third party, their counsel or attorneys) to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable."

The fourth and fifth sections of the same Statute <sup>Appeal.</sup> give a power of appeal from the decision of a Judge at chambers to the Court in interpleader matters, and also a discretionary power to the Judge at chambers to refer the matter to the Court in the first instance. It should be remarked, however, that where by consent the Judge summarily disposes of the rights of the parties at chambers, there is no appeal from his decision to the Court, and also that such summary disposition can only take place *by consent of both parties.*

Upon an interpleader application under the above Statute, it must be shown to the satisfaction of the Judge by affidavit or otherwise :—

1st. That the stakeholder has been sued for the <sup>Affidavit.</sup> recovery of some specific chattel or its value, or for a debt, or some demand in the nature of a debt.

2dly. That the action has gone on to declara-

tion, but that no plea or pleas has or have been pleaded.

3rdly. That the defendant has no interest in the subject matter of the action.

4thly. That the claimant who has not declared has either commenced an action or put in a legal claim against the stakeholder.

5thly. That the defendant does not collude in any manner with either of the claimants, and is ready to pay the disputed amount into Court.

And, upon being satisfied as to the truth of these averments, the Judge will direct an issue to be tried, as mentioned in the Statute, unless by consent he summarily disposes of the case.

Where the second claimant does not appear in pursuance of the rule or summons calling upon him so to do, or does not comply with the terms of any rule or order made after appearance, the Statute by section 3. directs, that "it shall be lawful for the Court or Judge to declare" him, "and all persons claiming by or under him, to be for ever *barred* from prosecuting his claim against the *defendant*, and to make such order respecting costs as may be just and reasonable."

It will be observed hereafter, that by virtue of the provisions of a very recent Statute (23 & 24 Vict. c. 126) the summary jurisdiction of a Judge at chambers in interpleader applications is very greatly extended, and may be used, if applied for by *either* of the parties summoned, in all cases "where from the smallness of the amount in dispute, or of the value of the goods seized," it appears reasonable and proper to decide in such summary manner.

As to costs in ordinary cases, as a general rule, Costs. where the stakeholder makes a prompt and bonâ fide application to a Court or Judge (and the claimant appears), his whole costs will be allowed out of the sum in dispute, and such costs, together with those of the successful party, will in the end have to be paid by the party who fails. As to the allowance of costs in cases where the claimant does not appear, the Judges are somewhat divided in their practice.

The sixth section of the Statute already mentioned, in conjunction with the 1 & 2 Vict. c. 45, 1 & 2 Vict. c. 45, s. 2. s. 2, places a sheriff, who has in his hands goods Interpleader at the instance of a sheriff. or chattels seized under a "fieri facias" to which a claim or claims is or are made by a person or persons other than the judgment creditor, on the same footing as a stakeholder is placed by the Statute, and gives him the same privileges of summoning the contending parties by summons or rule before a Court or Judge as a stakeholder enjoys.

In order that a sheriff may take advantage of the provisions of the Statute, it is necessary :—

1st. That he should either have seized the defendant's goods, or have gone to the premises for the purpose of making a seizure. Affidavit.

2nd. That if he has seized, the goods should be actually in his possession at the time of the application.

3rd. That he should be totally *uninterested* in the result of the interpleader decision.

4th. That an actual claim should have been made upon him.

5th. That the application should be prompt.

**Order.** The usual orders made by the Judge in cases in which a summary decision is not given, and an issue is ordered, may be reduced to three, which will be found in the Appendix (a).

**Costs.** "If the claimant fail to appear to the interpleader rule or summons, he is barred as against the sheriff, but cannot be made to pay the costs thereof. If having appeared he abandons his claim, he may be barred as against the execution creditor, on a rule or order to that effect being applied for. If the latter do not appear the Courts cannot bar him, but they have allowed the sheriff to withdraw, and have directed that no proceedings should be taken against him by such creditor in respect of the seizure of the goods claimed; and where neither party appeared the sheriff was ordered to sell as much as would pay his expenses, and withdraw from the remainder."

**Costs.** As regards the *costs* of interpleading, when at the instance of the sheriff, it may be mentioned that the sheriff is only allowed his possession money, and costs incurred subsequently to his application for the order, and these he receives from the party who ultimately fails, who has also to pay the whole of the costs of the successful party, whether execution creditor or claimant.

**Common Law Procedure Act, 1860.**  
**Sect. 12.** The Statute 23 & 24 *Vict. c. 126, ss. 12 to 18 inclusive*, considerably extends the power of the Judges in interpleader applications, by permitting the Court or a Judge to whom any such application is made, to entertain and adjudicate upon the same although

(a) *Vide* Appendix No. 52.

“the titles of the claimants to the money, goods or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent one of another;” and also by permitting such Court or Judge in cases where the claimant makes his claim to such goods, &c. under a bill of sale, or by reason of a conveyance of the same by way of security for a debt, to “order a sale of the whole or part thereof, upon such terms as to the payment of the whole or part of the secured debt or otherwise as they or he shall think fit.” Sect. 13.

The same Statute directs that in cases where, “from the smallness of the amount in dispute or of the value of the goods seized,” it shall appear desirable so to do, the Judge may at the request of either party deal *summarily* with the application, and make such order with respect to the matter in dispute, costs, &c., as shall appear to him to be just, such order to be final and conclusive against the parties. It also directs that in all cases where the question in dispute is one of law and not of fact, the Judge may in his discretion decide the case without directing an *issue* to be tried, or may order a Special Case to be stated for the opinion of the Court, and if the latter course is pursued, the proceedings upon the Special Case and all matters relating to error brought upon it are to be conducted as nearly as may be in the same manner as if the Special Case had been stated under the ordinary provisions of the Common Law Procedure Acts, 1852 and 1854. Sect. 17.  
Sect. 15.  
Sect. 16.

Lastly, in order to secure the due enforcing of “rules, orders, matters and decisions,” made in in- Sect. 18.

terpleader applications under the new Statute, the same are directed to be entered of record, and when so entered are to have "the force and effect of judgments in the Superior Courts of Common Law."

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#### EXAMINATION UPON INTERROGATORIES.

17 & 18 Vict.  
c. 125, s. 51.

By the 17 & 18 Vict. c. 125, s. 51, it is provided, that in all causes in any of the Superior Courts, *by order* of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of a Court or Judge may at any other time, deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter,) interrogatories in writing upon any matter as to which discovery may be sought, and may require such party, or, in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing by affidavit to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought within the above time, or such extended time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly."

Proper time  
to deliver in-  
terrogatories.

Although either party may, by the special leave of the Court or of a Judge, deliver interrogatories which it is incumbent upon the opposite party to answer at *any* stage of the proceedings, the proper time

to do so is undoubtedly with the declaration or pleas (*Martin v. Hemming*, 10 Exch. 478), and as a general rule the delivery at any other period is discountenanced by the judicial authorities. These interrogatories may be delivered to a foreigner residing abroad (*Johl v. Young*, 25 L. J., Q. B. 23); also to a claimant in an action of ejectment, as to his title and the pedigree through which he claims, but not of the evidence by which the claimant's case is to be made out. (*Fritchcroft v. Fletcher*, 25 L. J., Exch. 95.)

Where they may be delivered.

The same Statute directs that the application for the order to deliver interrogatories shall be "upon affidavit of the party proposing to interrogate (a), and his attorney or agent, stating that the deponent or deponents believe that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence upon the merits, and, if the application be made on the part of the defendant, that the discovery is not made for the purpose of delay;" and the same section provides, "that where it shall happen from unavoidable circumstances that the plaintiff or defendant cannot join in such affidavit, the Court or Judge may, if they or he shall think fit, upon affidavit of such circumstances, . . . allow and order that the interrogatories may be delivered without such affidavit."

Affidavit.

Where the interrogated party omits, without just cause, to answer sufficiently such written interrogatories, "it shall be lawful for a Court or Judge, at

Where party does not duly answer.

(a) Appendix No. 53.

their or his discretion, to direct an oral examination of the interrogated party as to such points as they or he may direct, before a Judge or Master, and the Court or Judge may, by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination."

Costs.

The *costs* of all proceedings under the Statute are directed to be "in the discretion of the Court or Judge by whom the rule or order is made."

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#### APPLICATION FOR SUMMARY RELIEF IN EJECTMENT.

23 & 24 Vict.  
c. 126, ss. 1  
and 2.

By the 23 & 24 Vict. c. 126, ss. 1 and 2, it is enacted, that "in the case of any ejectment for a forfeiture brought for non-payment of rent, the Court or a Judge shall have power upon rule or summons to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects as to payment of rent, costs, and otherwise, as in the Court of Chancery, and if the lessee, &c. shall upon such proceeding be relieved, he shall hold the demised lands according to the lease thereof made without any new lease." 2. "In the case of a covenant or condition to insure against loss or damage by fire, the Court or a Judge shall

have power upon rule or summons to give relief in a summary manner, but subject to appeal as hereinafter mentioned, in all cases in which such relief may now be obtained in the Court of Chancery under the provisions of the 22 & 23 Vict. c. 35, and upon such terms as would be imposed in such Court."

3. "Where such relief shall be granted, the Court or a Judge shall direct a minute thereof to be made by indorsement on the lease or otherwise."

The appeal alluded to in the first section of the Appeal. statute is from an order of the Judge to the Court, and from a rule of the Court to the decision of a Court of Error, and such appeals are made subject to certain notices, &c., mentioned in the Statute.

#### DELIVERY OF PARTICULARS OF DEMAND OR BREACHES.

The 19th rule of the Reg. Gen. H. T. 1853 directs — "That with every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th section of the 15 & 16 Vict. c. 76) delivered or filed, containing causes of action such as those set forth in Schedule 'B' of that Act, and numbered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim and the amount of the sum or balance which he claims to be due as may be comprised within that number of folios, and with every plea of 'set-off' containing claims of a similar

nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off. And to secure the delivery or filing of particulars in all such cases, it is ordered that if any such declaration shall be delivered or filed, or any plea of set-off delivered without such particulars or statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver, and a copy of the particulars of demand and set-off shall be annexed by the plaintiff's attorney to every record at the time it is entered with the proper officer." The words "any costs in respect of any summons" include the costs for any number of summonses for particulars. (*Eade v. Woodland*, 27 L. T. 42.)

The special indorsement referred to in the above rule (15 & 16 Vict. c. 76, s. 25), and which stands in the stead of any particulars of demand, is available in all cases: "where the defendant resides within the jurisdiction of the Court, and the claim is for a debt, a liquidated demand in money, with or without interest arising upon a contract express or implied, or on a bond or contract under seal for payment of a liquidated amount of money, or on a Statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt or liquidated demand, bill, cheque, or note."

The causes of action in which particulars of demand are declared to be necessary, are:—

1. For goods bargained and sold.

Where particulars are necessary.

2. For work done and materials provided.
3. For money lent.
4. For money paid for defendant.
5. For money received by defendant for the use of plaintiff.
6. Money found to be due on accounts stated.
7. Messuage and land sold and conveyed by plaintiff to defendant.
8. Goodwill, &c. to be sold and given up.
9. For defendant's use of plaintiff's house and land.
10. For defendant's use of plaintiff's fishery.
11. For copyhold fines payable by defendant.
12. For hire of plaintiff's goods.
13. For freight.
14. For demurrage.

If in any one of these claims, the plaintiff neglect to deliver particulars to the defendant, the latter may take out a summons and obtain an order for their delivery, and the plaintiff will have to pay the costs of the summons, attendance and order.

The order for particulars may be obtained by the defendant before entering an appearance, and (should the Judge think fit) without the production of any affidavit. (*Reg. Gen. H. T. 1853, Reg. 20.*) When order may be obtained.

As usually drawn up, the order contains a clause directing a "stay of proceedings," without which, indeed, the proceedings will not by the mere issue of the order be stayed. By the 21st rule of *Reg. Gen. H. T. 1853*, it is ordered, that a defendant shall be allowed the same time for pleading after the delivery of particulars under a Judge's order

which he had at the return of the summons, unless otherwise provided for in such summons.

If, therefore, the time for pleading be expired at the period the order is made, the plaintiff may, immediately upon being served therewith, deliver particulars and sign judgment against the defendant, and in such cases, to avoid his doing so, it is usual to take out, with the summons for delivery of particulars, a summons for time to plead after delivery of particulars.

Signing judgment at expiration of order.

It should also be carefully remembered that the *summons* for particulars will of itself only prevent the signing of judgment by the plaintiff until its disposal, and that the time the defendant had upon its issue continues to run; if, therefore, no order be made, the plaintiff may, immediately upon the summons being discharged, sign judgment against the defendant.

Where the particulars delivered under the order are unsatisfactory, a second, and subsequently even a third application may be made upon summons for "further and better particulars," or for "further and better particulars with dates and items," the Judge making such order with reference to the costs of such further and better particulars as he may consider advisable, usually that such costs shall be "costs in the cause," which they will be, if nothing whatever is said in the order about costs.

Amendment of particulars.

The particulars delivered may be amended at any period of the cause, the order being usually made subject to the payment of costs by the party applying, and subject to such other conditions as the Judge may think proper to impose.

In any action brought for the infringement of a

patent, it is provided by the 15 & 16 Vict. c. 83, s. 41—"that the plaintiff shall deliver with his declaration particulars of the breaches complained of in the action, and that the prosecutor (if the proceedings be by sci. fa. to repeal letters patent) shall deliver with his declaration particulars of any objections on which he means to rely at the trial, in support of the suggestion in the said declaration in such proceedings by sci. fa. And at the trial of such action or proceeding by sci. fa. no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such letters patent, which shall not be contained in the particulars delivered as aforesaid."

#### DISCOVERY BY PLAINTIFF'S ATTORNEY OF THE PROFESSION, &C. OF PLAINTIFF.

"Every attorney, whose name shall be indorsed 15 & 16 Vict. c. 76, s. 7. on any writ issued by authority of this act, shall, on demand in writing, made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court or a Judge shall so order and direct, declare in writing, within a time to be allowed by such Court or Judge, the profession, occupation, quality and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall

be taken thereupon without leave of the Court or a Judge."

There is no time mentioned in the Statute within which the application is to be made, so that, although it has been refused after verdict (*Hooper v. Harcourt*, 1 H. Bl. 534) it may no doubt be made during all the earlier stages of the proceedings, more especially if the advisability of the application has been known to the defendant only a short time before its being made.

An attorney is bound to give a *true and determinate* answer to the demand made of him, and if his reply only vaguely intimates the quality, address, &c., of the plaintiff, proceedings will be stayed until better information is supplied. Where the plaintiff had left his residence and gone to Liverpool, the address given, "Peel's Coffee House, Fleet Street, London," was held insufficient, although accompanied by an affidavit that he was then residing there. (*Hodson v. Gamble*, 3 D. P. C. 174.) In a second case the plaintiff's attorney received his instructions from Bridport, and subsequently from Lynn, and under a Judge's order gave Bridport as the plaintiff's address, though it was proved he had removed to Lynn; another order being obtained, he gave "Lynn" as the place of residence, and this turning out to be untrue, the Court ordered the attorney to pay the costs of the applications, together with the costs of a motion made for his attachment, and stayed all proceedings in the action until a true address was given. (*Harris v. Holler*, 7 D. & L. 319.)

## EXECUTION AGAINST A SHAREHOLDER.

The suing out of execution against a private individual, on a judgment recovered against a company of which he is a shareholder, is regulated by the Statute 7 & 8 Vict. c. 110, extended to joint stock companies with limited liability by the 18 & 19 Vict. c. 135.

The 66th section of the first cited Act declares, that "every judgment, and every decree or order which shall be at any time after the passing of (the) Act obtained against any company completely registered under (the) Act, except companies incorporated by Act of Parliament or charter, or companies the liability of the members of which is restricted by virtue of any letters patent, in any action, suit or proceeding prosecuted by or against such company, in any Court of Law or Equity, shall and may take effect and be enforced, and execution thereon be issued, not only against the property and effects of such company, but also, if due diligence shall have been used to obtain satisfaction of such judgment, decree or order, by execution against the property and effects of such company, then against the person, property and effects of any shareholder for the time being or any former shareholder of such company in his natural or individual capacity, until such judgment, decree or order shall be fully satisfied.

As regards *former* shareholders, the same section Former shareholders. provides that they shall not be liable as above, unless they were shareholders in the company at the time when the contract, &c. upon which judgment is obtained was entered into, or became shareholders whilst such contract, &c. remained unexpired, or

were shareholders when the judgment itself was obtained, and there is a further restriction against execution being issued against a former shareholder by a provision that no such execution shall issue after the expiration of *three years* next after the person sought to be charged has ceased to be a shareholder.

The office of a Judge at chambers, in connexion with the issuing such execution, is declared in section 68 of the same Act, which enacts:—

“That such execution may be issued by leave of the Court or of a Judge of the Court in which such judgment, decree or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the Court, without any suggestion or scire facias in that behalf, and it shall be lawful for such Court or Judge to make absolute or discharge such rule, or allow or dismiss such motion, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Court or Judge shall seem fit . . . provided that any order made by a Judge as aforesaid may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order: Provided also that no such order shall be made nor summons granted for the purpose of charging any shareholder or former shareholder until ten days’ notice thereof shall have been given to the person sought to be charged thereby.”

Proceedings  
necessary  
before appli-  
cation.

In order to proceed under these sections, it is necessary first to give the ten days’ notice required above to the person against whom execution is proposed to be issued.

At the expiry of such ten days, a copy notice, verified by an affidavit of its due service, being produced to the Judge's chamber clerk, a summons will be issued calling upon the shareholder to show cause why execution should not issue against him (*a*). This summons, supported by affidavit of due diligence having been ineffectually used to obtain satisfaction of the judgment from the goods of the company and of the shareholder's interest in such company, will cause an order to issue, whereby the shareholder's person and own private property will be charged as directed by the Statute, provided, of course, that the shareholder is not able to withdraw himself from the operation of the Statute.

The proper period for making the application is after judgment has been signed against the shareholder, and before execution issues upon such judgment. The mere issue of a writ against *any one* cannot be restricted by Act of Parliament, and in obedience to such writ an appearance is entered, or in contempt of it judgment is signed in default of appearance. If the application be made prior to signing judgment, it is presumed that the defendant may urge that the plaintiff is not in a position to issue execution, but this would be of little advantage to him, as the order would be made with the condition annexed to it of the plaintiff's signing judgment.

Time for  
making  
application.

#### APPLICATION TO TRY BEFORE THE SHERIFF.

By the 3 & 4 Will. IV. c. 42, s. 17, it is enacted:—“That in any action depending in any of the Superior Courts of Law at Westminster for any

(*a*) For the forms of this notice, affidavit, &c., see Archbold's Practical Forms, p. 645 *et seq.*, 7th ed.

debt or demand in which the sum sought to be recovered and indorsed on the writ of summons shall not exceed 20*l.*, it shall be lawful for the Court in which such suit shall be depending, or for any Judge of any of the said Courts, if such Court or Judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such Court or Judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any Judge of any Court of Record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, &c.”

The application for a writ of trial to issue is in the ordinary manner by summons, and the proper period for making it is after issue joined, and before the issue is delivered. The affidavit upon which the application is grounded should distinctly show that the amount sought to be recovered is 20*l.* or less, and that the cause of action is debt, or something “*ejusdem generis*” with debt (*a*).

To what  
Court writ to  
be directed.

The *Court* to which the writ is to be directed is usually the Court of the Sheriff, and it has been determined that a *County Court*, established under 9 & 10 Vict. c. 95, is not a Court of Record within the meaning of the Statute.

Even by consent of both parties, an order will not in strictness issue to try before the sheriff without the consent of a Judge; and although this rule is sometimes departed from, the affidavit already

(*a*) Appendix No. 54.

referred to must be produced together with the written consent and the pleadings, when the order is applied for. One reason for the Judge's own authority being required before issuing the order, arises from the fact that the Court will not review or set aside such order when once issued, however improperly the writ of trial may have been ordered.

One effect of the establishment of the new County Courts was to diminish greatly the number of writs of trial issued to the sheriff, the relief afforded by the County Courts being almost identical with that found in a trial before the sheriff; there are still cases, however, in which the older relief can only be secured, such as where the parties dwell more than twenty miles asunder, where the cause of action did not arise wholly or in some material part within the jurisdiction of the County Court of the district wherein the defendant dwelt or carried on business at the time when the action was commenced, or where some officer of the County Court is a party to the action, &c.

Effect of  
County  
Courts.

It should also be borne in mind that as a general rule no writ of trial will be issued to try before the Judge of the Sheriff's Court in London, or before the Judge of any Court of Record in which counsel only are heard, in a case where the amount in dispute is under 50*l*.

#### APPLICATION TO PLEAD OR REPLY SEVERAL MATTERS.

Any two or more of the following pleas, viz. :—  
A plea denying any contract or debt alleged in the declaration, a plea of tender as to part, a plea of the Statute of Limitations, set-off, bankruptcy of the

defendant, discharge under the Insolvent Act, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, denial of property belonging to plaintiff, leave and licence, and *son assault demesne*, may be pleaded together without any leave of the Court or Judge. (C. L. P. A. 1852, sect. 81.)

If, however, it is desired to plead other pleas together, an application must be made upon summons in the usual manner, an abstract of the pleas proposed to be pleaded being annexed to the copy summons served, and to the original laid before the Judge upon hearing, and all objections to the proposed pleas, upon the ground that they are founded upon the same ground of answer or defence, are directed to be heard and determined while the summons itself is being disposed of. (C. L. P. A. 1852, sect. 83.)

#### Affidavit.

It is not uncommon for the Judge to call for an affidavit of the truth "in substance and in fact" of the matter proposed to be pleaded, and this affidavit may be in the form set forth in the Appendix. The summons itself operates as a stay of proceedings from the hour of its return.

#### STAYING PROCEEDINGS.

Where it is proved on affidavit to the satisfaction of the Judge, or appears by the indorsement of the writ of summons, that the debt for the recovery of which the action is brought is less than 40s., and where the plaintiff can avail himself of an inferior jurisdiction, a Judge will, upon application, order all further proceedings in the action to be stayed, and a similar course will be pursued should the

action have been brought against good faith, or without authority on the part of the plaintiff or his attorney.

The more ordinary cause, however, of a stay of proceedings is a consent of the defendant (where he has pleaded) to withdraw his plea and permit judgment to be signed against him, or an arrangement by the plaintiff to receive the debt, or a certain sum for the debt in a single payment, or by instalments, securing himself against default on the part of the defendant, by obtaining an order to sign judgment and issue execution in case of the defendant's failing to observe his own part of the arrangement.

Where such an order is obtained by consent of the plaintiff's and defendant's respective *attornies*, their written consent alone is required; where the defendant has appeared in person, and gives a consent, he must either have the same verified by an attorney attending at his request and witnessing his signature, or else personally attend at the Judge's chambers, and be examined by the clerk in attendance respecting his knowledge of the nature of the instrument to which he has consented. (Reg. Gen. H. T. 1853, reg. 156.)

There are two forms of "orders to stay" in common use at chambers — the *short*, and the *long*. The former, orders "that upon payment of £ , the debt for which this action is brought, together with" (here are inserted the particular terms of the consent), "all further proceedings herein be stayed; and in case default be made in any or either payment as aforesaid, the plaintiff shall be at liberty to sign judgment and issue execution against the de-

defendant for the amount remaining unpaid, with costs of judgment and execution, sheriff's poundage, officers' fees, incidental expenses, and all other proceedings, whether by *fi. fa.* or *ca. sa.*"

Long order.

The terms of the long order are slightly different, and a little more explicit. It first directs all proceedings to be stayed, and then orders that in case the debt, interest, and costs, to be taxed as between attorney and client, are *not* paid, that the plaintiff or his executors, &c. shall be at liberty to sign judgment, &c., as in the short order, for the "amount remaining unpaid at the time of such default, with costs of judgment *and registering the same*, and execution or executions, whether by *fi. fa.* or *ca. sa.* or both; likewise the costs of any other writ or proceeding which may be necessary, as also the costs of ruling the sheriff or sheriffs to return such writ or writs, sheriff's poundage, officers' fees, costs of levying expenses of sale, and all other incidental expenses.

There is a further order that it shall not be necessary to revive such judgment by writ of revivor or otherwise.

Where a summons to "stay" upon payment of a less amount than that claimed is not attended upon its return by the party upon whom it has been served, an order will *not* be drawn up upon the production of an affidavit of service and non-attendance, it being out of the Judge's power (except by consent of parties on both sides) to make such an order.

#### APPLICATION FOR TIME TO PLEAD, &C.

The application for time to plead, in the ordinary form of the summons for that purpose, is, "Why

the defendant should not have *a month's* time to plead herein," or "a month's *further* time," as the case may be. If it be made returnable before the expiration of the time the defendant already has, it will operate as a stay of proceedings pending the application; if returnable *after* the defendant's time has expired, the plaintiff may proceed to sign judgment before the return of the summons, although, if he does not avail himself of his right, he cannot afterwards take any advantage of it. Where there is no objection on the part of the plaintiff, he usually indorses a consent on the back of the summons, giving the defendant a certain definite number of weeks or days in which to plead; and if this consent direct that the order is to be drawn up "as by Judge," the sum of 6s. 8d. will, upon the subsequent taxation of costs, be allowed to the plaintiff for his assumed attendance upon the summons, such being always the case where the consent is indorsed "take an order *as by Judge*." Consent.

Where the time to plead has not expired at the time of drawing up the order, the time given begins to run from the date of the order, and not from the expiration of the original time to plead, except the order be for *further* time, when the reverse is the case.

Where time is given, either by the Judge or by consent, it is frequently on certain conditions or "terms." The usual terms are, that the defendant shall: 1. Plead *issuably*; 2. Rejoin gratis; and 3. Take short notice of trial. "Usual terms."

The first of these terms prevents the defendant from pleading a dilatory plea, and indeed obliges him to frame his pleadings in such a manner as that "Pleading *issuably*."

“Rejoining gratis.”

the trial of the cause shall not be unnecessarily delayed by any act of his. The second stipulation, “Rejoining gratis,” means rejoining, without being required by notice so to do, within four days after the plaintiff has replied; and if he fails so to do, the plaintiff may treat his plea as a nullity and sign judgment by default.

“Taking short notice of trial.”

“Taking short notice of trial” is directed by Reg. Gen. H. T. 1853, reg. 35, to be understood as taking four days’ notice, although as the order directs that the defendant is to take short notice of trial, “if necessary,” the plaintiff is bound to give all the notice he can.

In the case of a country venue, it is not usual to put the defendant under terms until the Commission day for the County, City or Town in which his venue is laid has been fixed, and made public in the Circuit Papers.

If the defendant’s time for pleading expires on or after the 10th of August, he has the same time for pleading after the 24th of October, as if the declaration were delivered or filed on the latter day (Reg. Gen. H. T. 1853, reg. 9). And if he has time given by a Judge’s order which does not expire by the 10th of August, he has as much time after the 24th of October as he had by the original notice, and *perhaps* also the number of days given by the order remaining unexpired on the 10th of August.

Order made on affidavit of service and non-attendance.

Where the plaintiff neither consents to the order being made, nor attends the summons, the defendant will, as in most other cases, be entitled to an order upon the production of an affidavit of service and non-attendance of the summons. Perhaps in strictness he is entitled to the whole month’s time asked for in the summons, but in practice it is usual for

the Judge or his clerk to inquire into the circumstances of the case, and the requirements of the defendant, and to award such further time to plead as he may deem advisable, the usual periods being a week, ten days, or a fortnight.

Where a summons for time to plead is taken out contemporaneously with one for "further and better particulars," "inspection," &c., it should ask for such time after the plaintiff's compliance with the order made upon the other summons, and the order for time should be drawn up accordingly. If this be neglected, although the order for particulars may direct a stay of proceedings until their delivery, the plaintiff will be at liberty to hold back the particulars until the defendant's time has expired, and then deliver them and sign judgment immediately after.

Time to plead after delivery of further and better particulars.

#### CHANGING ATTORNEY.

It is ordered by Reg. Gen. H. T. 1853, reg. 4, that "No attorney shall be changed without the order of a Judge."

The consent of an attorney to the appointment of another in his stead, even though accompanied with that of all the parties to the proceedings, is insufficient without the *order* directed by the rule, and the attorney proposed to be changed will remain liable as attorney in the action, and this, to however small an extent he has acted in the cause.

In almost every case, an attorney is entitled to be paid his costs before he can be dismissed, and it is not unusual for the terms of dismissal in the order to be, "upon payment of the said Mr. —'s taxed bill of costs."

The summons to change attorneys (which need summons. not be served upon the opposite party in the action)

simply calls on Mr. B. to show cause why "Mr. A. should not be appointed attorney for the (plaintiff) herein instead of the said Mr. B." It may be taken out in any stage of the proceedings, even after final judgment.

Order.

The order is an echo of the summons, sometimes in addition embodying the terms already mentioned. It should be served upon *all* persons connected with the proceedings, in order that no delay may take place by efforts to discover the right attorney or fruitless transactions with the one dismissed.

Terms.

If the order contains terms which are not forthwith, or within a reasonable time, complied with, the dismissed attorney may apply for the order to be rescinded, and then proceed as attorney in the action. Whilst, however, the order remains in force he cannot without the client's express direction take any further proceedings.

Death of attorney.

Where an attorney dies, no order for a new attorney is necessary, but the party deprived of his services is bound forthwith to make a new appointment, and to serve due notice thereof upon his opponent, without which, after demand made, he may be treated as suing or defending in person.

Where a plaintiff or defendant sues or defends in person, and subsequently appoints an attorney, he may do so without order, by simply giving a notice of the appointment to the opposite party.

#### APPLICATION TO ASCERTAIN LOADING OF A LOST SHIP, &C.

53 Geo. 3,  
c. 159, s. 1.

By Statute 53 Geo. III. c. 159, s. 1—Ship-owners are liable to answer for, or make good, any loss or damage to any goods laden on board, by reason of any act, neglect, matter or thing done or

omitted without the fault or privity of such owners, to the extent only of the value of the ship and of the freight due or to be due during the voyage; and if several persons have sustained such loss or damage, and the value of the ship and freight is not sufficient to compensate all, the owners of the ship may file a bill in Equity against all such persons who have brought actions or made claim for compensation, to have the value of ship and freight ascertained and the amount distributed rateably amongst the claimants.

By section 7 of the same Act it is provided, that Sect. 7.  
 “the shipowner or shipowners filing the bill in Equity shall annex to such bill an affidavit that he, she or they do not directly or indirectly collude with any of the defendants thereto, or with any other owner or owners of the same ship or vessel, or with any other person or persons, but that such bill is filed only for the purposes of justice, and to obtain the benefit of the provisions of the Act, and that the several persons named as defendants to the said bill are, as the person or persons making such affidavit verily believes, all the persons claiming to be entitled to recompense for loss and damage sustained by the same accident, act, neglect, or default, or on the same occasion, and that all such defendants do claim such recompense and to be entitled to proportions of the value of such ship or vessel, appurtenances and freight, and that no other person claims to be entitled to any proportion thereof under the provisions of this Act, and that the amount of the value of such ship or vessel, appurtenances and freight, does not exceed a sum to be specified in such affidavit, and that the several claims made by the defendants to such bill do exceed the amount of

the value of such ship or vessel, appurtenances and freight; and the plaintiff or plaintiffs in such bill shall, on filing such bill, apply to the Court and obtain an order for liberty to pay into Court the amount of the value of such ship or vessel, appurtenances and freight as ascertained by such affidavit, and shall pay the same into Court according to such order, and no defendant or defendants to such bill shall be compellable to put in any answer thereto until such value shall have been paid into Court as aforesaid, unless the Court shall for any special cause think fit to order security to be given for the same, in such manner as the said Court shall think fit, either instead of payment thereof into Court as aforesaid, or until such Court shall make other order to the contrary."

17 & 18 Vict.  
c. 125, s. 88.

By the 17 & 18 Vict. c. 125, s. 88, it is declared, that "the Superior Courts or any Judge thereof may, upon summary application by rule or order, exercise such and the like jurisdiction as may, under the provisions of 53 Geo. III. c. 159, intituled 'An Act to limit the Responsibility of Ship-owners in Certain Cases,' be exercised by any Court of Equity."

#### REFERENCE OF MATTERS TO ARBITRATION.

Either by a rule of Court, a Judge's order, a deed under or not under seal, or a mere verbal agreement, matters not within the operation of a Court of Law, may be referred to the decision of one or more arbitrators agreed upon by the parties.

Where the reference is by a Judge's order drawn up in the full form, and with all the special provisions found in the order set out in the Appendix (a),

(a) Appendix No. 55.

few subsequent applications to a Court or Judge will be necessary in order to carry it into effect.

If there be no power given to the arbitrator to enlarge the time limited for the making of his award, and such enlarged time be necessary, application must be made by summons to a Judge at chambers, upon affidavit that the delay caused does not originate in any wilful negligence on the part of the applicant, or in any vexatious proceedings instituted by him, and the further time may be granted by the Judge upon such an affidavit, even if the other party makes default in appearance.

Where the time for making the award has actually elapsed without an order having been made for its extension, the Court or a Judge will still entertain the application, and if the award has in the meantime been made, it seems that the matter should be by order remitted *pro forma* to the consideration of the arbitrator in order that a fresh award may be made, but it is doubtful if any order will be made extending the originally limited time, upon application after such time has passed by, unless the omission to make an earlier application has been the result of accident or mistake.

3 & 4 Will. 4,  
c. 42, s. 39.

The second Common Law Procedure Act gives a general power of enlarging the time limited to an arbitrator for making an award in the following terms:—

17 & 18 Vict.  
c. 125, s. 15.

“The arbitrator, &c. shall make his award” (unless there is a different limit of time) “within three months after he shall have been appointed, &c., but the parties may, by consent in writing, enlarge the term for making the award, and the Court or a Judge, &c. may, for good cause to be stated in the

rule or order for enlargement, from time to time enlarge the term for making the award, and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month."

There has been considerable doubt expressed whether the Court or a Judge has power to interfere in enlarging the time: where the order or submission gives such power to the arbitrator, of which he has neglected to avail himself, the general belief is, that such power exists, and in practice it is continually exercised.

17 & 18 Vict.  
c. 125, s. 15.

Where no particular period is limited in the order during which the award is to be made, it must be completed and ready for delivery within three months after the arbitrator has been appointed or entered upon the reference, or has been called upon by notice in writing so to do, and if it be not so made, it will be null and void.

The death of either party whilst the arbitration is being carried on will at once revoke the arbitrator's authority, and a fresh person must be appointed by the parties, and sanctioned by the order of a Judge. Bankruptcy, insolvency, or the marriage of a feme sole, will only be a revocation of such arbitrator if insisted on by the bankrupt, &c. If his assignees or the husband of the female, elect to continue the reference, the other side cannot object.

17 & 18 Vict.  
c. 125, ss. 12,  
13, 14.

With respect to the non-appointment, refusal to act, or death of an arbitrator, it is provided by a recent statute, that where the arbitration is to a *single* arbitrator, and the parties cannot concur in the person to be appointed, or where such person being

appointed refuses to act, becomes incapable of acting, or dies, and the parties do not concur in the appointment of a new one, *any* party may serve the others with a written notice to appoint an arbitrator, and if they do not so appoint in *seven clear days*, then it shall be lawful for a Judge upon summons to make such appointment.

The same power is given to a Judge, in cases where the parties or two arbitrators have power to, and do not appoint an *umpire*, or when such umpire being appointed refuses to act, becomes incapable of acting, or dies, and no fresh one is appointed. And in cases where two arbitrators are to be appointed, one by each party, and one side refuses to appoint, or his arbitrator dying, &c., refuses to appoint a new one, which the statute permits him to do, it is declared that the nominator of the surviving arbitrator may, after giving notice as aforesaid, appoint such arbitrator to act as sole arbitrator in the reference, a power being reserved to a Judge upon application to revoke such appointment.

The Common Law Procedure Act, 1853, extended considerably the power of a Judge to direct a reference to arbitration, by enacting that "If it be made appear, at any time *after the issuing* of the writ, to the satisfaction of the Court or a Judge, upon the application of *either party*, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary way, or to order that such matter, either wholly or in part, be

17 & 18 Vict.  
c. 125, s. 3.

referred to an arbitrator appointed by the parties or to an officer of the Court [or, in Country Cases, to the Judge of any County Court (*a*)], upon such terms as to costs and otherwise as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred."

It is in the discretion of the Judge, making the compulsory order of reference, to order the whole or the part of the matter to be referred, whether the whole or part only relates to mere matter of account. As it must "be made appear to the satisfaction of . . . the Judge that the matter in dispute consists wholly or in part of matters of mere account, &c.," the party applying for the order to refer must be provided either with a copy of the particulars delivered in the action or with an affidavit disclosing the peculiar nature of the action, and this must also be the case where a *consent* to refer is given upon a summons taken out for that purpose, no order to refer under the provisions of the Statute being given upon a bare consent of the parties, or being drawn up with the words "by consent" introduced therein.

Where the order says nothing about *costs*, the arbitrator has no power over them, and an order must be applied for upon summons to amend the order of reference in such a case, if it is wished to submit to the arbitrator's discretion the question respecting costs.

There is in the Statute we have already cited, a

(*a*) Repealed by 21 & 22 Vict. c. 74, s. 55.

further enactment, that "If it shall appear that the allowance or disallowance of any particular item depends upon a question of law, fit to be decided by the Court, or upon a question of fact fit to be decided by a jury, or by a Judge upon the consent of both parties, it shall be lawful for such Judge to *direct a case to be stated or an issue or issues to be tried, &c.*; and the decision of the Court upon such case, and the finding of the jury or Judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive." • Sect. 4.

As to the enforcing of an award made by an arbitrator under this Statute, it is declared that "Any award made on a compulsory reference Sect. 10. under this Act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time *after seven days* from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed."

The proper manner to make this section available is, by taking out a summons to show cause "Why the plaintiff (*or* defendant) should not be at liberty to sign judgment against the plaintiff (*or* defendant) for the sum of £        being the amount found to be due by the arbitrator herein, by his award dated the        day of        1861." And the application must be supported by an affidavit of the entering upon the reference, and the date of the arbitrator's final award and determination.



## APPENDIX.



### No. 1.

#### Jurat of Affidavit sworn at Chambers.

Sworn at the Judges' Chambers, Rolls' Garden, Chancery Lane, this — day of —, 1861.

Before me,  
A. B.,  
a Commissioner, &c.

—

#### *If more than one Deponent.*

Sworn at the Judges' Chambers, Rolls' Garden, Chancery Lane, by the within-named deponents C. D. and E. F., this — day of —, 1861.

Before me,  
A. B.,  
a Commissioner, &c.

—

#### *If by a Marksman or Illiterate Person.*

Sworn at the Judges' Chambers, Rolls' Gardens, Chancery Lane, the above affidavit having been first read over and explained to the deponent A. B. in my presence, who seemed perfectly to understand the same, and wrote his signature [*or made his mark*] thereto in my presence, this —, day of —, 1861.

A. B.,  
a Commissioner, &c.

—

#### *If by a Foreigner.*

Sworn at the Judges' Chambers, Rolls' Garden, Chancery Lane, this — day of —, 1861, by the deponent A. B., the contents of the above affidavit having been first read over and explained to him in the — language by C. D., of —, who was first sworn duly to interpret the same.

Before me,  
E. F.,  
a Commissioner, &c.

## No. 2.

Affidavit on which is grounded a Petition for a  
Country Commission to take Affidavits.

In the Court of ——— .

I, A. B., of ———, in the county of ———, gentleman, make oath  
and say—1. That I have been duly enrolled and am now practising as  
an attorney in her Majesty's Court of ———.2. That I have duly taken out my certificate for the current  
year.3. That I am not at this time, nor do I intend to become or  
practise as, a conveyancer.

Sworn, &amp;c.

A. B.



## No. 3.

## Petition.

To the Right Honourable the Lord Chief Justice and the other  
Judges of the Court of Queen's Bench.The humble petition of A. B., gentleman, applying to  
be appointed a Commissioner to administer oaths  
in Common Law in the Court of Queen's Bench,

Showeth,—

That your petitioner resides at ———, in the county of ———.

That your petitioner has been duly enrolled an attorney of  
her Majesty's Court of Queen's Bench at Westminster, and has  
practised as an attorney for upwards of ——— years.That your petitioner carries on his business at ———, in the  
county of ——— [*in partnership with C. D.*].That your petitioner has taken out his certificate to practise  
as such attorney for the current year.That the town of [*here state the particular facts rendering an  
additional Commissioner necessary*].Your petitioner therefore humbly prays that your Lord-  
ships will be pleased to appoint him a Commissioner  
to administer oaths in Common Law in the Court of  
Queen's Bench, within the counties of ———.

And your petitioner, &amp;c.



## No. 4.

## Certificate.

To the Right Honourable the Lord Chief Justice and the other  
Judges of the Court of Queen's Bench.We, the undersigned, A. B., C. D., E. F., &c. do hereby humbly  
certify unto your Lordships, that ———, of ——— in the county of  
———, carrying on business at ———, in the county of ———, is well  
known to us. That he is an attorney of integrity, well affected

to her Majesty's person and Government, and properly qualified to execute the office of a Commissioner to administer oaths in the Court of Queen's Bench, within the counties of —.

Dated this — day of — 18—.

A. B. Incumbent of —.

C. D.

E. F., &c.

—  
No. 5.

**Affidavit of taking out of Certificate.**

*In the Queen's Bench.*

I, — of — in the county of —, gentleman, carrying on business at — in the county of —, make oath and say :

That I have been duly enrolled an attorney of this Honourable Court, and have taken out my certificate for the current year.

Sworn at —, in the county  
of —, this — day of  
—, 1861. }

A. B.

Before me,

A. B.,

a Commissioner, &c.

—  
No. 6.

**Petition of London Attorney for a Commission to take Affidavits within ten miles of Serjeants' Inn Hall.**

To the Right Honourable the Lord Chief Justice and the other Judges of Her Majesty's Court of Queen's Bench.

The humble petition of A. B., gentleman, applying to be appointed a London Commissioner to administer oaths in Common Law,

Showeth,

That your petitioner has been an admitted attorney of your Lordships' Honourable Court for — years [*not less than five*], and during that period has practised as an attorney in such Court.

That your petitioner's office and place of business is situate at No. — Street, —, in the county of —.

That No. — Street, —, aforesaid, is within ten miles of Serjeants' Inn Hall, Rolls' Garden, Chancery Lane.

That your petitioner is not in partnership in his said business of an attorney [*or is in partnership in his said business of an attorney with C. D., gentleman, and that the said C. D. is [not] a Commissioner for taking oaths as aforesaid*].

Your petitioner therefore humbly prays that your Lordships will be pleased to grant him a commission to administer oaths in Common Law as aforesaid.

And your petitioner, &c.

## No. 7.

Certificate of Respectability of Person applying for a  
Commission to take Affidavits in London District.

We, E. F. of — Street, in the — of —, and C. D. of — Street, in the — of —, being severally practising attornies in her Majesty's Court of —, and having practised as attornies in such Court, I, E. F., for the period of — years [not less than five], and I, C. D., for — years, hereby humbly certify that we well know A. B., gentleman, of — Street, in the county of —, and have known the said A. B. for — years and more, and we hereby also humbly certify that the said A. B. is a person of worth and respectability, and a fit and proper person in our opinion for the office of a London Commissioner to administer oaths in Common Law.

Dated this — day of —, 1861.

E. F.  
C. D.



## No. 8.

## Affidavit of Acknowledgment of Deed.

A. B., of —, in the — of —, gentleman, one of the attornies [or solicitors] of the Court of —, maketh oath and saith that he knows — the wife of — in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said — and the certificate signed by the Judge on the day and year therein mentioned, at his chambers in Rolls' Garden, Chancery Lane, in the presence of this deponent, and that at the time of making such acknowledgment the said — was of full age and competent understanding, and that the said — knew that the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made. And this deponent further saith, that previous to the said — making the said acknowledgment [he, this deponent, inquired of the said — whether she intended to give up her interest in the estates 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 — 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 — this deponent has no reason to doubt the truth, and verily believes the same to be true], or [the said — declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates. And this deponent further saith, that before her acknow-

ledgment was so taken he was satisfied and does now verily believe that such provision has been made by deed or writing, or that the terms thereof have been reduced into writing, and that such deed or writing has been produced to the said Judge].

And lastly this deponent saith that it appears by the deed acknowledged by the said — that the premises wherein she is stated to be interested are described to be in the parish or place of — [or parishes or places of — and —], in the county of — [or counties of —].

Sworn, &c.

A. B.

—◆—

No. 9.

**Affidavit upon which to obtain an Order to file a Certificate of an acknowledged Deed more than twelve Months old.**

*In the Court of Common Pleas.*

I, A. B., of — in the county of — gentleman, attorney-at-law, make oath and say :

1. That the deed mentioned in the certificate of acknowledgment marked A, shown to me at the time of swearing this my affidavit, was acknowledged on the day and year in the said certificate mentioned by E. F., the wife of G. H., before [*the Judge*] by whom the said certificate is signed.

2. That the said certificate was after the acknowledgment of the said deed by the said E. F. accidentally mislaid, and has never been duly filed in the office for filing the same, according to the provisions of the statute passed in the third and fourth years of the reign of his late Majesty King William the Fourth.

3. That I am now desirous of filing the said certificate with an affidavit of the due execution thereof, and that I know of no legal objection to the filing of the said certificate other than that the said certificate was signed more than twelve months since.

4. That all the parties to the deed in the said certificate mentioned are now living, and that no change has taken place (so far as I am aware) in the ownership of the property in the said deed and said certificate mentioned.

Sworn, &c.

A. B.

—◆—

No. 10.

**Certificate of Plaintiff's or Defendant's Attorney for the Attendance of Witnesses before an Arbitrator.**

I, A. B., gentleman, attorney for the above-named plaintiff [or defendant], do hereby certify that this cause has been duly referred to the arbitration of —, esquire, of —, who has fixed —, the — day of —, 1861, for proceeding with such

reference at his chambers [*or* at the — Inn], &c., in the county of —, at — o'clock.

And I further certify that —, of —, in the county of —, shopkeeper; —, of —, in the county of —, weaver, &c., are necessary and material witnesses on behalf of the plaintiff [*or* defendant].

A. B.



### No. 11.

#### Certificate for the Examination, within the Jurisdiction, of Witnesses in a foreign Suit.

I, —, ambassador from — to the Court of her Britannic Majesty, do hereby certify that, in the Court of —, holden at —, in —, there is now pending a certain civil suit or matter between — of the one part and — of the other part.

And I hereby further certify that the said Court of — is a Court of competent jurisdiction, having, according to the laws of —, power and authority to hear and determine the said suit or matter.

And I hereby further certify that such Court is desirous to obtain the testimony of —, now residing at —, such testimony being necessary and material in the due determination of the said suit or matter.

(Signed)

—  
Ambassador, &c.



### No. 12.

#### Petition to sue by Prochein Amy.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

To the Right Honourable Sir — Knight, Lord Chief Justice [*or* Baron] of her Majesty's Court of —, and the rest of the Justices [*or* Barons] of the said Court.

The humble petition of A. B., the plaintiff in this suit, an infant, under the age of twenty-one years,

Showeth,—

That your petitioner has, as he is advised, a good cause of action against the said C. D. for the price and value of work done and materials for the same provided by your petitioner for the said C. D. at his request [*or otherwise describe shortly the cause of action*], and that your petitioner has lately commenced an

action against the said C. D. in this Honourable Court for the same. But in regard to your petitioner being an infant under the age of twenty-one years, to wit, of the age of — years,

Your petitioner therefore humbly prays your Lordships [or in *Exchequer* "your Honours"] to admit him to prosecute the said action by E. F., of —, tailor, your petitioner's next friend.

And your petitioner will ever pray.

A. B.

Witness.



### No. 13.

#### Consent of Prochein Amy to sue on behalf of Infant.

I hereby consent and agree that the above-named A. B. shall be at liberty to prosecute this action by me as his next friend according to the prayer of the above petition. Witness my hand, this — day of —, 1861.

E. F.

Witness.



### No. 14.

#### Affidavit verifying Signatures attached to Petition and Consent.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, G. H., clerk to I. K., of —, gentleman, attorney in this action for the above-named plaintiff, make oath and say—

1. That A. B., the above-named plaintiff, did on the — day of — instant, duly sign the petition hereunto annexed in my presence.

2. That E. F., the person mentioned in the prayer of the said petition, did also in my presence duly sign the consent to the said petition annexed as next friend of the plaintiff herein.

G. H.

Sworn, &c.



## No. 15.

## Petition to sue in Formâ Pauperis.

*If before action brought.*

In the Court of —.

To the Right Honourable Sir — —, Lord Chief Justice  
[or Baron] of her Majesty's Court of —.

The humble petition of A. B., of —

Sheweth,—

That C. D., of —, is justly and truly indebted to your petitioner in the sum of £ — for [as in the proposed declaration], and your petitioner [hath not yet commenced an action against him for the same, being unable to commence or carry on such action on account of his poverty].

Your petitioner therefore humbly prays your Lordship that he may be admitted to prosecute his said action in formâ pauperis, and that —, esquire, may be assigned to him as his counsel, and —, gentleman, as his attorney to prosecute the said suit.

And your petitioner will ever pray, &amp;c.

A. B.

—  
*If the action has already been commenced, the petition must be varied by placing these words between the brackets:—*

— “hath commenced an action against him for the same, but finds himself unable to carry on the said cause on account of his extreme poverty.”

## No. 16.

## Affidavit of Poverty.

In the Court of —.

A. B., plaintiff,

v.

C. D., defendant.

*[Or if no action has been commenced no title must be inserted.]*

I, A. B., of —, make oath and say—

That I am not worth 5*l.* in the world, save and except my wearing apparel, and the matter in question in this cause [or, if no action has been commenced, matters in question between myself and C. D., referred to in the petition hereto annexed, marked “A.”]

A. B.

Sworn, &amp;c.

## No. 17.

Affidavit of the Truth of the Case submitted to  
Counsel.

In the Court of —.

A. B., plaintiff,

v.

C. D., defendant.

*[Or if no action has been commenced, no title must be inserted.]*

I, A. B., of —, make oath and say—

1. That the case hereto annexed, marked A., contains a full and true statement of all the material facts relating to the matters in question in this cause [or, if no action has been commenced, between myself and the said C. D., and in respect of which I am desirous of bringing an action in formâ pauperis against the said C. D.] to the best of my knowledge and belief.

2. That the said case was, on the — day of —, 1861, laid before —, esquire, barrister-at-law, for his opinion thereon, and that his opinion thereon is written at the end of the said case.

A. B.

Sworn, &amp;c.

## No. 18.

Form of Affidavit for Order for leave to proceed as if  
Writ of Summons had been personally served upon  
the Defendant.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, E. F., of —, in the county of — —, make oath and say—

1. That on —, the — day of — last, I was directed by G. H., of — —, attorney for the above-named plaintiff, to serve the above-named defendant personally with a copy of a writ of summons which appeared to have been issued out of this Honourable Court, dated, &c., against the said defendant, at the suit of the said plaintiff, and a true copy whereof, with the memorandums and indorsements thereupon made, is hereunto annexed marked "A."

2. That being so directed, I did accordingly, on the — day of — last, attend at the defendant's said residence, situate at —, in the county of —, for the purpose of serving the said copy writ, and upon my inquiring after the said defendant was informed then and there, by a person whom I verily believe to be the [wife] of the said defendant, that he the said defendant was not at home,

and that she the said person could not tell me when he would be at home, and could not give me any appointment for meeting the said defendant; whereupon I told the said person that I called for the purpose of serving the said defendant with a writ, at the suit of A. B. the said plaintiff, and would call again for the same purpose on — the — day of — next, at — o'clock in the afternoon, and desired her to inform the said defendant thereof, which she promised to do.

3. That I did accordingly call at the said residence of the defendant on —, the — day of —, at — o'clock in the afternoon, and then and there saw the same person as I had previously seen, who informed me that the defendant was not then at home, and that she did not know when he would be at home, or when and where I could see him.

4. That I thereupon left with the said person a true copy of the writ issued herein, and desired her to give it to the said defendant when she next saw him, which she promised to do, and I told her the said person that I would call again on —, the — day of — next, at — o'clock in the —noon, to serve the said defendant with the said writ, and to inquire what she had done with the copy writ so left with her by me.

5. That I did accordingly call at the said defendant's said residence on —, the — day of —, and then and there again saw the said person, who informed me that the defendant was not then at home, and that she did not know when the said defendant would be at home, and who also informed me that she had that morning given the defendant the copy writ I had left with her, and that he the defendant said he would attend to it.

6. That for the reasons aforesaid I verily believe that the said writ has come to the knowledge of the defendant, and that he wilfully evades service of the same.

7. That I have this day searched in the book kept for entering appearances in this Honourable Court, and that the said defendant hath not appeared herein.

E. F.

Sworn, &c.



### No. 19.

## Affidavits for leave to proceed against a British Subject living out of the Jurisdiction.

### 1. *As to Service of the Writ.*

In the Court of — .

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, E. F., of —, make oath and say—

1. That I did on the — day of —, A.D. —, personally serve C. D., the above-named defendant, he then being out of

the jurisdiction of this Honourable Court, at —, in —, with a true copy of a writ of summons, which appeared to me to have been regularly issued out of this Honourable Court, dated the — day of —, A.D. —, against the said defendant, at the suit of the above-named plaintiff, a true copy whereof, with the memorandum thereto annexed, and the endorsements thereupon made, is hereunto annexed, marked "A."

2. That at the time of the said service the said defendant's residence was at — aforesaid, and that he hath hitherto resided and still resides there, as I am informed and verily believe.

3. That — is distant from England — miles or thereabouts.

Sworn, &c.

E. F.

2. *Affidavit of Cause of Action, &c.*

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of —, the plaintiff in this action, make oath and say:—

1. That the above-named defendant is a British subject.

2. That the said defendant is justly and truly indebted to me in the sum of — [*for goods sold and delivered by me to the said defendant*], and that the said debt was incurred within the jurisdiction of this Honourable Court, at —, in the county of —.

3. That the said defendant is now residing at —, in the kingdom of —, and [*here state facts showing that defendant is residing abroad, in order to defeat and delay his creditors, or that he wilfully neglects to appear to the writ*].

Sworn, &c.

A. B.

3. [*Must be an Affidavit of search for appearance and non-appearance by the defendant.*]

No. 20.

Affidavit for leave to appear and defend where the Action is brought upon a Bill of Exchange or Promissory Note.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, C. D., of —, in the county of —, the above-named defendant, make oath and say:—

1. That I was served with a copy of the writ hereunto annexed marked "A," on — the — day of — instant.

K

2. That this action is brought by the above-named plaintiff against me as [*acceptor*] of a certain bill of exchange indorsed on the said copy writ.

3. That [*here state the special defence*].

4. That I am advised and believe that I have a good defence to this action on the merits.

C. D.

Sworn, &c.

—◆—  
No. 21.

Affidavit for leave to appear and defend as Landlord,  
in an Action of Ejectment.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, E. F., of —, in the county of —, make oath and say, that I am in possession of the land and premises sought to be recovered in this action by the above-named defendant, my tenant.

E. F.

Sworn, &c.

—◆—  
No. 23.

Affidavit for Order for leave to sign Judgment in  
Ejectment, in the event of non-payment of Rent.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

We, A. B., the above-named plaintiff, and E. F., of —, clerk to Messrs. —, severally make oath and say; and first I, the said E. F., for myself say as follows:—

1. That on — last, and for a long time previously, the land and premises for the recovery of the possession of which this action is brought, and which were lately in the occupation of the defendant herein, was and were wholly vacant, deserted and unoccupied, and that there was no tenant in the actual possession thereof, and I therefore did on the day and year aforesaid affix a true copy of the writ in ejectment by which this action was commenced upon —, being a notorious place of the said lands and premises.

2. That a true copy of the said writ in ejectment is hereunto annexed, marked "A."

And I, the said A. B., for myself say:—

3. That before and at the time the said copy writ was so affixed as aforesaid, there was due to me the sum of £ —, being one half year's rent for the said land and premises, under and by virtue of a certain indenture made and dated the — day of — 18 —, and that at the time of so affixing the said writ, no sufficient distress was to be found on the said land countervailing the said arrears of rent then due.

4. That at the time of affixing the said copy writ as aforesaid, and at the time I claim by the said writ to have been entitled to the possession of the said land, I had power to re-enter upon the said land by virtue of the said indenture, for the non-payment of the rent so in arrear as aforesaid.

Sworn, &c.

A. B.,  
E. F.



No. 24.

**Affidavit for an Order for a Capias to issue to hold Defendant to Bail.**

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of —, in the county of —, the above-named plaintiff, make oath and say:—

1. That C. D., the above-named defendant, is justly and truly indebted to me in the sum of — pounds sterling for, &c.

2. That Mr. —, of —, in the county of —, in a conversation which I had with him on — the — day of —, informed me that the defendant had made arrangements immediately to leave England for America, and that he the said defendant had employed him, the said Mr. —, forthwith to sell off his goods and furniture, in order that he the said defendant might forthwith proceed on his said voyage, which information I verily believe to be true.

3. That for the reason aforesaid I verily believe that the said defendant is about to quit England, unless he be forthwith apprehended.

4. That I have caused a writ of summons to be issued out of this Honourable Court against the above-named defendant for the recovery of the amount aforesaid.

Sworn, &c.

A. B.



## No. 25.

*Bail Piece in the Queen's Bench.*

In the Queen's Bench.

The — day of —, 1861.

— }  
 to } C. D. is delivered to bail upon a *cepi corpus* [or C. D.  
 wit. } having been arrested is delivered to bail] to —.

Bail for £ —, by order  
 of Sir —, Knight.

J. K.,

attorney for defendant.

E. F.

G. H.

At the suit of A. B.

Taken and acknowledged conditionally  
 at my chambers, Rolls' Garden, Chan-  
 cery Lane, this — day of —,  
 1861.

*Bail Piece in the Common Pleas.*

In the Common Pleas.

The — day of —, 1861.

— }  
 to } Writ of *capias* against C. D., late of —, in the  
 wit. } county of —, at the suit of A. B., for £ —, dated  
 the — day of —, 1861.

Bail for £ —, by order of the  
 Hon. Mr. Justice —.

J. K.,

defendant's attorney.

The bail are E. F., of —,  
 and G. H., of —, each of  
 whom is bound in £ —.

Taken and acknowledged condi-  
 tionally at my chambers, Rolls'  
 Garden, Chancery Lane, this  
 — day of —, 1861.

Before me,

*Bail Piece in the Exchequer.*

In the Exchequer of Pleas.

The — day of —, 1861.

— }  
 to } C. D. [having been arrested] is delivered to bail  
 wit. } upon a *cepi corpus* to E. F., of —, and G. H., of  
 —, at the suit of A. B.

Bail for £ —, by order of  
 the Hon. Baron —.

J. K.,

defendant's attorney.

E. F.

G. H.

[Signatures of the bail.]

Taken and acknowledged condi-  
 tionally at my chambers, Rolls'  
 Garden, Chancery Lane, this  
 — day of —, 1861.

Before me,

## No. 26.

## Notice to Plaintiff of Bail having been put in.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

Take notice that special bail was this day put in in this cause for the defendant before the Honourable Mr. [Justice or Baron] —, at his chambers, in Rolls' Garden, Chancery Lane, London; and the names, additions and particulars of and relating to such bail are as follow:—

The said bail are E. F., of No. —, — street, —, in the county of —, and who is a housekeeper there, and G. H., of No. —, — street, —, in the county of —, and who is a housekeeper there, and who is also a freeholder of a messuage and tenement in the parish of —, in the county of —, and which is now in the possession of, &c. [describing the tenancy], and the said E. F. hath resided continually, for upwards of the last six months, at No. —, — street aforesaid; and the said G. H., in the month of — last, did reside at No. —, — street, in the county of —, and in that month he removed from thence to No. —, — street, in the town of —, in the county of —, where he resided continually until the — day of —, when he removed to — street, in the county of — aforesaid, where he has ever since resided. [And further take notice that the said E. F. and G. H. have duly made and sworn to the affidavits which accompany this notice for your perusal, and copies of which affidavits are herewith left.]

Dated, &amp;c.

To Mr. L. M.,  
plaintiff's attorney.

Yours, &amp;c.,

N. O., of —,  
defendant's attorney.

## No. 26 (a).

Take notice that special bail was this day put in in this cause for the defendant before the Honourable Mr. [Justice or Baron] —, at his chambers, in Rolls' Garden, Chancery Lane, London, and that at the time of putting in such special bail, affidavits of the sufficiency thereof were duly sworn and filed herein, copies of which affidavits accompany this notice.

## No. 26 (b).

## Affidavit of Justification of Bail.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, B. B., one of the bail for the above-named defendant, make oath and say:—

1. That I am a housekeeper [or freeholder, as the case may be], residing at [describing particularly the street or place and number if any].

2. That I am worth property to the amount of £— [the amount required by the practice of the Courts] over and above what will pay all my just debts [if bail in any other action add "and every other sum for which I am now bail,"] and that I am not bail for any defendant except in this action [or if bail 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 J. K., in the Court of —, for the sum of —" specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail].

3. That my property to the amount of the said sum of £— [if bail in any other action or actions here add "and of all other sums for which I am now bail as aforesaid"] consists of [here specify the nature and value of the property in respect of which the bail proposes to justify 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.]

4. And I, this deponent, further make oath and say, that I have for the last six months resided at — [describing the place or places of such residences]. [Reg. Gen. H. T. 1853, reg. 98.]

B. B.

Sworn, &c.



No. 27.

### Exception to Bail.

In the Court of —.

A. B., plaintiff,

v.

C. D., defendant.

Take notice that I have excepted against the bail [or G. H., one of the bail] put in in this cause for the defendant.

Dated, &c.

Yours, &c.,

L. M.,

plaintiff's attorney [or agent].

To Mr. N. O.,

defendant's attorney [or agent].



**Exception to Bail where Defendant's Bail have made Affidavits of Justification pursuant to the Rule of H. T. 1853.**

In the Court of —.

A. B., plaintiff,

v.

C. D., defendant.

Take notice that I have excepted and do except and object to the bail or intended bail whereof notice has been given in this cause, and do hereby require them to justify in person before a Judge sitting in Chambers, in Rolls' Garden, Chancery Lane, London, notwithstanding the affidavits made by them, and which accompanied the notice of bail served in this cause.

Yours, &c.,

L. M.,

plaintiff's attorney [or agent].

To Mr. N. O.,

defendant's attorney [or agent].



No. 28.

**Notice of Justification of Bail.**

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

Take notice, that E. F. and G. H., the bail already put in in this cause for the defendant, and of whom you have had notice, will, at the hour of — o'clock in the fore noon, on — next, justify themselves [if country bail here say "by affidavit"] before the Honourable Mr. Justice [or Baron] —, or such other Judge as shall be then sitting in chambers in Rolls Garden, Chancery Lane, London, as good and sufficient bail for the said defendant in this action. Dated, &c.

To Mr. L. M.,  
plaintiff's attorney  
[or agent].

N. O.,  
defendant's attorney  
[or agent].



No. 29.

**Affidavit of Justification in a Country Cause.**

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, E. F., one of the bail for the above-named defendant, make oath and say:—

1. That I am a housekeeper [*or freeholder*], residing at No. — Street, in the parish of —, in the county of —.

2. That I am worth property to the amount of £ — over and above what will pay all my just debts [and every other sum for which I am now bail].

3. [That I am not bail for any defendant except in this action] *or* [That beside being bail in this action I am only bail for Q. R. at the suit of S. T., in the Court of —, in the sum of £ —].

4. That my property to the amount of the said sum of £ — [and of all other sums for which I am now bail as aforesaid] consists of *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 £ —, &c., &c.,* and that I have for the last six months resided at —.

E. F.

Sworn, &amp;c.

—◆—  
No. 30.

Notice of intention to put in and justify Bail at the same time.

In the Court of —.

Between { A. B., plaintiff,  
                  and  
                  C. D., defendant.

Take notice that E. F. — and G. H. —, will, on the — day of — next be put in as special bail for the defendant in this cause, and will on the same day, at the hour of — of the clock in the fore noon, justify themselves before the Honourable Mr. Justice [*or Baron*] —, or such other Judge as shall be then sitting at his chambers in Rolls' Garden, Chancery Lane, London, as good and sufficient bail for the defendant in this cause. And take further notice that [*here describe the status of the bail, and their abodes for the last six months*]. Dated, &c.

Yours, &amp;c.,

To Mr. L. M.,  
plaintiff's attorney  
[*or agent*].

N. O.,  
defendant's attorney  
[*or agent*].

—◆—  
No. 31.

Entry of Exoneretur, on render of Defendant.

The within-named defendant, having surrendered himself [*or been rendered*] in discharge of his bail, was thereupon committed to the custody of the keeper of the Queen's Prison, there to remain until, &c.

Dated, &amp;c.

[*Judge's signature.*]

## No. 32.

**Form of Affidavit for Fiat for a Writ of Habeas Corpus ad Testificandum, where witness is in civil custody.**

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of —, the above-named plaintiff, make oath and say:—

1. That this cause is set down for trial at the sittings after this present term, to be holden at the Guildhall, London.

2. That X. Y., now a prisoner for debt in the custody of the keeper of the Queen's Prison [*or* in the county gaol of —], is a material and necessary witness for me on the trial of this cause.

3. That I am advised and verily believe that I cannot safely proceed to the trial of this cause without the testimony of the said X. Y.

4. That the said X. Y. is ready and willing to attend as a witness at the trial of the said cause.

A. B.

Sworn, &c.



## No. 33.

The affidavit to obtain an order of the nature of a Habeas Corpus ad test. for the attendance upon the trial of a civil action of a witness in criminal custody may be the same as that last given (No. 32), with a correct description of the place and nature of the prisoner's confinement.



## No. 34.

No affidavit now necessary.



## No. 35.

**Affidavit of Plaintiff upon which an application may be made to attach Debts, under C. L. P. Act, 1854.**

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of —, in the parish of —, in the county of —, the above-named plaintiff, make oath and say:—

1. That I, on the — day of — last, recovered a judgment

K 5

in her Majesty's Court of — in this action against the above-named defendant, for the sum of £ —.

2. That the said judgment is still wholly unsatisfied [*or is still unsatisfied to the sum of £ —, part of the said judgment so recovered as aforesaid*].

3. That M. N., of —, gentleman, is indebted to the said defendant.

4. That the said M. N. is within the jurisdiction of this Honourable Court.

A. B.

Sworn, &c.

—◆—  
No. 36.

**Affidavit on which to ground an application to charge Defendant's interest in Public Stock or Shares.**

In the Court of —.

Between { A. B., plaintiff,  
                  and  
                  C. D., defendant.

I, A. B., of —, the above-named plaintiff, make oath and say:—

1. That the above-named defendant is justly and truly indebted unto me in the sum of £ —, upon and by virtue of a judgment obtained herein, on the — day of —, 1861, for the sum of £ — (*debt and costs*).

2. That there is now standing in the books of the Governor and Company of the Bank of England, in the name of the said defendant, [*or in the names of E. F. and G. H., in trust for the said defendant*] the sum of £ —, new £3 per cent. annuities.

3. That I am informed and verily believe that the said defendant is beneficially interested in the said sum of stock [*or to the dividends therefrom accruing*] for his own use and benefit.

A. B.

Sworn, &c.

—◆—  
No. 37.

**Affidavit for Order to charge Defendant in Execution.**

In the Court of —.

Between { A. B., plaintiff,  
                  and  
                  C. D., defendant.

I, X. Y., of —, the attorney in this action for the above-named plaintiff, make oath and say:—

1. That C. D., the above-named defendant, is now a prisoner in the custody of the keeper of the Queen's Prison.

2. That final judgment against the said defendant was signed herein on the — day of —, 1861, by the said plaintiff, for £ —.

3. That the said judgment remains unsatisfied, and that the said sum of £ — and interest thereon remain due and unpaid.

4. That the said plaintiff is desirous of having the said defendant charged in execution for such sum and interest thereon.  
X. Y.

Sworn, &c.



No. 38.

**Affidavit in support of application to enter Satisfaction in the Senior Master's Book.**

In the Common Pleas.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, X. Y., of —, gentleman, attorney for the above-named plaintiff, make oath and say:—

1. That the debt and costs recovered herein for which judgment was signed against the defendant on the — day of —, 1861, and a memorandum of the said judgment registered with the Senior Master of this Honourable Court, to affect the lands of the said defendant, have been fully paid and satisfied.

2. And I further say that I did on the — day of —, 1861, duly sign the consent indorsed on the summons hereto annexed marked "A." for a memorandum of satisfaction to be entered upon the said registry, and that the words X. Y. are in my hand-writing.

X. Y.

Sworn, &c.



No. 39.

**Affidavit in support of application to sign Judgment on a Warrant of Attorney, more than One Year old.**

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

We, A. B., of —, —, the above-named plaintiff, E. F., of —, gentleman, attorney for the above-named plaintiff, and G. H., of —, clerk to the said E. F., severally make oath and say:

And first I, the said A. B., for myself say:—

1. That before the execution of the warrant of attorney hereinafter mentioned, C. D., the above-mentioned defendant, was justly and truly indebted unto me, the said A. B., in £ —, for

goods sold and delivered by me to the said C. D. [*here state concisely the debt.*]

2. That the said C. D. being so indebted to me, the said C. D., on — day of — in the year of our Lord —, after the said debt had become payable, gave unto me his bond in the sum of £ —, conditioned for the payment of the said £ —, upon a day [*or at certain time*] therein particularly mentioned, and now elapsed; and also as a further security for the said debt, the said C. D. duly executed unto me, the said A. B., his warrant of attorney aforesaid, by which the said C. D. authorized certain attorneys therein mentioned to appear for him in this Honourable Court, and to receive for him a declaration in an action for £ — at my suit, and thereupon to confess the said action or else to suffer judgment by *nil dicet* or otherwise to pass against him in the same action, and to be thereupon forthwith entered up against him of record in this Honourable Court, the said sum of £ —, besides costs of suit [*let this agree with the warrant*], and upon which said warrant of attorney was indorsed a certain defeasance, whereby it was agreed that the said £ — should be paid with interest on the days and in manner following, that is to say, £ — on, &c. [*to follow the defeasance*], and that judgment should not be entered up in pursuance of the said warrant of attorney, until —, and that no execution should be sued out or other proceedings taken upon the judgment so to be entered up, until [*&c.—proceed as in the defeasance*].

3. That the said C. D. hath not paid to me, or to any person for me or on my behalf, the said £ —, but that the same, together with interest thereon, making altogether £ —, is still due and owing from the said C. D. unto me.

4. And I, the said E. F., for myself say, that I was present on the — day of —, 1861, and did then see the said C. D. duly execute the said warrant of attorney, and that the said C. D. did then sign, seal, and as his act and deed deliver, the said warrant of attorney in my presence, and that the name C. D. at the foot thereof is of the proper handwriting of the said C. D., and that the name E. F. subscribed to the said warrant of attorney is my andwriting.

5. And I, the said G. H., for myself say:—That I personally know the said C. D., and I verily believe the said C. D. is now living, I, the said G. H., having seen him alive [*and conversed with him*] on — [*or “having received on — a letter from him in his own handwriting, dated the — day of —, 1861”*].

Sworn, &c.

A. B.

E. F.

G. H.

—  
No. 40.

### Form of a Newspaper Recognizance.

[The form must be obtained at the Inland Revenue Office, at Somerset House, no written or privately printed form being allowed.]

## No. 41.

**Affidavit to remove a Plaintiff by Certiorari from a County Court into a Superior Court.**

In the Court of —.

In the matter of a plaintiff between  
A. B. and C. D. in the County  
Court of —, holden at —.

I, C. D., of —, make oath and say:—

1. That, on the — day of — last, I was served with a summons issued out of the County Court of —, held at —, of which summons the following is a copy [*copy summons*].

2. That the following is a copy of the particulars of demand annexed to the said summons [*copy particulars*].

3. That I am the said C. D. mentioned and referred to in the said summons and particulars.

4. That this said action is brought against me for the purpose of recovering the said sum of £— for [*here state the cause of action*].

5. That I am advised and verily believe that several difficult questions of law are likely to arise on the trial of this cause, and amongst others the following [*state them*].

6. That I am advised and verily believe that I have a good defence to the said action on the merits.

C. D.

Sworn, &amp;c.

## No. 41 (a).

**Affidavit to remove an Action of Replevin from a County Court.**

In the Court of —.

I, A. B., make oath and say:—

1. That, on the — day of — last, I was served with a summons issued out of the County Court of —, holden at —, and a copy of which summons is hereunto annexed, marked "A."

2. That the paper writing hereto annexed, marked "B." is a true copy of the particulars of demand annexed to such summons.

3. That the title to a certain close, called —, is really and bonâ fide in question in the said action.

4. That I distrained the said goods for the purpose of trying the question whether I am entitled to the said close which I claim as my soil and freehold, and did so at the time of the making of the said distress.

5. That the said close was conveyed to me [*here briefly describe the title*].

6. That a question of title is bonâ fide the question to be tried in this cause.

Sworn, &amp;c.

A. B.

## No. 42.

Form of Affidavit to obtain a Certiorari on 19 Geo. III.  
c. 70, s. 4, for having Execution upon a Judgment of an Inferior Court.

In the Court of —.

I, X. Y., of —, gentleman, attorney for A. B. in a suit hereinafter mentioned, and I, M. N., of —, —, severally make oath and say:—

1. And first I, X. Y., for myself say:—That on or about — last past, a suit was commenced by the said A. B. against C. D. in the Court of —, the same being a Court of Record, for [*state the nature of the claim*], and such proceedings were had in the said suit that afterwards, on — last past, final judgment was given and entered for the said A. B. against the said C. D. for £—, which is still in force and unsatisfied.

2. That I thereupon sued out an attachment against the person of the said C. D., and also a warrant against the goods and chattels founded on the said judgment, and for the purposes of having execution thereon, and delivered the same to the other deponent M. N. to execute.

3. And I, the same M. N., for myself say:—That upon the said attachment and warrant being by the said other deponent delivered unto me, the said M. N., to be executed, I made diligent search and inquiry after the person and effects of the said C. D., but that neither the person of the said C. D., nor any effects to him belonging, were to be found within the jurisdiction of the same Court.

4. And I, X. Y., further say that I have heard and verily believe that the said C. D. is now residing [*or that effects of the said C. D. are now to be found*] in the county of —.

X. Y.  
M. N.

Sworn, &c.



## No. 42 (a).

Affidavit for obtaining an Order to remove a Judgment of an Inferior Court of Record, under 1 & 2 Vict. c. 110, s. 22.

In the Court of —.

I, P. A., of —, gentleman, make oath and say:—

1. That I have been employed by A. B. to make application on behalf of the said A. B. for the removal into this Honourable Court of a judgment obtained by the said A. B. against one C. D. in the Court of —, and by which judgment the said A. B. recovered against the said C. D. £—.

2. That the said judgment is in full force, and wholly unsatisfied.

3. That the said Court of — is an inferior Court of Record, and that on the — day of —, 1861, and at the time of recovering the said judgment, a barrister of not less than seven years' standing acted therein as Judge [or "assessor," or "assistant,"] in the trial of causes therein.

P. A.

Sworn, &c.

—  
No. 42 (b).

Affidavit to remove a Judgment by Certiorari from a County Court—*vide* 19 & 20 Vict. c. 108, s. 49.

In the Matter of a Plaintiff in the County Court of —,  
holden at —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of —, in the county of —, the above-named plaintiff, make oath and say:—

1. That on the — day of —, 1861, I recovered judgment herein against the above-named defendant for the sum of £— debt and £— costs, and that such judgment remains wholly due and unsatisfied.

2. That the said defendant has no goods or chattels within the jurisdiction of the said County Court which can be conveniently taken to satisfy such judgment.

A. B.

Sworn, &c.

—  
No. 42 (c).

Affidavit to obtain leave to issue Execution on a Judgment in the Common Pleas at Lancaster, under 4 & 5 Will. IV. c. 62, s. 31.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, E. F., of —, in the county of —, clerk to P. A. of the same place, attorney for the above-named plaintiff in this cause, make oath and say:—

1. That on the — day of —, the above-named plaintiff obtained a judgment against the above-named defendant in the Court of Common Pleas at Lancaster for £—, and such judgment still remains in force and unsatisfied.

2. That at the time of the commencement of the action in which judgment was so recovered [*or*, at the time when such judgment was so recovered], the said defendant was a resident within the said county of Lancaster, and then had divers goods and chattels within the jurisdiction of the said Court.

3. That he has since removed all his said goods and chattels out of the said jurisdiction of the said Court [*or*, that he has since removed his person out of the jurisdiction of the said Court], as I am informed and believe, for the purpose of evading payment of the said £——.

E. C.

Sworn, &amp;c.

*Certificate in such case of the Deputy Prothonotary.*

Court of Common Pleas at Lancaster.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, J. F., Deputy Prothonotary of the said Court, do hereby certify that final judgment was signed in this cause on the —— day of ——, 1861, for £——.

Dated, &amp;c.

J. F.

*Affidavit verifying Signature of Prothonotary.*

I, T. C., of —— in the county of ——, make oath and say:—  
That I did see the above-named J. F. set and subscribe his name to the above-written certificate.

F. C.

Sworn, &amp;c.

No. 42 (d).

**Affidavit in support of an application for an Order for a Subpoena to compel the attendance of a Witness from Ireland or Scotland.**

In the Court of ——.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, E. F., of ——, attorney in this action for the above-named plaintiff [*or* defendant], make oath and say:—

1. That issue has been joined in this action, and the same is now pending for trial at ——.

2. That G. H., who is at present residing at ——, in that part of the United Kingdom of Great Britain and Ireland called Scotland [*or* Ireland], is a material and necessary witness for the plaintiff [*or* defendant] on the trial of this cause.

3. That it is material for the interests of the plaintiff [*or* de-

fendant] that the said G. H. should personally attend the trial of this cause, and be examined as a witness thereat, because [here state the particular reasons for which the witness is required, and the general nature of the evidence he will give].

E. F.

Sworn, &amp;c.

## No. 43.

## Form of Affidavit of Service and Non-attendance of Summons.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

We G. H., of —, clerk to Messrs. —, attorneys for the above-named plaintiff, and E. F., of —, process server, respectively make oath and say :

And first I, the said E. F., for myself say :—

1. That I duly served the above-named defendant C. D. with a true copy of the summons hereunto annexed marked "A," on Monday, the — day of —, 1861, by leaving the same with a clerk of the said defendant, at the office of the said defendant, before seven o'clock [or on Saturday before two o'clock] in the afternoon of the same day.

And I, the said G. H., for myself say :—

2. That I duly attended at the chambers of the Hon. Mr. Justice —, in Rolls' Garden, Chancery Lane, from eleven o'clock in the forenoon of —, the — day of —, 1861, being the time of the return of the said summons, until half-past eleven o'clock in the forenoon of the said day, but that the said defendant did not appear thereto, nor did any other person appear thereto on behalf of the said defendant.

E. F.

G. H.

Sworn, &amp;c.

## No. 44.

## Common Affidavit to change the Venue.

In the Court of —.

A. B., plaintiff,  
v.  
C. D., defendant.

I, C. D., of —, the above-named defendant [or attorney in this action for the above-named defendant], make oath and say :—

1. That the plaintiff's cause of action (if any) arose in the

county of Y. [*the county to which it is proposed to change the venue*], and not in the county of M. [*the venue already laid*], or elsewhere out of the county of Y.

C. D.

Sworn, &amp;c.

—◆—

No. 45.

Suggestion of Change of Place of Trial to be entered  
on the Record.

And now on — the — day of —, 1861, it is suggested and manifestly appears to the Court here, that by an order of the Hon. Mr. Justice —, made in this action, on — the — day of —, 1861, it was ordered that the trial of this action should take place in the county of —, and not in the county of —: Therefore let a jury of the said county of — come accordingly.

—◆—

No. 46.

Affidavit on which to ground Application for the  
Examination of a sick, &c. Witness.

In the Court of —.

Between { A. B., plaintiff,  
                  and  
                  C. D., defendant.

I, A. B., of —, —, the above-named plaintiff, make oath and say:—

1. That this action is now depending in this Honourable Court, and is brought for [*here state shortly the general nature of the action*], and that issue was joined herein on the — day of — last past, and notice of trial given for the sittings — to be holden at —.

2. That J. K. of —, —, is a material and necessary witness for me in the said cause, as I am advised and verily believe, and that I cannot safely proceed to the trial thereof without the testimony of the said J. K.

3. That the said J. K. is about to leave this kingdom in a few days for —, in parts beyond the seas, and is not expected to return during the next — months, as he hath informed me, and as I verily believe, [*or, is dangerously ill and not expected to recover*], [*or, cannot possibly attend the trial of this cause, in regard that the said J. K., &c.*]

A. B.

Sworn, &amp;c.

## No. 47.

## Special Order for Consolidation of Causes.

Upon hearing the attorneys or agents on both sides, and by consent, I do order

That all further proceedings in these causes be stayed until the trial of —, the defendants submitting to be bound and concluded by the verdict in the said cause (provided the same be tried to the satisfaction of the presiding Judge), upon the following conditions:—

That, if the defendant in the cause to be tried pay money into Court, or if he pay money under a Judge's order to stay proceedings, the said defendants shall, within ten days after such payment as aforesaid, respectively pay into Court under this order the like sum, or such proportion as the same will bear to the sum assured by them respectively; and in that event the plaintiff shall be at liberty to take such money out of Court, and if he elect to receive such money in satisfaction of his claim in the action wherein the money is paid, then he may proceed to tax his costs at any time, either before or after the verdict in the said cause so to be tried as aforesaid; but if the defendants, or either of them, neglect to pay such sum, then the plaintiff shall be at liberty to file a declaration, and sign judgment against such defendant or defendants by default, and tax his costs, and issue execution for the amount so neglected to be paid as aforesaid, and the costs so to be taxed as aforesaid, and to levy the same, together with the costs and expenses of such execution.

That if the plaintiff, on the trial of the cause so to be tried as aforesaid, recover more than the sum so paid into Court by the defendant in that action, and if the defendants in the several other actions neglect to pay the plaintiff in proportion as aforesaid, the difference between the money paid into Court by them respectively, or levied under an execution as aforesaid, and the sum so recovered as aforesaid, the plaintiff shall be at liberty to sign judgment for such proportionate difference, and levy the same, together with the costs of judgment, execution, and all other expenses, notwithstanding any former judgment or execution that may have been signed or executed against the said defendant or defendants as aforesaid.

That if the defendant in the cause so to be tried as aforesaid do not pay any money into Court, and if the verdict be found for the plaintiff, then the defendants in the said other actions shall pay to the plaintiff the amount assured by them respectively, or such proportion thereof as the verdict recovered bears to the sum assured by the said defendant in the action to be tried as aforesaid, together with the costs to be taxed, within ten days after such taxation.

That if the amount be not so paid by the defendants, or either of them, as last aforesaid, then the plaintiff shall be at liberty to

file a declaration, and sign judgment by default, for the amount in the action in which the money is neglected to be paid, and to issue execution for the same, and levy the costs of judgment and execution on the usual terms.

Dated this — day of —, 186—.

—  
No. 48.

Affidavit for Costs where Sum recovered is  
under £50.

1. *Where the Plaintiff and Defendant reside more than Twenty Miles apart.*

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of — street, in the parish of —, in the county of —, the above-named plaintiff, make oath, and say:—

1. That this action was commenced by a writ of summons issued out of this Honourable Court, on the — day of —, 1861.

2. That issue was joined herein on —.

3. That the said issue was tried on the — day of — last, before —, at —, when a verdict was found for me for £—.

4. That at the time of the commencement of this action I dwelt at No. —, — street, in the parish of —, in the county of —, and that the defendant at the time of the commencement of this action dwelt at No. —, — street, in the parish of —, in the county of —, and that the said respective dwellings then were, and still are, more than twenty miles apart from each other.

5. That at the time of the commencement of this action, I, as aforesaid, dwelt more than twenty miles from the defendant.

A. B.

Sworn, &c.  
—

2. *Where no material Point of the Cause of Action arose within the Jurisdiction where the Defendant dwelt.*

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of —, the above-mentioned plaintiff, make oath and say:—

1. That this action was commenced by a writ of summons

issued out of this Honourable Court on the — day of —, 1861.

2. That I declared herein on — last [*state shortly the nature of the declaration*].

3. That the following is a copy of the particulars of my demand in the said action.

4. That the defendant pleaded the following pleas to the said declaration [*here abstract the pleas*].

5. That issue was joined on the said pleas on —.

6. That the said issues were tried on —, before —, at —, when a verdict was found for me for £—.

7. That, at the time of the commencement of this action, the defendant dwelt and carried on his business of a — at No. —, — Street, in the parish of —, in the county of —, and within the jurisdiction of the County Court of —, holden at —.

8. That the cause of action in this action did not arise wholly or in some or any material point within the jurisdiction of the said County Court.

9. That the goods, for the recovery of the price of which this action was brought, were sold and delivered at —, in the parish of —, in the county of —, and within the jurisdiction of the County Court of —.

A. B.

Sworn, &c.

—

3. *Where, in consequence of the Plaintiff's Claim being reduced below £50 by the Defendant's Set-off, the County Court had no Jurisdiction.*

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of —, in the parish of —, in the county of —, the above-named plaintiff, make oath and say:—

1. That this action was commenced by a writ of summons issued out of this Honourable Court on — the — day of —, 1861.

2. That the declaration in this action is for [*state declaration shortly*].

3. That the defendant pleaded to this action [*state pleadings and amount, &c., of set-off*].

4. That the following is a copy of my particulars of demand [*copy particulars*].

5. That the following is a copy of the defendant's particulars of set-off [*copy them*].

6. That this cause was tried on the — day of —, 1861, at —, before —, when a verdict was found for me for £—.

7. That the defendant proved the whole [*or part*] of his set-off

at the said trial, and accordingly for this, and no other reason, my demand in this action was reduced from the said £—— to the said £——.

8. That my claim and demand in this action was, at the time of the commencement thereof, for a greater sum than £50, viz., for the said £——.

A. B.

Sworn, &c.



No. 49.

Affidavit for Order for Security for Costs.

In the Court of ——.

Between { A. B., plaintiff,  
and  
C. D., defendant.

We, C. D., of ——, the above-named defendant, and E. E., of ——, gentleman, attorney to the said defendant, severally make oath and say :

And first, I, C. D., for myself say :—

1. That the residence of the above-named plaintiff is at ——, in the kingdom of ——, and that he the said plaintiff usually resides, and is now residing, there.

And I, E. F., for myself say :—

2. That an appearance has been duly entered in this action for the said defendant, and issue has not yet been joined herein.

3. That I, the said E. F., did, on the —— day of —— last, for and on behalf of the said defendant, demand of P. A., gentleman, attorney for the above-named plaintiff, security for costs in this action, but that the said P. A. refused to give any such security ; and thereupon I did, on the —— day of —— last, serve the said P. A. with a true copy of the summons hereunto annexed by delivering such copy to the said P. A. [or to a clerk or servant of the said P. A.] at his chambers [or house], &c., in ——.

C. D.

Sworn, &c.

E. F.



No. 50.

Affidavit for Discovery of Documents.

In the Court of ——.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, A. B., of ——, gentleman, the above-named plaintiff, make oath and say :—

1. That this action is brought to recover the sum of £——

due to me for certain large quantities of wheat sold by me to the defendant between the — day of — and the — day of —, in the year 1861.

2. That before, at the time of, and after, such sales of wheat as aforesaid, I wrote and sent several letters to the said defendant relating wholly or in part to such sales.

3. That I believe that in the ledger, journal and other account books of the said defendant, there are divers entries relating to the sales of such wheat, made by the said defendant and other persons in his employ.

4. That I am advised and verily believe that it is material and necessary for me, in order to prove my claim in this action and to prepare my case for trial, to have produced before me such letters, ledger, journal and other account books of the defendant, and that I shall derive material advantage from the production of the same.

5. That I verily believe that the documents aforesaid are in the possession, custody, power or control of the said defendant or of Messrs. —, his attornies in this action.

A. B.

Sworn, &c.



### No. 51.

**Affidavit of Stakeholder for an Order to require a third Person to appear and state the nature of his Claim.**

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, C. D., of —, —, the above-named defendant, make oath and say:—

1. That on or about the — day of — last past, the sum of 100*l.* was delivered by the above-named plaintiff to me, and deposited in my custody [*here mention the purpose for which the stake was deposited*], and that I still hold possession of the same.

2. That while I had the said sum of money in my possession, viz. on or about the — day of — last, I was served with the following notice by E. F. of — [*here copy notice*].

3. That in consequence of such notice I do not know to whom the said 100*l.* belongs, or to whom I should pay and deliver the same.

4. That this action was commenced on the — day of — last, and the above-named plaintiff declared herein against me on the — day of — last, in an action of [*state the nature of the action*], in respect of my not having delivered the said sum of money to the plaintiff.

5. That the declaration herein was delivered on the — day of — last, and that I have not pleaded thereto.

6. That I do not claim any interest whatever in the said 100*l.*, the subject-matter of this action.

7. That from the claim made as hereinbefore mentioned by E. F., I believe that the said E. F. will sue me, this deponent, for the said 100*l.*

8. That I do not in any manner collude with E. F. or the above-named plaintiff.

9. That I am ready forthwith to pay into Court the sum of 100*l.* as I may be directed by this Honourable Court, or any Judge thereof, if required so to do.

C. D.

Sworn, &c.



No. 52.

Affidavit on behalf of Sheriff for an Interpleader Issue.

In the Court of —.

Between { A, B., plaintiff,  
and  
C. D., defendant.

I, X. Y., of —, in the county of —, officer to the sheriff of —, make oath and say:—

1. That under and by virtue of a writ of *fi. fa.* which appeared to me to have been regularly issued out of this Honourable Court in this action, directed to the said sheriff, commanding him that he should cause to be levied of the goods and chattels of the above-named defendant £ —, which the above-named plaintiff had recovered against the said defendant in this Honourable Court, and indorsed to levy the whole [or £ —], besides sheriff's poundage, officers' fees, and other incidental expenses; and also by virtue of a warrant of the said sheriff granted on the said writ, I did on the — day of — instant, take possession of certain goods and chattels in the dwelling-house of the above-named defendant, situated at —, in the same county, and that the said goods and chattels still remain in my custody or possession, as officer of the said sheriff.

2. That on or about the — day of —, I was served with a written notice, of which the following is a copy [*copy claimant's notice*].

3. That an action is, as I verily believe, intended to be brought by the said E. F. [*the claimant*] against the sheriff, for the purpose, as I verily believe, of recovering damages for and in respect of the said seizure of the said goods and chattels. [*If an action has been brought, this clause must be varied accordingly.*]

4. That this application is made solely on my behalf, as officer to the said sheriff, at my own expense, and for my indemnity only, and that I do not, nor does the said sheriff, in any manner, collude with the said E. F., or with the above-named plaintiff.

Sworn, &c.

X. Y.

## Interpleader Order "A."

*Sheriff to sell the Goods and pay Proceeds into Court, to abide the event of an Interpleader Issue.*

\_\_\_\_\_ }  
 against        } Upon hearing the attornies or agents for  
 \_\_\_\_\_ } the sheriff of \_\_\_\_\_, and for the plaintiff, and  
                   } for \_\_\_\_\_, the claimant, and upon reading the  
                   } affidavits of \_\_\_\_\_,

I do order that the said sheriff do proceed, to sell the goods and chattels seized by him under the writ of *feri facias* issued herein, and do pay the net proceeds of the sale, after deducting the expenses thereof \_\_\_\_\_, into Court in this cause, to abide further order herein.

And I do further order, that the parties do proceed to the trial of an issue in the Court of \_\_\_\_\_, in which the said \_\_\_\_\_ shall be the plaintiff, and the said \_\_\_\_\_ shall be the defendant, and that the question to be tried shall be whether \_\_\_\_\_.

And I do further order, that such issue shall be prepared and delivered by the plaintiff therein within \_\_\_\_\_ from this date, and shall be returned by the defendant therein within \_\_\_\_\_ days, and shall be tried at \_\_\_\_\_.

And I reserve the question of costs, and all further questions, until after the trial of the said issue.

[Judge's signature.]

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 186—.

## Interpleader Order "B."

*Claimant either to pay Money into Court or give Security, and Sheriff to withdraw from the Goods seized, or Sheriff to sell the Goods and pay the Proceeds into Court.*

\_\_\_\_\_ }  
 against        } Upon hearing the attornies or agents for  
 \_\_\_\_\_ } the sheriff of \_\_\_\_\_, and for the plaintiff, and  
                   } for \_\_\_\_\_, the claimant, and upon reading the  
                   } affidavit of \_\_\_\_\_,

I do order, that upon payment of the sum of £\_\_\_\_\_ into Court by the said claimant, within \_\_\_\_\_ from this date, or upon \_\_\_\_\_ giving within the same time security to the satisfaction of one of the Masters for the payment of the same amount by the said claimant, according to the directions of any rule of Court or Judge's order to be made herein, and upon payment to the said sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods and chattels seized by him under the writ *feri facias* issued herein.

L

And I do further order, that, unless such payment shall be made, or such security be given, within the time aforesaid, the said sheriff do proceed to sell the said goods and chattels, and pay the proceeds of the sale, after deducting the expenses thereof, and the possession money, from this date, into Court in the cause, to abide further order herein.

And I do further order, that the parties do proceed to the trial of an issue of the Court of —, in which the said claimant shall be the plaintiff, and the said execution creditor shall be defendant, and that the question to be tried shall be whether, at the time of seizure by the sheriff, the goods, &c., were the property of the claimant, as against the execution creditor.

And I do further order, that such issue shall be prepared and delivered by the plaintiff therein within — from this date, and be returned by the defendant therein within — days, and shall be tried at —.

And I reserve the question of costs, and all further questions, until after the trial of the said issue.

And I further order, that no action shall be brought against the said sheriff for the seizure of the said goods.

[*Judge's signature.*]

Dated the — day of —, 18—.

### Interpleader Order "C."

(*Seldom used at the present time.*)

Upon hearing the attornies or agents for the sheriff of —, and for the plaintiff in the execution, and for —, the claimant, and upon reading the affidavit of —,

I do order, that upon payment of the sum of £ — into Court by the said claimant, or upon — giving security to the satisfaction of one of the Masters for the payment of the same amount by the said claimant, according to the directions of any rule of Court or Judge's order to be made herein, the said sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of *feri facias* issued herein.

And I further order, that in the meantime and until such payment shall be made or such security be given, the said sheriff continue in possession of the said goods and chattels, and the said claimant do pay possession money for the time he shall so continue, unless the said claimant shall desire the said goods and chattels to be sold by the sheriff, in which case the sheriff is to sell the same, and pay the proceeds of the sale, after deducting the expenses thereof and the possession money from this date, into Court in the cause, to abide further order herein.

And I further order, that the parties do proceed to the trial of a feigned issue in the Court of —, in which the said claimant

shall be the plaintiff, and the said execution plaintiff shall be the defendant, and that the question to be tried shall be whether the goods seized under the writ of *feri facias*, or any part thereof, were at the time of the delivery of the writ to the sheriff the property of the said claimant —, as against the said execution plaintiff.

And I further order, that such issue shall be prepared and delivered by the plaintiff therein within — from this date, and be returned by the defendant therein within — days, and shall be tried at —.

And I direct that no action shall be brought against the sheriff for the seizure of the said goods. And I reserve the question of costs, and of repayment of the said possession money, and all further questions, until after the trial of the said issue.

Dated the — day of —, 18—.



### No. 53.

#### Affidavit in order to obtain an Order to deliver Interrogatories.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

We, A. B., of —, the above-named plaintiff, and E. F., of —, attorney in this cause for the above-named plaintiff, severally make oath and say:—

And first, I, the said A. B., for myself say:—

1. That this action is brought to recover the sum of £— for [*state shortly the nature of the action*].

2. That I have a good cause of action herein on the merits.

3. That I believe that I shall derive material benefit in this cause from the discovery which I seek by the interrogatories herein.

And I, the said E. F., for myself say:—

4. That I am attorney in this cause for the said plaintiff.

5. That I verily believe that the plaintiff has a good cause of action in this action on the merits.

6. That I verily believe that the plaintiff will derive material benefit in this cause from the discovery which he seeks by the said interrogatories.

Sworn, &c.

A. B.  
E. F.



## No 54.

Affidavit in support of Application to try before  
the Sheriff.

In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

I, E. F., of —, gentleman, attorney for the above-named plaintiff in this action, make oath and say:—

1. That this action is brought to recover £— claimed to be due from the defendant to the plaintiff for [*shortly state the cause of action*], and that the sum sought to be recovered and indorsed on the writ of summons by which this action was commenced does not exceed twenty pounds.

2. That issue has been joined in this action, and the trial will not, as I verily believe, involve any difficult question of fact or law.

E. F.

Sworn, &amp;c.

## No. 55.

## “Long” Order of Reference.

} Upon hearing the attornies on both sides,  
and by their consent, I do order, that — be  
referred to the award, order, arbitrament, final  
end and determination of —,

who shall have all the powers, as to certifying, of a Judge of Nisi Prius, so as the said arbitrator — shall make and publish — award, in writing, of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as shall require the same [*or their respective personal representatives, if either of the said parties shall die before the making of the said award*], on or before the — now next ensuing, or on or before such further or ulterior day as the said arbitrator — shall from time to time appoint and signify in writing, under — hand, to be indorsed on this my order.

And, by the like consent, I further order, that the said parties shall in all things abide by, perform, fulfil and keep such award so to be made as aforesaid, and that the costs of the said cause —, and that the costs of the reference and award, shall be —.

And, by the like consent, I further order, that the said arbitrator — shall be at liberty (if — shall think fit) to examine the said parties to this suit, and their respective witnesses, upon oath or affirmation, and that the said parties do and shall produce before the said arbitrator — all books, deeds, papers and writings, in their or either of their custody or power, relating to the matters in difference.

And I further order, by and with such consent as aforesaid, that

neither the plaintiff nor the defendant shall bring or prosecute any action or suit at law or in equity against the said arbitrator —, or bring any writ of error, or prefer any bill in equity, against each other, of and concerning the matters so as aforesaid referred; and that if either party shall by affected delay or otherwise wilfully prevent the said arbitrator — from making an award, — shall pay such costs to the other as the Court of — shall think reasonable and just.

And, by the like consent, I further order that, in the event of either of the said parties disputing the validity of the said award so to be made and published as aforesaid, or moving the Court to set the same aside, the Court shall have power to remit the matters hereby referred, or any or either of them, to the reconsideration of the said arbitrator —.

And, by the like consent, I further order that, in the event of the said arbitrator — declining to act, or dying before — shall have made — award, the said parties may, or, if they cannot agree, one of the — of the Court of — may, on application by either side, appoint a new arbitrator.

And, by the like consent, I further order that this order shall and may be made a rule of her Majesty's Court of — if the same Court shall so please.

Dated the — day of — 18—.

[*Judge's signature.*]



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