

Great Britain.

Laws, statutes, etc.

Judiciary law

THE SUPREME COURT OF

JUDICATURE ACTS,

AND THE

APPELLATE JURISDICTION ACT, 1876,

WITH

RULES OF COURT AND FORMS ISSUED UP TO 1885.

ANNOTATED SO AS TO FORM A

MANUAL OF PRACTICE.

CONTAINING A

COMPREHENSIVE SELECTION OF CASES FROM THE MODERN
REPORTS, AND ALL THE MOST RECENT DECISIONS,

DOWN TO MARCH 1, 1885.

TOGETHER WITH

References to the earlier Authorities where such seemed advisable.

FOURTH EDITION.

BY

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tion to sign judgment for default of appearance where no proceeding has been taken for more than a year (*Webster v. Myer*, W. N. 1884, 223 A.).

To set aside an award. **14.** An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties.

Caveat in force six months. **15.** In Admiralty actions a caveat whether against the issue of a warrant, the release of property, or the payment of money out of the Admiralty Registry, shall not remain in force for more than six months from the date thereof.

ORDER LXV.

Costs.

The following Rules of this Order are new, 2-5, 8-26, and of the Special Allowances—8, 11, 24, 26, 31-36, 44-58; a considerable portion of these has been derived from the Consol Orders. Any real alteration in a Rule has been noted thereunder. Section 28 of the Solicitors' Act as to Charging Orders on costs is appended to this Order.

*LXV. I.
Generally.*

1. Subject to the provisions of the Acts and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge: Provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also, that where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the Judge by whom such action, cause, matter, or issue is tried, or the Court shall, for good cause, otherwise order.

Extent of application.

This Rule differs from the former one in these respects. The former Rule was only subject to the provisions of "the Act," this one of "the Act and these Rules." The term "Supreme Court" is substituted for High Court, and the phrase "including the administration of estates and trusts" has been added. The right of a person acting in a fiduciary character to his costs has been somewhat restricted by the introduction of the words "who has not unreasonably instituted or carried on or resisted any proceedings." Lastly, it may be observed that in the proviso as

to the trial of an issue by a jury the phrase used in the former Rule was the Judge "upon application at the trial," for "good cause shown."

The effect of this Order is to repeal the previous statutes as to costs; with the exception of such of the provisions of the County Court Act, 1867, as are expressly preserved by sec. 67 of the Judicature Act, 1873 (*Parsons v. Tiling*, 2 C. P. D. 119; *Garnett v. Bradley*, 3 App. Cas., 944). Where, therefore, a plaintiff recovered a farthing damages in an action of slander, the event was held to be in his favour.

If the effect of this Order has been to repeal the previous Statutes as to costs *a fortiori* it would seem to have diminished the importance of former decisions. Those cases only previous to the Judicature Acts are of tangible value which lay down a definite principle that the Court may feel itself bound to act upon as being in itself just. It has therefore been thought unnecessary to cite the greater part of a large number of the older cases which have been considered with reference to this work.

This Rule extends to a petition, under an Act which provides for the costs of such petition (*Re Lee & Hemingway*, 24 Ch. D. 669); *Ex parte Mercers' Co.*, 10 Ch. D. 481. Where a public or private Act contains no provisions as to costs, the Court has power under this Rule to direct payment of costs (*Ibid.*, *Ex parte Hosp. of St. Katharine*, 17 Ch. D. 378).

As sec. 9 of the C. C. Ad. Jurisdiction Act, 1868, is not mentioned in sec. 67 of the Judicature Act, 1873, it is repealed by this Rule (*Tennant v. Ellis*, 50 L. J. 143).

It was held under the former Rule that the words for good cause "shown," implied that counsel should have an opportunity of being heard (*Collins v. Welch*, 5 C. P. D. 33. A.).

The costs of an action in which judgment has been signed in default of defence, and the damages have been assessed by the jury upon a writ of inquiry, do not "follow the event," there having been no trial with a jury (*Gath v. Howarth*, W. N. 1884, 99).

If a suit be dismissed with costs, the same plaintiff cannot proceed in another suit for the same objects until the costs in the first action have been paid (*Randle v. Payne*, 28 Ch. D. 288. A.; *Martin v. Earl Beauchamp*, 25 Ch. D. 15. A.). Costs of a discontinued action are regulated by Order XXVI. 4.

The Judge has power to order a plaintiff who recovers a nominal sum to pay the defendant's costs (*Harris v. Petherick*, 4 Q. B. D. 611. A.); in exercising his discretion to deprive a successful party of his costs, he must consider the whole circumstances of the case, not merely the conduct of the party in the course of the litigation but previous to and conducing to the action. He must, however, assume the truth of the facts found by the jury (*Harnett v. Vise*, 5 Ex. D. 307. A.).

The Divisional Court has an original jurisdiction to make an order to deprive a successful party of the costs (*Myers v. Defries*, 5 Ex. D. 180. A.; *Siddons v. Lawrence*, 4 Q. B. D. 459. A.). Such application should be made within a reasonable time after the trial (*Bowey v. Bell*, 4 Q. B. D. 95); a successful applicant may be made to pay the costs of the other side if his application be deemed unnecessary (*Fane v. Fane*, 18 Ch. D. 228).

Where a plaintiff in an action wholly fails, it is not competent for the Court to order the defendant to pay his costs (*Foster v.*

G. W. R., 8 Q. B. D. 515. A, approved and commented on in *Butcher v. Pooler*, 24 Ch. D. 273. A).

Where an action is brought to enforce a legal right, and there has been no misconduct, no omission or neglect, the Court has no discretion, and cannot take away the plaintiff's right to costs (*Cooper v. Whittingham*, 15 Ch. D. 504).

An appeal from an order at the trial depriving a successful party of costs must be to the Court of Appeal (*Marsden v. Lancashire, &c., Ry. Co.*, 50 L. J. 320. A).

A Judge has no power to order any party to pay a sum by way of penalty beyond the costs of the claim and counter-claim (*Willmott v. Barber*, 17 Ch. D. 733. A); where the order was in substance within the discretion of the Judge, but was irregular in form, the Court of Appeal amended the order so as to carry out the intention of the Court below (*Ibid.*). It is not according to law to give to a party by way of damages the costs as between solicitor and client of the litigation in which the damages are recovered (*Cockburn v. Edwards*, 18 Ch. D. 459. A).

The principle on which the taxation of costs is to proceed would seem to be the subject of appeal (*Marcus v. Gen. Navigation Co.*, 35 L. T. 353).

In Court of Appeal. The costs of an appeal as a rule follow the event (*Memo.*, 1 Ch. D. 41, *Ex parte Masters*, *Ibid.* 113). And it makes no difference that the point on which the case is decided was not raised on the pleadings, but had been added by amendment by the Judge in the Court below in order to raise the real point at issue (*Nottage v. Jackson*, 11 Q. B. D. 688. A). In *Chard v. Jervis*, 9 Q. B. D. 178. A, the Court refused to allow the costs of the appellant, (1) Because they could in that way mark their sense of disapproval of his conduct; (2) Because the appeal had succeeded on new evidence.

A bill was dismissed by a Vice-Chancellor without costs, the plaintiff appealed against the whole decree and his appeal was dismissed; it was held that the Court had no power to vary the order of the Vice-Chancellor by directing that the bill should be dismissed with costs as he had exercised his discretion (*Harris v. Aaron*, 4 Ch. D. 749. A); where the appellant succeeded in the Court of Appeal on a point that had not been raised in the Court below, he was allowed the costs in the Court below but not the costs of the appeal (*Hussey v. Horne-Payne*, 8 Ch. D. 679. A). In *Re Hull & County Bank, Trotter's Claim*, 18 Ch. D. 261. A, the order of the Court below was varied on the subject of the costs, the Judge there having exercised no judicial discretion in the matter; where an appellant is successful on a point not adjudicated on in the Court below, he will not in general be allowed his costs (*Goddard v. Jeffreys*, 46 L. T. 904. A).

A Court has power to give costs, although without jurisdiction for any other purpose (*Mackintosh v. Lord Advocate*, 2 App. Caa. 78; *Reg. v. Steel*, 2 Q. B. D. 42. A; *G. N. R. Co. v. Inett*, 2 Q. B. D. 284. A); therefore *Brown v. Shaw*, 1 Ex. D. 425. A, can only be taken as an authority that in that case the Court considered the attendance of counsel to object to the jurisdiction, unnecessary.

When the Court of Appeal directs the payment of costs, the successful party is entitled to have them taxed and paid forthwith, unless there be a special direction to the contrary (*Philips v. Philips*, 5 Q. B. D. 60. A; *Chamberlain v. Barnewall*, W. N. 1880, 110. A).

As to the practice in the Chancery Division of proceeding to trial for the purpose of getting costs, where after action brought the defendant has conceded to the plaintiff the principal relief sought, see some observations of Jessel, M.R., upon *Burgess v. Hills*, 26 Beav. 244 in *Storr v. Corp. of Maidstone*, W. N. 1878, 219. There the Court refused to decide the question of costs at the trial. The parties had compromised the action, so that the question of costs alone remained.

Section 49 Jud. Act 1873 provides that "no order made by the High Court of Justice, or any Judge thereof, as to costs only which by law are left to the discretion of the Court, should be subject to any appeal, except by leave of the Court or Judge making such order." Appeal for costs.

Though a decision relate to costs, if it involve a question of law and principle, it is subject to appeal (*Re Rio Grande Co.*, 5 Ch. D. 282. A.).

The question whether facts do or do not exist, which would constitute "good cause" within the meaning of the latter portion of this Rule, is the subject of an appeal (*Jones v. Curling*, 13 Q. B. D. 262. A.).

The Act says, per James, L.J., in *Witt v. Corcoran*, 2 Ch. D. 69. A., "that there shall be no appeal for costs where they are in the discretion of the Court, but there is no discretion as to whether a man has or has not been guilty of something alleged against him." On an application, therefore, to commit for contempt, an order declaring that the defendant had committed a breach of an injunction, but giving no directions except that defendant pay the costs, is subject to appeal (*Ibid., Re Clements*, 46 L. J. Ch. 375. A.). But if the motion be refused with costs, it is within the section (*Ashworth v. Outram*, 5 Ch. D. 943. A.); explained in *Jarmain v. Chatterton*, 20 Ch. D. 493. A.

Before a solicitor can be personally ordered to pay costs he must be held to be guilty of misconduct in the case, and therefore an order for him to pay costs personally is not an order as to costs only, which by law are in the discretion of the Judge, and is the subject of an appeal (*Re Bradford*, 53 L. J. 65. A.).

An appeal will lie without leave from an order directing payment of costs, charges, and expenses (*Jones v. Chennell*, 8 Ch. D. 503. A.), not being an order as to costs only under sec. 49 Jud. Act, 1878.

In the exercise of his discretion the Judge should take into consideration the facts in the case, and the conduct of the parties in the litigation, not the mode in which counsel have argued it (*Moet v. Pickering*, 8 Ch. D. 374. A.).

A defendant cannot be made to pay the costs of a plaintiff who has failed to make out any title, except costs in respect of his own misconduct in the course of the action. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action, if the plaintiff had no title to bring him there (*Dicks v. Yates*, 18 Ch. D. 84. A.).

A defendant to an action which has been dismissed without costs, if he wish to obtain leave from the Court to appeal on the question of costs, should apply at the time when the action is so dismissed, and such leave will not be given on an application by the defendant for that purpose after plaintiff has given notice of, and set down, an appeal from the dismissal of the action

(*May v. Thompson*, W. N. 1882, 53). The dismissal of a bill without costs was pre-eminently the case to which the rule of not hearing appeal for costs applied (*Graham v. Campbell*, 7 Ch. D. 494. A; *Lianover v. Homfray*, 19 Ch. D. 232. A).

There is no appeal without leave to a Divisional Court, from the refusal of a Judge at Chambers, to deprive the plaintiff of his costs when he signs judgment for them under Order XXIV. 3 (confession of plea *puis darrein continuance*) (*Perkins v. Beresford*, 47 L. T. 515).

A Judge has jurisdiction to order a third party to pay to an unsuccessful defendant the costs payable by him to the plaintiff (Order XVI. 54), and his discretion is not the subject of an appeal (*Hornby v. Cardwell*, 8 Q. B. D. 329. A).

As to varying the order of the Court below as to costs when an appeal on the merits fails, see the observations of Jessel, M.R., in *Harpham v. Shacklock*, 19 Ch. D. 215. A :—"If we were to vary the order of the Court below as to costs, when an appeal on the merits fails, we should practically be allowing an appeal for costs only, and appeals would be brought nominally on the merits but really only for the purpose of varying the order as to costs."

A condition imposing upon one party or another as the price of an order, which is to be made, or permitted to stand, in his favour, some election to be made by him as to the payment of costs, does not come within the rule applying to an appeal for costs only (*Metrop. Asylum v. Hill*, 5 App. Cas. 585).

The enactment in sec. 49 does not apply to the order of a Master or District Registrar (*Foster v. Edwards*, 48 L. J. 767). This case was not cited in the argument in *Hansen v. Maddox*, 12 Q. B. D. 100, where the point was discussed but the decision went on other grounds.

Persons
acting in a
fiduciary
character.

With regard to the exception saving the rights of trustees, &c., a trustee or mortgagee has a right to appeal on a question of costs only, where he is entitled to them *ex debito justitiae*. As to when he is so entitled, see *Re Hoskins Trusts*, 6 Ch. D. 281. A; *Cotterell v. Stratton*, L. R. 8 Ch. 295; *Turner v. Hancock*, 20 Ch. D. 303. A; *Cooper v. Vesey*, W. N. 1882, 55. A; *Re Watts, Smith v. Watts*, 22 Ch. D. 5. A).

A trustee is entitled to costs unless it be adjudicated against him that he has been guilty of misconduct, and until that is adjudicated his costs are not within the discretion of the Court. Whether he has been guilty of misconduct is a matter on which an appeal must lie (per Cotton, L.J., in *Re Sarah Knight's Will*, 26 Ch. D. 90. A; *Bolingbroke v. Hinde*, 25 Ch. D. 795).

In an administration action against trustees, if it appear that the estate cannot pay costs in full, the trustees are entitled to a direction that their costs, &c., be paid in priority to all other parties (*Dodds v. Tuke*, 25 Ch. D. 617). The costs of trustees properly incurred in the administration of a trust are a first charge on both the capital and income of the trust estate, and they are not bound to part with the income until their costs have been otherwise provided for (*Stott v. Milne*, 25 Ch. D. 701. A).

Where a settlement is set aside the trustees have no claim to their costs as a matter of right, there being no contract in existence, and therefore if costs are given against them they have no right of appeal (*Dutton v. Thompson*, 23 Ch. D. 278. A).

An official liquidator, though in some sense a trustee, is a paid

agent, bound to discharge his duties with reasonable care and skill, and may be deprived of costs for a mistake which would not disentitle an ordinary gratuitous trustee (*Re Silver Valley Mines*, 21 Ch. D. 381).

There is a conflict of opinion as to whether a defaulting executor or trustee can get any of his costs out of the estate until he has made good his default (*Re Basham*, 23 Ch. D. 203; *Lewis v. Trask*, 21 Ch. D. 862; *Clare v. Clare*, 21 Ch. D. 865; *McEwan v. Crombie*, 25 Ch. D. 175. And see *Re Griffiths, Griffiths v. Lewis*, 26 Ch. D. 465. A).

Taxation of costs as between solicitor and client is directed where a fiduciary relation exists between the parties, or scandalous charges are made, or where a trustee acts in the proper discharge of his duties (*Turner v. Collins*, 12 Eq. 438; *Cockburn v. Edwards*, 18 Ch. D. 449. A).

On appeal to the House of Lords, if the solicitors give their personal undertaking to refund, an order for the recovery of costs will not be stayed pending the appeal (*Grant v. Banque Franco-Egyptienne*, 3 C. P. D. 202. A).

An action will lie on an order of the House of Lords, directing an unsuccessful appellant to pay the respondent's costs (*Marbella Iron Co. v. Allen*, 38 L. T. 815).

Unless a respondent have made a previous demand for the payment of the costs of an abandoned notice of appeal he will not be allowed the costs of an application to obtain them (*Griffiths v. Allen*, 11 Ch. D. 913. A).

In *Waddell v. Blockley*, 10 Ch. D. 416. A, the appellant unnecessarily gave two notices of appeal, the respondent was held entitled to the costs of one as an abandoned motion.

As to the costs up to the discontinuance of an action, see *Harrison v. Leutner*, Order XXVI. 1, note.

As to the costs of an abandoned petition for winding-up a company, see *Re Ang. Virginian Land Co.*, W. N. 1880, 155.

Where a new trial has been granted, the successful party on the second trial is, in the absence of any order to the contrary, entitled to the costs of the first (*Field v. G. N. R. Co.*, 3 Ex. D. 261. A; *Oreen v. Wright*, 2 C. P. D. 354. A). The costs of the first trial and of the rule for a new trial follow the event. When the Court of Appeal grant a new trial they will give a successful appellant the costs of the appeal in any event (*Anderson v. Pellier*, W. N. 1878, 129).

If the plaintiff on a second trial recover a mere nominal sum, the Judge may order him to pay the costs of both trials (*Harris v. Petherick*, 4 Q. B. D. 611. A).

As to payment into Court, see Order XXII. 7, note. As to what amounts to confessing a defence under Order XXIV. 3, see *Callander v. Hawkins*, 2 C. P. D. 592; *Champion v. Formby*, 7 Ch. D. 373. Order XXIV. 3, note.

Where two parties unnecessarily increased the cost by severing their defences, they were only allowed one set of costs between them (*Bull v. London School Board*, 34 L. T. 674; *The Longford*, 50 L. J. P. D. 80). The Court has full power to make a suitable order as to the apportionment of costs between co-defendants (*Bagot v. Easton*, 11 Ch. D. 396; *Wilson v. Thompson*, 20 Eq. 459; Order XVI. 54, 55; see also some observations of Jessel, M.R., in *Rudow v. G. Brit. Life Assur.*, 17 Ch. D. 607. A).

As to when a party may be entitled to deduct his costs out of

funds in his hands belonging to his co-defendant, see *Porter v. West*, 29 W. R. 236.

Where there were two respondents to an appeal, one of whom gave cross notice of appeal affecting his co-respondent, the Court made an apportionment of the costs of the appeal (*Harrison v. Cornwall Ry. Co.*, 18 Ch. D. 334. A.; see also *Robinson v. Drakes*, 23 Ch. D. 98. A.).

In actions of ejectment it was decided, in *Johnson v. Mills*, L. R. 3 C. P. 22, that each defendant is liable for the whole costs of the action, and if there be cases in which this rule would operate with hardship, it is competent to the Court to deal with such case and to apportion the costs in any manner which may seem just. This decision was relied on in *Real and Pers. Adv. Co. v. McCarthy*, 14 Ch. D. 191, 18 Ch. D. 362. A.; and in an action of a somewhat similar nature (*Dearly v. Middleweek*, 18 Ch. D. 236), Fry, J., refused to allow one co-defendant to proceed against another for contribution in respect of the costs of such an action.

As to salvage, see *City of Berlin*, 25 W. R. 793. A.

As to the costs of a representative case on a contributory summons in a winding-up, see *Re Mutual Soc.*, 18 Ch. D. 530.

Third parties.

The powers of the Court have been so much extended in regard to third parties by Order XVI. 54, that the *ratio decidendi* of most of the previous decisions has disappeared. The following cases may be found of some use :

When a third party is brought, or comes in for his own benefit, to reduce the damages, the plaintiff will not be obliged to pay two sets of costs (*Williams v. S. E. R. Co.*, 26 W. R. 352). In *Witham v. Vane*, 44 L. T. 718. A., the Court of Appeal held that under the circumstances of that case neither the third nor fourth parties were entitled to their costs, as their interests would have been adequately represented by defendant's counsel (affirmed on this point in H. L. 32 W. R. 617). The defendant is entitled to the costs of the issues upon which the plaintiff has been non-suit. If the judgment as drawn up be erroneous in this respect, he should apply to the Judge who tried the action to direct an alteration in the form of the judgment (*Abbott v. Andrews*, 8 Q. B. D. 648).

Administration, &c.

In an administration action by next of kin or legatee, where the estate is insufficient for payment of debts, the plaintiff is not entitled to solicitor and client costs, but when the plaintiff does not go on with the action, and a creditor then takes the conduct of it for the benefit of all the creditors and succeeds in recovering the fund, he is entitled to his costs as between solicitor and client (per Jeasel, M.R., in *Richardson v. Richardson*, 14 Ch. D. 613; *Re Harvey*, 26 Ch. D. 179).

The plaintiff in a legatee's administration action where the estate is insufficient to pay the legacies in full, is entitled to receive his costs as between solicitor and client (*Re Wilkins*, 27 Ch. D. 703; *Re Harvey*, 26 Ch. D. 179).

As a general rule in partition actions the costs should be borne by the parties in proportion to their interests, as declared by the judgment; they can be taxed as between solicitor and client only by consent of the parties (*Ball v. Kemp-Welch*, 14 Ch. D. 512).

The duties of an administrator and receiver, pending a probate action, commence from the date of the order of appointment, and if the decree in the action be appealed from, do not cease

until the appeal has been disposed of (*Taylor v. Taylor*, 6 P. D. 29).

Where testamentary expenses were to be paid out of a particular fund, the costs of an administration action were held included (*Penny v. Penny*, 11 Ch. D. 440).

A trustee in bankruptcy may be made personally liable for costs of an action to which he is a party; he may, however, be recouped out of the bankrupt's estate if he have acted *bond fide* and there are funds (*Pitts v. La Fontaine*, 6 App. Cas. 486). Trustee and official liquidator.

Where an official liquidator has failed on a summons to recover money for the company, and has been ordered to pay the costs of the summons out of the assets of the company, these costs will be paid out of the assets, in priority to the costs in the winding-up (*Re Home Invest. Soc.*, 14 Ch. D. 167; *Re Canadian Plumbago Co.*, 53 L. J. Ch. 894).

As to the costs of a partnership action, see *Potter v. Jackson*, Partnership action. 18 Ch. D. 845.

As to costs of a reference as to damage in the Admiralty Reference Division, see *The Consett*, 5 P. D. 77; *The Saverne*, Ibid., 166; *The Mary*, 81 W. R. 248).

An order against a next friend for payment of costs is final, Next friend unless there be some reservation in the order (*Caley v. Caley*, 25 W. R. 528).

The costs of a petition by an infant married woman for payment of a fund in Court to her husband, which was refused, were directed to be paid out of the income of the fund (*Shipway v. Ball*, 44 L. T. 49). Infant married woman.

On further consideration an affidavit on the question of costs was held admissible (*Palmer v. Perry*, W. N. 1870, 58). Miscellaneous.

Where a plaintiff got the general costs of the action, but accidentally omitted to ask for the costs of an adjourned motion, Fry, J., on a subsequent motion, corrected the judgment under Order XXVIII. 11, and directed the costs of the adjourned motion to be taxed and paid by the defendant (*Fritz v. Hobson*, 14 Ch. D. 562).

Where at the trial it was agreed that judgment should be entered for the plaintiff subject to a reference under the C. L. P. Act, 1854, and there was no provision that judgment might be entered for the defendants if the amount paid into Court were sufficient, the Court refused to give the defendant his costs under these circumstances (*Wimshurst v. Barrow Ship. Co.*, 2 Q. B. D. 335).

It is improper to make solicitors or others, who are properly witnesses, and who are not chargeable with any part of the relief claimed, parties to an action for the purpose of making them pay costs (*Burstell v. Beyfus*, 26 Ch. D. 41. A.).

The costs of proceedings before the Registrar of Trademarks and previous to the case coming into the High Court, are not within this Rule (*Re Brandreth's Trademark*, 9 Ch. D. 618).

When an injunction is granted, and an inquiry as to damages directed in Chambers, the costs of the inquiry will be reserved (*Slack v. Midland Ry.*, 16 Ch. D. 81).

Costs of proceedings incurred by a party after the date of the order taking the conduct of the action from him, although it has not been drawn up, will not be allowed to him (*Re Minter*, W. N. 1881, 81).

As to the costs of proceedings for the purpose of getting the Attorney-General's fiat for the filing of an information, see *Att.-Gen. v. Corp. of Halifax*, 12 Eq. 262.

Taxation of issues of law and fact. **2.** When issues in fact and law are raised upon a claim or counter-claim, the cost of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event.

Sec. 5 of the County Court Act, 1875, does not apply to a counter-claim (*Blake v. Appleyard*, 3 Ex. D. 195; *Davidson v. Grey*, 40 L. T. 192). When the claim and counter-claim are both dismissed with costs, the defendant has only to pay the sum by which the costs have been augmented by the counter-claim (*Sancer v. Bilton*, 11 Ch. D. 416; *Mason v. Brentin*, 15 Ch. D. 287. A).

The *event* is complex, and the word must be read distributively, as regards distinct causes of action. The general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed, in favour of the party who has succeeded on them (*Myers v. Defries*, 5 Ex. D. 180. A.; quoted and approved in *Stooke v. Taylor*, 5 Q. B. D. 577; *Ellis v. De Silea*, 6 Q. B. D. 521. A.; *Hearng v. Pearman*, 32 W. R. 429; and see also *Cole v. Firth*, 4 Ex. D. 301; *Chatfield v. Sedgwick*, 4 C. P. D. 459. A., explained in the judgment of Cockburn, C.J., in *Stooke v. Taylor*, 5 Q. B. D. 579; and the judgment of Brett, L.J., in *Baines v. Bromley*, 6 Q. B. D. 695. A., discussed in *In re Brown, Ward v. Morse*, 23 Ch. D. 388. A.; *Sparrow v. Hill*, 8 Q. B. D. 479. A.). In applying the above cases to the principles of taxation of claim and counter-claim, it must be borne in mind that they were decided anterior to the coming into operation of this Rule.

Removal from inferior Court **3.** If a cause be removed from an inferior Court, having jurisdiction in the cause, the costs in the Court below shall be costs in the cause.

Action remitted under 19 & 20 Vict. c. 108, s. 26. **4.** When an action is ordered to be tried in a County Court under the provisions of 19 & 20 Vict. c. 108, s. 26, the costs of the action shall, subject to the provisions of the Principal Act and these Rules, follow the event, unless by the Registrar's certificate of the result of the trial it shall appear that the Judge before whom the action was tried was of opinion that the question of costs ought to be referred to a Judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a Judge.

Where the cause is referred with a provision that the costs of the cause, of the reference, and of the award, are to abide the event of the arbitration, the event is in favour of that party in whose favour judgment would be entered, if the same judgment were given at a trial at law as is given in the arbitration. For the application of this principle, see *Goutard v. Carr*, 58 L. J. 57. A.; *Pearson v. Ripley*, 32 W. R. 463.

It should appear in some way that the Judge of the County Court has had an opportunity of expressing a judicial opinion on the question of costs, if he had chosen to give it (*Emeny v. Sandes*, W. N. 1884, 240. A.).

In *Knight v. Abbott*, 10 Q. B. D. 11, it was held that there was no power to order an action for unliquidated damages to be tried in a County Court, even where the writ is indorsed with a claim for a specified sum.

5. Where upon the trial of any cause or matter it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the Court or Judge, and which according to the practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the Court or Judge shall think fit to award.

c. o.
XXI. 12.
Delay by
neglect of
solicitor.

6. In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the Court or a Judge shall direct.

L.V. 2.
Security for
costs.

The Court may order security for costs to be given, for such an amount, and at such time or times, as may seem best (*Rep. of Costa Rica v. Erlanger*, 3 Ch. D. 69. A; *Lydney Iron Co. v. Bird*, 23 Ch. D. 358).

The Married Women's Property Act, 1882, enables a married woman to bring an action in her own name without giving security for costs, and although the cause of action arose before the Act came into operation (*Severance v. C.S.S.A.*, 48 L. T. 485; *Threlfall v. Wilson*, 8 P. D. 18; *James v. Barraud*, 31 W.R. 786).

A plaintiff who had gone into liquidation was ordered to give security for past and future costs, where there was no unnecessary delay in making the application (*Brocklebank v. King's Lynn Co.*, 3 C. P. D. 365. A). In the *Carta Para Mining Co.*, 19 Ch. D. 457, an insolvent petitioner in a winding-up was ordered to give security for costs. As to the circumstances under which the Court may require the trustee of a bankrupt to give security for costs, see *Trustee of Pooley v. Whetham*, W. N. 1884, 202. A; *Denston v. Ashton*, L. R. 4 Q. B. 590.

When a company in liquidation amended their statement of claim in an action, by which they raised a fresh case, involving much additional evidence, they were directed to give security for costs (*Northampton Waggon Co. v. Midland Waggon Co.*, 7 Ch. D. 500. A).

A plaintiff who goes out of the jurisdiction may be required to give security for costs, past as well as future (*Massey v. Allen*, 12 Ch. D. 807). If he be a foreigner, an order for him to give security for costs will not be granted, unless it be shown that he is actually abroad at the time of the application (*Redondo v. Chaytor*, 4 Q. B. D. 453. A). If he fail to give the required security, the action may be dismissed for want of prosecution, without getting the order for giving security discharged (*La Grange v. McAndrew*, 4 Q. B. D. 210). An allegation by foreign plaintiffs that an application under Order XIV. is about to be made, is no ground for refusing an application by defendant

requiring plaintiffs to give security for costs (*Banque de Travaux Publiques v. Wallis*, W. N. 1884, 64). Security was dispensed with where defendants had admitted the amount claimed, but stated that they were unable to meet their liabilities (*De St. Martin v. Davis*, W. N. 1884, 86). In the Probate Division the mate of a foreign vessel, though not domiciled in England, was allowed to proceed with an action for wages without giving security (*The Don Ricardo*, 5 P. D. 121). A plaintiff who is out of the jurisdiction will not as a rule be obliged to give security for the costs of a counter-claim, which is in the nature of a new action (*Winterfield v. Bradnum*, 3 Q. B. D. 324. A).

If an Englishman and a foreigner join as plaintiffs in an action alleging a right to exist in both, or, in the alternative, in either of them severally, the foreigner is not required to give security for costs. If he have been improperly joined, his co-plaintiff is liable for the costs thereby incurred (*D'Hormusgee & Co. v. Grey*, 10 Q. B. D. 13).

In an action for the dissolution of a partnership, carried on in England, where the property was in England, Bacon, V.C., thought it unnecessary to require the foreign plaintiff to give security for costs (*Hamburger v. Poeting*, 47 L. T. 249).

Where the Judge has exercised his discretion as to the amount of security, the Court of Appeal will not interfere (*Sturia v. Freccia*, W. N. 1877, 188. A.).

A defendant has a right to take any proceeding to defend himself, without being called upon to give security for costs (*Re Percy Iron Co.*, 2 Ch. D. 581). Thus Malina, V.C., in *Spiller v. Paris Skating Rink Co.*, 27 W. R. 224, refused to order the defendant company to give security for the costs of a commission to take evidence abroad. In this case there was not even a suggestion that defendants were in insolvent circumstances. Even where he is nominally plaintiff, though really defendant (*Belmonte v. Aynard*, 4 C. P. D. 352. A.). He may also set up a counter-claim which is less than the original claim (*Mapleson v. Masini*, 5 Q. B. D. 144). The contrary has apparently been held in an Admiralty action *in rem* (*The Julia Fisher*, 2 P. D. 115).

As to security by the owners of the cargo in an action in the Admiralty Division, see *The Carnarvon Castle*, 26 W. R. 876. A.

When a County Court Judge was made a respondent, the Court thought it an additional reason for ordering security to be given (*Clarke v. Roche*, 46 L. J. Ch. 372. A.).

Time for taking steps in a cause ceases to run till the order is complied with (Order LXIV. 6).

*L.V. 8.
Security for
costs when
given by
bond.*

7. Where a bond is to be given as security for costs, it shall, unless the Court or a Judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court.

Lower scale.

8. In causes and matters commenced after these Rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "lower scale" in Appendix N, in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this Order

otherwise provided for; and in causes and matters pending at the time when these Rules come into operation, to which the higher scale of costs previously in force was applicable, the same scale shall continue to be applied.

9. The fees set forth in the column headed "higher scale" in Appendix N may be allowed, either generally in any cause or matter, or as to the costs of any particular application made, or business done, in any cause or matter, if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the Court or a Judge shall, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order; or if the taxing officer, under directions given to him for that purpose by the Court or a Judge, shall think that such allowance ought to be so made upon such special grounds as aforesaid.

The fact that the amount of an award in a salvage action was £2400 is not in itself a sufficient ground to induce the Court to give costs on the higher scale (*The Horace*, 9 P. D. 86).

A submission to a perpetual injunction with costs in a trademark action is not a special ground (*Hudson v. Osserby*, 50 L. T. 323, and see the remarks of the L. J. in *Grafton v. Watson*, 51 L. T. 145. A.).

10. Upon any reference to a taxing officer to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof from the person to be charged therewith, if such bill shall include charges for business done in any cause or matter, the taxing officer may allow the fees set forth in the column headed "higher scale" in Appendix N, in respect of such cause or matter, or in respect of any particular application made or business done therein, if on such special grounds, as are in the last preceding Rule mentioned, he shall think that such allowance ought to be so made.

11. If in any case it shall appear to the Court or a Judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved

fruitless to the person incurring the same, the Court or Judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require. The Court or Judge may, if they or he think fit, refer the matter to a taxing officer for inquiry and report; and direct the solicitor in the first place to show cause before such taxing officer, and may also, if they or he think fit, direct or authorise the Official Solicitor of the Supreme Court to attend and take part in such inquiry. Such notice (if any) of the proceedings or order shall be given to the client in such manner as the Court or Judge may direct. Any costs of the Official Solicitor shall be paid by such parties, or out of such funds as the Court or a Judge may direct; or, if not otherwise paid, may be paid out of such moneys (if any) as may be provided by Parliament.

A retainer to a country solicitor does not justify an action in which his London agents are the solicitors on the record (*Wray v. Kemp*, 26 Ch. D. 169). It should be sufficient and explicit (*Ibid.*).

Where a solicitor has commenced an action in the name of a plaintiff without authority, the proper course is for the plaintiff to serve notice of motion on the defendant as well as on the solicitor that the action may be dismissed and that the solicitor may pay the costs of the plaintiff as between solicitor and client and the costs of the defendant as between party and party (*Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. D. 310; *Nurse v. Durnford*, 13 Ch. D. 764).

An order upon a solicitor personally to pay the costs of an application is the subject of appeal (*Re Bradford*, 53 L. J. 65 A).

In *Clark v. Girdwood*, 7 Ch. D. 9 (a case decided prior to the above Rule), it was held that in the absence of fraud the Court had no jurisdiction to order a solicitor who had made a mistake in the preparation of a document, to pay the costs of an action for its rectification.

Actions of
contract
under £50.

12. In actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding £50, he shall be entitled to no more costs than he would have been entitled to, had he brought his action in a County Court, unless the Court or a Judge otherwise orders.

This Rule must be considered in conjunction with sec. 5 of the County Court Act, 1867, extended to actions in the High Court by sec. 67 of the Judicature Act, 1873, which says: "In any action in the Superior Court, if the plaintiff recover a sum, not exceeding £20 (now, 'less than,' by 45 & 46 Vict. c. 57, s. 4) if the action is founded on contract, or £10 if founded on tort, he shall not be entitled to any costs of suit, unless the Judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs." Under this section it was held that if the plaintiff succeeded in proving a claim of over £50, though the ultimate sum he recovered is under £20 owing to a counter-claim, he is entitled to his costs of proving it, and the general costs of the action (*Potter v. Chambers*, 4 C. P. D. 457; *Neale v. Clarke*, 4 Ex. D. 286). In *Lowe v. Holme*, 10 Q. B. D. 286, the claim being for price of work done, the Court held that the inferiority of the workmanship, though in form pleaded as a counter-claim, really amounted to a defence to the action.

If the plaintiff have done nothing oppressive in suing in the Superior Court, he ought to have his costs (*Oppenheimer v. Davenport & Co.*, W. N. 1884, 57).

In *Mendelsohn v. Hoppe*, W. N. 1884, 31, plaintiff was held entitled to his costs since he could not have brought his action in the County Court effectively, as he could not have got leave to serve the writ out of the jurisdiction.

Where the plaintiff had reasonable ground for thinking that Order XIV. would apply to his case, and did in fact get the benefit of payment into Court under that Order, he was allowed his costs according to the scale in the High Court (*Copley v. Jackson*, W. N. 1884, 94).

The issues would be taxed under Rule 2, *ante*. See also the observations of Brett, L. J., in *Baines v. Bromley*, Order XXI. 17, note; *Stooke v. Taylor*, 5 Q. B. D. 569; *Bowker v. Kesteven*, 47 L. T. 545.

In *detinue* a fancy price placed on an article to insure its return, is not a criterion on the question of costs (*Halliman v. Price*, 27 W. R. 490). *Detinue* is an action founded on tort (*Bryant v. Herbert*, 3 C. P. D. 389).

An action for compensation for damage to goods, through the negligence of common carriers, is an action founded on contract, within the meaning of the County Court Act, 1867; and if the plaintiff recover less than £20 he is not entitled to his costs (*Fleming v. Manchester Ry. Co.*, 4 Q. B. D. 81); where, however, the plaintiff as unpaid vendor had exercised his right of stoppage in transitu, and gave the railway company notice, they were held properly liable in tort for the neglect of it (*Pontifex v. Midland Ry. Co.*, 3 Q. B. D. 23).

Where matters in difference are referred by consent, the costs of the action, reference, and award to abide the event, and the arbitrator finds for the plaintiff for less than £20, he is deprived of his costs by the operation of the 5th sec. of the County Court Act, 1867 (*Fergusson v. Davison*, 8 Q. B. D. 470. A).

Where a cause has been referred to a Master with all the powers of certifying and amending of a Judge at *Nisi Prius*, a certificate that the action was suitable to be brought in the Superior Court, must be given in the award itself (*Bedwell v. Wood*, 2 Q. B. D. 626; *Gelatti v. Wakefield*, 4 Ex. D. 249).

As to briefing more than one counsel where this Rule applies, see Rule 27 (46), *post*.

C. O. XL. 4.
Solicitor of
Court ap-
pointed
guardian
ad litem.

13. Where the Court or a Judge appoints one of the solicitors of the Court to be guardian *ad litem* of an infant or person of unsound mind, the Court or Judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in Court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require.

In *Fraser v. Thompson*, 4 De G. & J. 659, it was held that the Court had no jurisdiction to order payment out of the Suitors' Fund of the costs incurred by the solicitor of the Suitors' Fund as guardian *ad litem* of an infant defendant. These costs were directed to be paid by the plaintiffs in the first instance, with liberty to add what was so paid to their own costs. The solicitor to the Suitors' Fund, says the Vice-Chancellor in *Harris v. Hamllyn*, 3 De G. & S. 470, an officer of this Court, ought not to lose his costs, he having been appointed for the convenience and at the request of the plaintiff. A plaintiff may accordingly be directed to pay an infant's costs to such solicitor, and to charge them on the infant's share (*Robinson v. Aston*, 9 Jur. Part I., 224); if there be nothing upon which to charge them, he must pay the costs himself (*Newbury v. Marten*, 15 Jur. Part. I., 166).

A defendant having become of unsound mind after bill filed, plaintiff obtained an order appointing the solicitor to the Suitors' Fund guardian *ad litem*; defendant recovered, but having taken no steps immediately on recovery to get his own solicitor placed on the record, held that he must pay the costs of the solicitor so appointed, and add them to his own (*Frampton v. Webb*, 11 W. R. 1018). This decision seems to go further than necessary; it is hard to see why a person, who adopts and ratifies the proceedings by defending the action, should not pay the costs properly incurred on his behalf previous to his recovery.

Solicitor's
lien—set off.

14. A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought.

A set-off for costs is allowed under Rule 27 (21), *post*. The provision with regard to the solicitor's lien only applies in the particular cause or matter, see *Wilde v. Walford*, 31 W. R. 518. As between the town agent and the client the lien extends only to the costs of the particular action in which he is engaged (*Lawrence v. Fletcher*, 12 Ch. D. 858).

An application in a summary manner for a solicitor to deliver up a deed, can only be justified on the ground that the solicitor is holding a deed which belongs to the applicant, and which he

is holding for the applicant without having any lien or claim on it of his own (*Ex parte Cobeldick*, 12 Q. B. D. 149. A).

A solicitor cannot assert a lien upon any documents which come to him pending the winding-up of a company such as would interfere with the prosecution of the winding-up; but a winding-up order cannot defeat a valid lien existing at the time when the winding-up petition was presented (*Re Capital Fire Insur. Co.*, 24 Ch. D. 408. A.).

15. Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed. Costs of award.

16. One day's notice of taxing costs, together with Notice to a copy of the bill of costs and affidavit of increase tax. (if any), shall be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor, in all cases where a notice to tax is necessary.

17. Notice of taxing costs shall not be necessary Notice not required. in any case where the defendant has not appeared in person, or by his solicitor or guardian.

18. Every reference for the taxation of costs in the Chancery Division shall be made to the taxing master Division, reference by rotation. in rotation; provided that in any case where there shall have been any former taxation in the same cause or matter, or in any summons under Order LV., Rules 3 or 4, relating to the same estate or trust, the reference shall be to the taxing master before whom such former taxation took place.

19. The taxing masters shall be respectively Taxing masters to work in conjunction. assistant to each other, and in the discharge of their duties; and, for the better despatch of the business of their respective offices, any taxing master may tax or assist in the taxation of a bill of costs which has been referred to any other taxing master for taxation, and for ascertaining what is due in respect of such costs, and in such case shall certify accordingly.

As to taxation of costs where an action has been transferred from one Division to another, see *Ross v. Ashwin*, W. N. 1884, 86.

20. Where, upon the taxation of any bill of costs in the Chancery Division, it appears to the taxing master that for the purpose of duly taxing the same it is necessary to inspect any books, papers, or documents, relating to the cause or matter in the Chambers of any Judge, the taxing master shall be at liberty c. o. XL 26. Books and documents for taxing master.

to request the Chief Clerk of such Judge to cause the same to be transmitted to the office of the taxing master, and also to request such Chief Clerk to certify any proceedings in the said Chambers which may be comprised in the bill of costs under taxation, and in such cases the Chief Clerk, when and so soon, and at and for such times, as the due transaction of the business at the said Chambers will permit, shall direct such books, papers, and documents to be transmitted to the office of the taxing master for his use during the taxation, and shall certify the proceedings which have taken place in the said Chambers according to the request of the taxing master; and after the costs in respect of which such request of the taxing master was made shall have been certified, the taxing master shall cause the same books, papers, and documents, which have been so transmitted to his office, if then remaining there, to be returned to the Chambers of the Judge.

*c. o. XL 27.
Transmission of documents, memorandum of.*

21. When a book, paper, or document, shall be transmitted from the Chambers of a Judge to the office of a taxing master, a memorandum of such transmission shall be made and signed by the taxing master, or the clerk of the taxing master, at whose request such book, paper, or document, may be transmitted, and shall be delivered to the Chief Clerk of such Judge; and when any such book, paper, or document, shall be returned from the office of the taxing master to the Judge's Chambers, a memorandum of such return shall be made and signed by such Chief Clerk, or by one of his clerks, and shall be delivered to the taxing master.

*c. o. XL 30.
Expense of drafts settled by private counsel.*

22. Where in pursuance of any direction by the Court or a Judge in Chambers drafts are settled by any of the Conveyancing Counsel of the Court, the expense of procuring such drafts to be previously or subsequently settled by other counsel, on behalf of the same parties on whose behalf such drafts are settled by the Conveyancing Counsel of the Court, shall not be allowed on taxation as between party and party, or as between solicitor and client, unless the Court or a Judge shall otherwise direct.

*c. o. XL 37.
Upon interlocutory applications.*

23. Upon interlocutory applications where the Court or a Judge shall think fit to award costs to any party, the Court or Judge may by the order direct payment

of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross shall be paid.

24. The fees payable on proceedings before a Judge in Chambers under the Charitable Trusts Act, 1853, s. 28, shall be the same as the fees payable according to the Rules relating to costs in respect of other proceedings commencing by summons, and shall also in all other respects be regulated by these Rules.

25. Where the Judge directs that any matter commenced by summons under the Act in the last preceding Rule mentioned shall be heard in open Court, the same fees shall be payable and the same costs shall be allowed as would have been payable in respect of any other matter so heard.

26. The fees and allowances to solicitors on proceedings under the Act 22 & 23 Vict. c. 35, s. 30, shall be the same as are payable under these Rules, and by the practice of the Court for business of a similar nature.

The question whether the costs should be paid out of the corpus of the estate or out of income will depend on whether the application is for the general benefit of the estate or only for the benefit of the tenant for life (Seton, 4th ed. 527; *Re T*—, 15 Ch. D. 78).

SPECIAL ALLOWANCES AND GENERAL REGULATIONS.

27. The following special allowances and general regulations shall apply to all proceedings and all taxations in the Supreme Court of Judicature.

(1.) As to writs of summons requiring special endorsement, and as to special cases, pleadings, and affidavits in answer to interrogatories, and other special affidavits, and admissions under Order XXXII. Rule 4, the taxing officer may, in lieu of the allowances for instructions and preparing or drawing, and attendances, make such allowance for work, labour, and expenses in or about the preparation of such documents as in his discretion he may think proper.

The words "when the higher scale is applicable" are omitted from this Rule.

(2.) As to drawing any pleading or other document, the fees allowed shall include any copy made for the use of the solicitor, agent, or client, or for counsel to settle.

Sp. All. 3.
Instruc-
tions.

(3.) As to instructions to sue or defend, or the preparation of briefs, if the taxing officer shall on special grounds consider the fee in either scale provided inadequate, he may make such further allowance as he shall in his discretion consider reasonable.

This Rule has been made much more general.

Sp. All. 4.
Affidavi-
tions
preparation
of.

(4.) As to affidavits, when there are several deponents to be sworn, or it is necessary for the purpose of an affidavit being sworn to go to a distance, or to employ an agent, such reasonable allowance may be made as the taxing officer in his discretion may think fit.

Sp. All. 5.
Attendances
to settle.

(5.) The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, include all attendances on the deponent to settle and read over.

Sp. All. 6.
Same solici-
tor for bo. h
parties.

(6.) As to delivery of pleadings, services, and notices, the fees are not to be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service.

Sp. All. 7.
Perusals,
same solici-
tor.

(7.) As to perusals the fees are not to apply where the same solicitor is for both parties.

C. O. XL 12.
Several
defendants
separate
pleadings.

(8.) Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

Sp. All. 8.
Procuring
evidence.

(9.) As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed.

The fees of surveyors for making surveys necessary for the proper conduct of the case are proper to be allowed on taxation (*Mackley v. Chillingworth*, 2 C. P. D. 278).

The successful party should not be deprived of what it is intended that he should have: an indemnity against costs reasonably incurred in prosecuting or defending the action (*Picasso v. Maryport Harb. Trustees*, W. N. 1884, 85).

(10.) As to agency correspondence, in country agency causes and matters, if it be shown to the satisfaction of the taxing officer that such correspondence has been special and extensive, he is to be at liberty to make such special allowance in respect thereof as in his discretion he may think proper.

(11.) As to the attendance of solicitors upon the Registrars in the Chancery Division for the purpose of settling the terms of and passing judgments or orders, the taxing officer may, in such cases as are provided for by Order LXII. Rule 15, make such special allowances in respect thereof as he shall consider reasonable.

(12.) As to attendances at the Judges' Chambers, where, from the length of the attendance, or from the difficulty of the case, the Judge or Master shall think the highest of the fees an insufficient remuneration for the services performed, or where the preparation of the case or matter to lay it before the Judge or Master in Chambers, or on a summons, shall have required skill and labour for which no fee has been allowed, the Judge or Master may allow such fee, in lieu of the fee of £1, 1s. provided, not exceeding £2, 2s., or where the higher scale is applicable £3, 3s., or in proceedings to wind up a company £5, 5s., as in his discretion he may think fit; and where the preparation of the case or matter to lay it before a Judge at Chambers on a summons shall have required and received from the solicitor such extraordinary skill and labour as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the Judge to deserve higher remuneration than the ordinary fees, the Judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose and signed by the Judge, specifying distinctly the grounds of such allowance, such fee, not exceeding ten guineas, as in his discretion he may think fit, instead of the fees of £2, 2s., £3, 3s., and £5, 5s.

(13.) As to attendances at the Judges' Chambers, where by reason of the non-attendance of any party (unless it be considered expedient to proceed *ex parte*), or where by reason of the neglect of any party in not being prepared with any proper evidence, account, or other proceeding, the attendance is adjourned without

any useful progress being made, the Judge may order such an amount of costs (if any) as he shall think reasonable to be paid to the party attending by the party so absent or neglectful, or by his solicitor personally; and the party so absent or neglectful is not to be allowed any fee as against any other party, or any estate or fund in which any other party is interested.

**Sp. All. 12.
Words in
folio.**

(14.) A folio is to comprise seventy-two words, every figure comprised in a column, or authorised to be used, being counted as one word.

**Sp. All. 13.
Advice of
counsel.**

(15.) Such costs of procuring the advice of counsel on the pleadings, evidence, and proceedings in any cause or matter as the taxing officer shall in his discretion think just and reasonable, and of procuring counsel to settle such pleadings and special affidavits as the taxing officer shall in his discretion think proper to be settled by counsel, are to be allowed; but as to affidavits a separate fee is not to be allowed for each affidavit, but one fee for all the affidavits proper to be so settled, which are or ought to be filed at the same time.

**Sp. All. 14.
Counsel at
Chambers.**

(16.) As to counsel attending at Judges' Chambers, no costs thereof shall in any case be allowed, unless the Judge certifies it to be a proper case for counsel to attend.

This Rule applies to the taxation of costs between solicitor and client as well as between party and party (*Re Chapman*, 10 Q. B. D. 54. A).

**Sp. All. 15.
Inspection of
documents.**

(17.) As to inspection of documents under Order XXXI. Rule 15; no allowance is to be made for any notice or inspection, unless it is shown to the satisfaction of the taxing officer that there were good and sufficient reasons for giving such notice and making such inspection.

The successful party can be allowed no costs of producing documents at the office of his own solicitor or of inspecting his opponent's documents (*Brown v. Sewell*, 16 Ch. D. 517. A).

**Sp. All. 16.
Copies of
documents in
posse-
sion of
another.**

(18.) As to taking copies of documents in possession of another party, or extracts therefrom, under Rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4d.

per folio ; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof.

(19.) Where any petition in a cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be £1, 10s. The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise ; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition, without appearing thereon, he is to be allowed a fee not exceeding the amount aforesaid.

Where mortgagees were served with a petition, but were not tendered their costs, and they appeared on the petition and only asked for their costs, Kay, J., merely allowed each of them the sum of two guineas out of the petitioner's share (*Somes v. Martin*, W. N. 1882, 113). Trustees who were respondents to a petition under the Trustee Relief Act, and had accepted two guineas for their costs, were not allowed their costs of appearance on petition (*Re Sutton*, W. N. 1882, 68). Under the former Rule two guineas was the sum allowed.

(20.) The Court or Judge may, at the hearing of any cause or matter, or upon any application or proceeding in any cause or matter in Court or at Chambers, and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence, notice requiring a statement of claim, notice to produce, admit, or cross-examine witnesses, account, statement, procuring discovery by interrogatories or order, applications for time, bills of costs, service of notice of motion or summons, or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct, or negligence, to be disallowed, or may direct the taxing officer to look

Sp. All. 17.
Costs to be
tendered on
service of
petition.

Sp. All. 18.
Unnecessary
proceedings.

into the same and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence; and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties; and in any case where such question shall not have been raised before and dealt with by the Court or Judge, it shall be the duty of the taxing officer to look into the same (and, as to evidence, although the same may be entered as read in any decree or order) for the purpose aforesaid, and thereupon the same consequences shall ensue as if he had been specially directed to do so: and in the Queen's Bench Division the Master shall make such order as may be required to effect the object of this regulation.

This Rule has been made more extensive in its operation.

On taxation the Master must inquire into the propriety of proceedings in an action, though not specially directed to do so. He cannot refuse to make the inquiry where an order is made to stay proceedings on payment of costs (*Baines v. Wormsley*, 47 L. J. Ch. 844).

The Taxing Master in taxing a bill of costs between solicitor and client has power to disallow the costs of proceedings which were occasioned by the negligence or ignorance of the solicitor, but if it go to the extent of losing the whole action, then he should leave the client to his remedy by action (*Massey v. Carey*, 26 Ch. D. 459. A).

The plaintiff was ordered to pay the costs of bringing sixteen actions against underwriters, as he might have included them all in one writ (*Gueret v. Young*, W. N. 1883, 216).

Sp. All 19.
Set-off.

(21.) In any case in which, under the last preceding regulation, or any other Rule of Court, or by the order or direction of a Court or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the taxing officer may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto in the same manner as costs ordered to be paid may be recovered.

See Order LXV. 14.

Whenever a party entitled to receive costs is liable to pay costs to the other party, the Taxing Master may adjust the costs by

way of deduction or set-off only in respect of the costs of the same action, and not in respect of any separate proceeding between the same parties (*Barker v. Hemming*, 5 Q. B. D. 609. A; *Robarts v. Bude*, 8 Ch. D. 198; *Ex parte Griffin*, 14 Ch. D. 37. A; *Batten v. Wedgwood Coal Co.*, W. N. 1884, 218).

(22.) Where in the Chancery Division any question as to any costs is under Regulation 20 dealt with at Chambers, the Chief Clerk is to make a note thereof, and state the same on his allowance of the fees for attendances at Chambers, or otherwise as may be convenient for the information of the taxing officer.

(23.) Where any party appears upon any application or proceeding in Court or at Chambers, in which he is not interested, or upon which, according to the practice of the Court, he ought not to attend, he is not to be allowed any costs of such appearance unless the Court or Judge shall expressly direct such costs to be allowed.

(24.) The costs of applications to extend the time for taking any proceedings shall be in the discretion of the taxing officer, unless the Court or Judge shall have specially directed how the costs are to be paid or borne. The taxing officer shall not allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary, and could not, with due diligence, have been avoided. The costs of a summons to extend time shall not be allowed in cases to which Rule 8 of Order LXIV. applies, unless the party taking out such summons has previously applied to the opposite party to consent, and he has not given a consent, to a sufficient extension of time, or the taxing officer shall consider there was a good reason for not making such application; and in case the taxing officer shall not allow the costs of such summons, and shall consider that the party applying ought to pay the costs of any other party occasioned thereby, he may direct such payment, or deal with such costs, in the manner provided by Regulation 21.

All but the first clause of this Rule is new.

(25.) The taxing officers of the Supreme Court, or of any Division thereof, shall, for the purpose of any proceeding before them, have power and authority to administer oaths, and shall, in relation to the taxation of costs, perform all such duties as have heretofore been or are by general orders directed to be performed by

Sp. All. 20.
Note by
Chief Clerk.

Sp. All. 21.
Unnecessary
appearance.

Sp. All. 22.
Extension
of time.

Sp. All. 23.
Powers of
taxing
officers.

any of the Masters, Taxing Masters, Registrars, or other officers of any of the Courts whose jurisdiction is by the Principal Act transferred to the High Court of Justice or Court of Appeal, and shall, in respect thereof, have such powers and authorities as previous to the commencement of the Principal Act were, or by general orders are, vested in any of such officers, including examining witnesses, directing production of books, papers, and documents, making separate certificates or allocaturs, requiring any party to be represented by a separate solicitor, and to direct and adopt all such other proceedings as could be directed and adopted by any such officer on references for the taxation of costs, and taking accounts of what is due in respect of such costs, and such other accounts connected therewith as may be directed by the Court or a Judge.

*C. O. XL. 25.
Account
consisting
partly of
bill of
costs.*

(26.) Where an account consists in part of any bill of costs, the Court or Judge may direct the taxing officer to assist in settling such costs, not being the ordinary costs of passing the account of a receiver, and the taxing officer, on receiving such direction, shall proceed to tax such costs, and shall have the same powers, and the same fees shall be payable in respect thereof, as if the same had been referred to the taxing officer by an order; and he shall return the same, with his opinion thereon, to the Court or Judge by whose direction the same were taxed.

*Sp. All. 24.
Parties to
attend.*

(27.) The taxing officer shall have authority to arrange and direct what parties are to attend before him on the taxation of costs to be borne by a fund or estate, and to disallow the costs of any party whose attendance such officer shall in his discretion consider unnecessary in consequence of the interest of such party in such fund or estate being small or remote, or sufficiently protected by other parties interested.

*Sp. All. 25.
Refusal or
neglect to
bring in
costs.*

(28.) When any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer shall be at liberty to certify the costs of the other party, and certify such refusal or neglect, or may allow such party refusing or neglecting a nominal or other sum for such costs, so

as to prevent any other party being prejudiced by such refusal or neglect.

(29.) As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

Costs of copies of shorthand-writers' notes of the evidence will not be allowed on taxation between party and party unless the Judge at the trial so direct (*Kirkwood v. Webster*, 9 Ch. D. 239; *Gandy v. Beddaway*, W. N. 1883, 89; or it is so ordered by the Divisional Court (*Watson v. G. W. Ry. Co.*, 6 Q. B. D. 163).

Special directions from the Court of Appeal with regard to shorthand notes used in the appeal should be applied for (*Ashworth v. Outram*, 9 Ch. D. 483. A). Where such notes of evidence and proceedings in the Court below are used on appeal, an application to be allowed on taxation the costs of the notes as costs of the appeal must be made before the judgment of the Court of Appeal is entered (*Hill v. Metrop. Asylum*, 49 L. J. 668. A). Such a direction will only be inserted in exceptional cases, the Judge's notes, supplemented by those of counsel, being in general considered a sufficient record of the evidence (*Earl De La Warr v. Miles*, 19 Ch. D. 80. A; *Kelly v. Byles*, 13 Ch. D. 693. A; *Vernon v. Vestry of Paddington*, 44 L. T. 229. A; *Singer Co. v. Loog*, 49 L. T. 484. A).

When the shorthand notes are essential to the proper hearing of the case the costs will be allowed (*Lee Cons. Board v. Button*, 12 Ch. D. 383. A; *Duchess of Westminster Ore Co.*, 10 Ch. D. 307. A).

A solicitor should be careful to obtain the authority of his client before directing shorthand notes to be taken, or other unusual expense to be incurred, and to point out to the client that he may be liable to pay the costs in any event (*Re Blyth & Fanshawe*, 10 Q. B. D. 207. A).

Costs of brief copies of notes in a reference for the use of counsel will not be allowed unless by agreement (*Wells v. Mitcham Gas Co.*, 4 Ex. D. 1). The costs of copies of pleadings for the use of counsel and Judges on an interlocutory application, will be allowed where such copies were necessary to enable the case to be properly argued (*Warner v. Mosses*, 19 Ch. D. 72. A).

When the *vide voce* evidence is voluminous, and the parties cannot properly argue the appeal without referring to all parts of it, the Court will allow the costs of printing (*Bigsby v. Dickenson*, 4 Ch. D. 24. A).

Journeys of the country solicitor to confer with counsel, &c., must be authorised by the client or they will not be allowed (*Re Storer*, 26 Ch. D. 190).

The Court never interferes with the Master's discretion in matters which are peculiarly within his province, unless it be satisfied that he has been clearly wrong or unless some principle of taxation be involved (per Brett, J., in *Wakefield v. Brown*, L.

Sp. All. 26.
Extraordi-
nary allow-
ances.

R. 9 C. P. 411. As for instance obtaining the advice of counsel on behalf of a trustee (*Re Braund*, 39 L. J. Ch. 384).

Sp. All. 27. (30.) As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed.

C. O. XL 7. (31.) Where the plaintiff is directed to pay to the defendant the costs of the cause, the costs occasioned to a defendant by any amendment of the plaintiff's pleadings shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which shall appear to have been rendered necessary by the default of such defendant); but there shall be deducted from such costs any sum which may have been paid by the plaintiff according to the course of the Court at the time of any amendment.

C. O. XL 8. (32.) Where upon taxation a plaintiff who has obtained a judgment with costs is not allowed the costs of any amendment of his pleadings on the grounds of the same having been unnecessary, the defendant's costs occasioned by such amendment shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

C. O. XL 88. (33.) Where an action or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order directed to be paid, the taxing officer may tax such costs without any order referring the same for taxation, unless the Court or a Judge upon the application of the party alleging himself to be aggrieved prohibits the taxation of such costs.

C. O. XL 89. (34.) Where it is directed that costs shall be taxed in case the parties differ about the same, the party claiming the costs shall bring the bill of costs into the office of the proper taxing officer, and give notice of his having so done to the other party, and at any time within eight days after such notice such other party shall have liberty to inspect the same without fee, if he thinks fit. And at or before the expiration of the eight days, or such further time as the taxing officer shall in his discretion allow, such other party shall either agree to pay the costs or signify his dissent therefrom, and shall thereupon be at liberty to tender

a sum of money for the costs ; but where he makes no such tender, or where the party claiming the costs refuses to accept the sum so tendered, the taxing officer shall proceed to tax the costs ; and where the taxed costs shall not exceed the sum tendered, the costs of the taxation shall be borne by the party claiming the costs.

(35.) Where any costs are by any judgment or *c. o. XL* 40. order directed to be taxed and to be paid out of any money or fund in Court, the taxing officer in his certificate of taxation shall state the total amount of all such costs as taxed without any direction for that purpose in such judgment or order.

(36.) The allowances in respect of fees to the Con- 15 & 16 Vict.veyancing Counsel of the Court, and to any accountants, c. 80, s. 43. merchants, engineers, actuaries, and other scientific persons to whom any question is referred, shall be regulated by the taxing officers, subject to appeal to the Court or Judge, whose decision shall be final.

(37.) The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the Principal Act, shall, in so far as they are not inconsistent with the Principal Act and these Rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal.

Brett, L.J., has pointed out, in *Sparrow v. Hill*, 8 Q. B. D. 480. A, that it is not always possible to apply the same rules of taxation to an action in the Q. B. D. as an action in the Ch. D., because the subject-matters are different.

In *Knight v. Pursell*, 49 L. J. Ch. 120, the plaintiff claimed an injunction in respect of three separate subjects of complaint, succeeded as to one and failed as to the others. The order for taxation directed that the defendant was to have the costs of so much of the action as had been dismissed, and the plaintiff of the rest of the action. The Taxing Master taxed the plaintiff's and defendant's costs of the whole action and allowed one-third to the plaintiff, and two-thirds to the defendant : Held, that he had proceeded on the usual principle.

(38.) As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who,

Sp. All. 29.
Discretion of
Master.

in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances: and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment.

The last clause of this Rule is new.

The Taxing Master may require an affidavit of increase to prove the number of days witnesses were absent from home, &c., or not, at his discretion (*Smith v. Day*, 16 Ch. D. 726).

As to an order directing the costs of special documents and exhibits to be taxed, see *Re De Rosas*, 24 Ch. D. 684.

It would appear that the costs and expenses of witnesses are in the discretion of the Master (*Thomas v. Parry*, W. N. 1880. 184).

**Sp. All. 30.
Objections
to taxation.**

(39.) Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items, or parts thereof, objected to, and the grounds and reasons for such objections, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

This Rule only applies where particular items are objected to, not where the general principle of taxation is disputed (*Sparrow v. Hill*, 7 Q. B. D. 368). On appeal, 8 Q. B. D. 479, this point was not touched upon.

A person who is not a party to the making of an order for taxation of costs, and who desires to have reviewed the taxation made under it, ought to apply to have the order for taxation set aside (*Charlton v. Charlton*, 31 W. R. 237).

**Sp. All. 31.
Review of
taxation.**

(40.) Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

(41.) Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur, or such other time as the Court or Judge, or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as the Judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

The clause as to the fourteen days' limit is new.

Where accounts are being taken before the Chief Clerk, either party may bring an item before the Judge without any summons (Order L.V. 69), but if the solicitor insist upon this right in an unreasonable manner, the Court may make him pay the costs personally (*Upton v. Brown*, 20 Ch. D. 731).

(42.) Such application shall be heard and determined by the Judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct.

(43.) When a writ of summons for the commencement of an action shall be issued from a District Registry, and when an action proceeds in a District Registry, all fees and allowances, and rules and directions relating to costs, which would be applicable to such proceeding if the writ of summons were issued at the Central Office, and if the action proceeded in London, shall apply to such writ of summons issued from and other proceedings in the District Registry.

(44.) No retaining fee to counsel shall be allowed on taxation as between party and party.

As to counsel's fees in general the Court will not interfere with the Master's discretion as to the amount allowed for counsel's fees unless it have been exercised in an unreasonable manner (*Hargreaves v. Scott*, 4 C. P. D. 21), or unless a gross mistake has been made (*Brown v. Sewell*, 16 Ch. D. 517. A).

(45.) Fees for conferences are not to be allowed in any cause or matter in addition to the solicitor's and counsel's fees for drawing and settling, or perusing any pleadings, affidavits, deeds, or other proceedings or abstracts of title, or for advising thereon, unless it

shall appear to the taxing officer for some special reason that a conference was necessary or proper.

Two counsel. **Sum under £50.** (46.) In any case in which under Rule 12 of this Order the scale of costs in County Courts is applicable, the costs of briefing more than one counsel shall not be allowed, unless the taxing officer shall, for special reasons, be of opinion that briefing more than one counsel was proper.

Two counsel will generally be allowed on taxation in any case of importance, see the observations of Pearson, J., in *Llanover v. Homfray*, W. N. 1884, 134.

Two juniors. (47.) Where the costs of retaining two counsel may properly be allowed, such allowance may be made although both such counsel may have been selected from the Outer Bar.

The mere fact that one junior has been called within the bar does not of itself justify a third being retained (*Re Lafitte*, 20 Eq. 650; *France v. Carver*, W. N. 1875, 171). Where a junior counsel who had prepared the pleading, was called within the bar, before the hearing and after a leader had been retained, the costs of three counsel were allowed because it was considered that the case was of such a description as to make the retaining a leader at that stage of the cause, proper (*Cousens v. Cousens*, L. R. 7 Ch. 48, commented on in *Bets v. Cleaver*, *Ibid.*, 516).

On taxation between party and party, costs of three counsel will be allowed only where the Court considers it a case in which a prudent man would have employed three (*Kirkwood v. Webster*, 9 Ch. D. 239; *The Mammoth*, 9 P. D. 128; *Millard v. Burroughes*, W. N. 1880, 4).

Refreshers. (48.) As to refresher fees, when any cause or matter is to be tried or heard upon *vivæ voce* evidence in open Court, if the trial shall extend over more than one day, and shall occupy either on the first day only, or partly on the first and partly on a subsequent day or days, more than five hours, without being concluded, the taxing officer may allow, for every clear day subsequent to that on which the five hours shall have expired, the following fees:—

To the leading counsel . . .	from 5 to 10 gs.
To the second, if three counsel . . .	3 to 7 ,,
To the third, if three counsel, . . .	
or the second, if only two . . .	3 to 5 ,,

The like allowances may be made where the evidence in chief is not taken *vivæ voce*, if the trial on hearing shall be substantially prolonged beyond such period of five hours, to be so computed as aforesaid, by the

cross-examination of witnesses whose affidavits or depositions have been used.

(49.) Where a cause or matter shall not be brought on for trial or hearing, the costs of and consequent on the preparation and delivery of briefs shall not be allowed if the taxing officer shall be of opinion that such costs were prematurely incurred.

(50.) Where a cause or matter which stands for trial is called on to be tried, but cannot be decided by reason of a want of parties or other defect on part of the plaintiff, and is therefore struck out of the paper, and the same cause is again set down, the defendant shall be allowed the taxed costs occasioned by the first setting down, although he does not obtain the costs of the cause or matter.

(51.) The following fees are to be allowed to counsel's clerks:—

	£ s. d.
Upon a fee under 5 guineas	0 2 6
5 guineas and under 10 guineas	0 5 0
10 guineas and under 20 guineas	0 10 0
20 guineas and under 30 guineas	0 15 0
30 guineas and under 50 guineas	1 0 0
50 guineas and upwards, per cent.	2 10 0
On consultations, senior's clerk	0 5 0
On consultations, junior's clerk	0 2 6
On conferences	0 5 0
On retainers (where allowed):	
General retainer	0 10 6
Common retainer	0 2 6

(52.) No fee to counsel shall be allowed on taxation unless vouched by his signature.

Signature of
counsel.

(53.) In cases in which an original affidavit can be used, and to which Order XXXVIII. Rule 15 applies, it shall not be necessary to take an office copy.

(54.) It shall not be necessary to take an office copy of any affidavit of discovery of documents, and the copy delivered by the party filing it may be used as against such party.

(55.) Where, in proceedings before the taxing officer, any party is guilty of neglect or delay, or puts any other party to any unnecessary or improper expense

Improper
expense on
taxation.

relative to such proceedings, the taxing officer may direct such party or his solicitor to pay such costs as he may think proper, or deal with them under Regulation 21.

Costs to be paid out of fund in Court. Notice to client.

(56.) Where in any cause or matter any bill of costs is directed to be taxed for the purpose of being paid or raised out of any fund or property, the taxing officer may, if he shall consider there is a reasonable ground for so doing, require the solicitor to deliver or send to his clients, or any of them, free of charge, a copy of such bill, or any part thereof, previously to such officer completing the taxation thereof, accompanied by any statement such officer may direct, and by a letter informing such client that the bill of costs has been referred to the taxing officer, giving his name and address for taxation, and will be proceeded with at the time the officer shall have appointed for this purpose, and such officer may suspend the taxation for such time as he may consider reasonable.

Extension of time.

(57.) The taxing officer shall have power to limit or extend the time for any proceeding before him, and where, by any general order, or any order of the Court or a Judge, a time is appointed for any proceeding before or by a taxing officer, unless the Court or Judge shall otherwise direct, such officer shall have power from time to time to extend the time appointed upon such terms (if any) as the justice of the case may require, and although the application for the same is not made until after the expiration of the time appointed, it shall not be necessary to make a certificate or order for this purpose, unless required for any special purpose.

Indorsement on bill left for taxation.

(58.) Every bill of costs which shall be left for taxation shall be indorsed with the name and address of the solicitor by whom it is so left, and also the name and address of the solicitor, if any, for whom he is agent, including any solicitor who is entitled or intended to participate in the costs to be so taxed.

As to the signature by a new firm to a bill of costs for work done by the old firm, see *Penley v. Anstruther*, 48 L. T. 664; a case decided on the Attorneys and Solicitors Act, which requires a signed bill of costs to be delivered to the party.

A solicitor cannot avoid the taxation of a bill delivered to the person chargeable, by withdrawing it and delivering an amended bill, even though he offer to strike out overcharge objected to upon the same day as the delivery of the original bill (*Re Holroyde*, 29 W. R. 599).

A solicitor delivered a bill for £360, but intimated his willingness to accept £320, held that the Taxing Master was wrong in holding that the bill was never really delivered for more than £320 (*Ingle v. McCutchan*, 12 Q. B. D. 518; *Re Paull*, 27 Ch. D. 485. A).

23 & 24 Vict c. 127, s. 28.

XXVIII. In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of Justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding, and it shall be lawful for such Court or Judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or Judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bond fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right. Provided always that no such order shall be made by any such Court or Judge, in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations.

This section is intended for the benefit and protection of solicitors only, and it is not competent for the parties to an action to charge the property recovered with the payment of costs which they are liable and able to pay (*Harrison v. Cornwall Mining Co.*, 58 L. J. Ch. 596).

An application by a solicitor for an order charging his costs upon the interest of a party to an action in a fund in Court is properly made by a petition in the action; the other parties to the action ought not to be served with the petition (*Brown v. Trotman*, 12 Ch. D. 880). But it need not necessarily be made on petition, in a suitable case it may be obtained on summons, and need not be intituled either in the matter of the Act or of the solicitor (*Hamer v. Giles*, 11 Ch. D. 942).

In a summons for this purpose substituted service may be allowed (*Hunt v. Austin, Ex parte J. N. Mason*, 9 Q. B. D. 598; and see now Order LXVII. 6).

An application for a charging order is such a further proceeding under Order XLIX. 2, as will be ordered to be heard before the Judge who tried the case (*Porter v. West*, W. N. 1880, 195).

In an action intituled in the Chancery Division, and tried at the Assizes before a Judge, he is the proper person to hear such an application (*Owen v. Henshaw*, 7 Ch. D. 885).

A petition has been presented by the personal representative of a solicitor (*Baile v. Baile*, 18 Eq. 497), in which case the solicitor had been retained by the next friend of an infant, and the object of the suit was to obtain an allowance for his maintenance.

In *Catlow v. Catlow*, 2 C. P. D. 362, the cause was tried in the

Court of Common Pleas at Lancaster, and the application for a charging order was made in the Common Pleas Division at Westminster, where the matter was heard and determined upon the authority of *Wilson v. Hood*, 3 H. & C. 148, 33 L. J. Ex. 204. In *Higgs v. Schrader*, 3 C. P. D. 252, however, the Court set aside a charging order made by a Judge at Chambers, on the ground that the Judge who tried the case was the proper person to make the order, being the only person who could exercise a discretion upon the merits. When an action is pending in the Queen's Bench Division, a Judge at Chambers has jurisdiction to make this order.

Money paid into Court in the action is property recovered or preserved within the meaning of the section (*Cloer v. Adams*, 6 Q. B. D. 622). If he has discharged himself from the position of plaintiff's solicitor, but has not done so wrongly or improperly, the solicitor is still entitled to a charge on the property recovered (*Ibid.*). He is not debarred of his right because by an order of the Court made prior to the order to charge the solicitor his costs were to be paid out of a specified fund (*Pilcher v. Arden*, 7 Ch. D. 318. A).

Where there was a technical difficulty felt in giving the solicitors a charge upon the entire fund in a partition action, Fry, J., granted an injunction to prevent the plaintiffs from receiving any money in the action, or by way of compromise, without notice to the solicitors (*Lloyd v. Jones*, 27 W. R. 655).

There must be an actual "recovery or preservation" of the property, and it must take place through the instrumentality of the solicitor. Hence it is not possible to make a charge upon an easement—e.g., the right to light and air (*Foxon v. Gascoigne*, L. R. 9 Ch. 654). The real question in such cases must be whether proof has been given to the satisfaction of the Court of the actual recovery or preservation of property by means of the suit, which is always a question of fact (per Selborne, L.C., in *Pinkerton v. Easton*, 16 Eq. 498; *Charlton v. Charlton*, 52 L. J. Ch. 971). And in *Pierson v. Knutsford Estate Co.*, 13 Q. B. D. 666. A, the Court declined to give a charging order upon money paid into the Bankruptcy Court to abide the result of a counter-claim, inasmuch as the right to it depended on the discretion of the Bankruptcy Court, which might be affected by circumstances outside the litigation. The charge on the property recovered or preserved is in the nature of salvage, and may be made on the interest of persons who did not employ the solicitor, and who were not parties to the action, if they adopt the benefit obtained by it. It makes no difference that the persons whose interests are to be charged are infants, but the Court will not make the order until the infants have had an opportunity of being heard on it (*Greer v. Young*, 24 Ch. D. 545. A; *Jackson v. Smith*, 53 L. J. 972).

A trustee is a person who duty it is to preserve the property; he is the owner of the property for this purpose, and he represents the *cestui que trust*; as he represents the *cestui que trust*, his solicitor is entitled to a charge upon the whole of the trust property recovered through his exertions (*Bulley v. Bulley*, 8 Ch. D. 479. A).

In *Re Fiddey, Jones v. Frost*, L. R. 7 Ch. 773, it was urged that the solicitor was not entitled to an order, as the suit had been practically useless, but the Court decided that the suit had not been practically useless, as a cloud or doubt which affected

the title had been removed, and that as the plaintiff knew that there was a pending suit, and that costs must have been incurred in it, he ought to have inquired whether the solicitor had been paid.

Plaintiffs in an action having mortgaged their interest in an estate, it was held that the mortgagees, having notice of the action, they were presumed to have known the rights of the solicitor to the plaintiff, and that his charge ought not to be postponed to the mortgagee, he not having been guilty of any misrepresentation or concealment (*Faithfull v. Even*, 7 Ch. D. 495. A). As a general rule, says Pollock, B., in *Dallow v. Garrold*, 13 Q. B. D. 546, it is clearly laid down by the cases that all persons of business when dealing with a fund obtained by litigation must be assumed to be aware that the fund is to be considered as subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which is successful; affirmed on appeal (W. N. 1884, 231).

In *Teynam v. Porter*, 11 Eq. 181, it was attempted to deprive a solicitor of his rights by the principals entering into a compromise without his knowledge. There is no rule that the parties may not compromise an action without the intervention of their solicitors; they must, however, do so honourably, and not intend to cheat their solicitors of their proper charges (per Lindley, L.J., in *The Hope*, 8 P. D. 146. A).

A solicitor, who has got a charging order, being changed after the administration decree, cannot have an order for payment of his costs till after the hearing on further consideration (*Re Green*, 26 Ch. D. 16. A).

As to charging an annuity given to a married woman for her separate use without power of anticipation, see *Re Keane*, 12 Eq. 115.

Where a trustee in bankruptcy intervenes and adopts the action he takes the fruits of it, subject to the solicitor's lien for costs up to that date (*Emden v. Carle*, 19 Ch. D. 311. A).

The lien of a solicitor for his costs of recovering a sum of money takes priority of a garnishee order *nisi* (*Slippey v. Grey*, 49 L. J. 524. A; *Sympson v. Prothero*, 26 L. J. Ch. 671; *Birchall v. Pugin*, L. R. 10 C. P. 397). The lien upon the interest of his client in a fund paid into Court through his exertions would seem to be paramount to the claim of an assignee for value without notice (*Haymes v. Cooper*, 38 L. J. Ch. 488).

As a general rule, the Statute of Limitations does not begin to run until the termination of the action or the death of the client (*Whitehead v. Lord*, 7 Ex. 691).

ORDER LXVI.

NOTICES, PRINTING, PAPER, COPIES, OFFICE COPIES, MINUTES, &c.

Rules 2, 8, and 9 are new. The remainder of the Order is taken from R. S. C. (Costs).

1. All notices required by these Rules shall be in *LVI. 1*