STUDIES IN ENGLISH CIVIL PROCEDURE.*

II. The Rule Making Authority.

XII.

The larger part of the five hundred amendments to the R. S. C. 1883 cannot be grouped together as the product of concerted movements or general agitations for reform; unlike the changes reviewed in the foregoing sections, each of them stands more or less alone, with a story of its own. They can, however, for convenience, be classified according to their character rather than their origins, and such a method brings out the fact that they fall, roughly, into five or six general categories whose diversity is further evidence of the advantages of the rule-making system over the regulation of procedure directly by statute.

To a student of the rule-making authority as a new development in the machinery of legislation the most striking of these categories, though not the most numerous or the most weighty in its content, is that which contains amendments made with the purpose of counteracting various judicial decisions in the Supreme Court and the House of Lords. Frequently a branch of the Court of Appeal, or a Judge in Chambers, or some other tribunal, in the consideration of a specific set of facts, will interpret an existing Rule or practice in such a way as to impair the usefulness or to restrict the scope for which it was apparently intended; sometimes such a decision cannot be avoided when the ordinary canons of interpretation are applied to a loosely worded passage in the Rules. When that occurs and the resulting inconvenience is brought to the attention of the Rule Committee, the usual course is the promulgation of an alteration in the wording of the Rule, or an addition to it, which will make it clear, so that without expressly overruling decisions, the Committee is able effectually to overcome their binding force. This is a use of the rule-making power which was probably not contemplated by its

*Continued from the March issue, 63 University of Pennsylvania Law Review, 429.

creators, but as the power has been so exercised no less than twenty-five times since 1883 without question, the method seems to be accepted as clearly *intra vires.*

Among the amendments in this class the one that borders nearest on the domain of substantive law is the addition made in 1896 to the Rule permitting joinder of parties. Order XVI, Rule 1, as formulated in 1883, read as follows:

> "All persons may be joined in one action as plaintiffs in whom any right to relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief," *etc.*

In the Nineties a line of decisions interpreted this Rule as limiting the joinder to parties who claimed *the same relief,* thereby materially restricting the classes of claims that might be joined under the Rule. It was considered necessary to remove the obstacle, so in 1896 the Rule was altered to read:

> "All persons may be joined in one action as plaintiffs in whom any right to relief *in respect of or arising out of the same transaction or series of transactions* is alleged to exist, whether jointly, severally, or in the alternative, *where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of an action, the Court or a Judge may order separate trials, or make such other order as may be expedient,* and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief," *etc.*

Thus the doctrine of 1873, that the sole limit for the right to join claims and parties should be the convenience of trial, was emphasized and re-affirmed, and the effect of the decisions that sought to hamper it swept away. Since 1896 joinder has been permitted under the new Rule in many cases in which, under the prior interpretation, it would have been refused.

It is interesting to examine the decisions which brought about this result, as the instance is typical. The first was *Smurthwaite* v. *Hannay,* in the House of Lords,[389] in which it

[389] [1894] Appeal Cases, 494.

was decided that the old Order XVI, Rule 1, did not permit of a joinder in one action by sixteen persons (nine being shippers and seven consignees, of cotton under various bills of lading) against the shipowners, for short delivery. Lord Chancellor Herschell in his judgment, after reading the words of the Rule, said:

> "This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief,"

and Lord Russell of Killowen, C. J., also felt that the Rule was too broadly worded, as under it

> "it would be possible to join any number of plaintiffs with distinct causes of action against any number of defendants charged on distinct grounds of liability."

The limitation declared in that case was followed without hesitation by the Privy Council in *Peninsular and Oriental Steam Navigation Company* v. *Tsune Kijima*,[390] an action under Lord Campbell's Act, in which sixty-two different groups of persons joined, claiming damages for injury done to them by the drowning of sixty-two seamen whom they represented, and alleging that a collision between two ships was due to the negligence of the defendant's servants. The following year, in a Divisional Court sitting to hear County Court appeals, Lord Russell was obliged to follow his House of Lords judgment in a case of most distressing character. Fifty miners were drowned in the sudden flooding of the seam in which they were working, and their representatives joined in an action under Lord Campbell's Act, brought in the local County Court. The County Court Rule on joinder of plaintiffs, Order III, Rule 1, was identical with Order XVI, Rule 1, in the High Court Rules, and the Divisional Court held, *Carter* v. *Rigby and Company*,[391] that the joinder could not be allowed under the Rule as interpreted by the House of Lords. The Lord Chief Justice said:

> "I am sorry to feel obliged to come to this conclusion, for although I cannot doubt that *Smurthwaite* v. *Hannay* was rightly decided, I think it in every way desirable that Order III,

[390] [1895] Appeal Cases. 661.
[391] [1896] 2 Q. B. 113.

> Rule 1, should be so framed as to permit such a joinder as that here in question, subject to the control of the Court where inconvenience or injustice might arise from following that course, and I hope that the Rule Committee may see fit to amend Order III, Rule 1."

The case was taken up to the Court of Appeal, but Lord Esher dismissed it with the comment that:

> "The House of Lords has put a construction upon it, and we cannot go beyond or behind that decision."

At the beginning of the next sittings of the Court, October 26, 1896, the Supreme Court Rule Committee met once more, and acting upon the suggestion of Lord Russell issued the amendment to Order XVI. Rule 1, of the Supreme Court Rules which has been quoted and whose effect has been described; a few weeks later, November 19, the identical amendment to Order III, Rule 1, of the County Court Rules was made by the County Court Rule Committee and approved by the Lord Chancellor. In this manner a quasi-legislative body, composed of eight judges, two barristers and a solicitor, altered the law of the land as it had been declared by the highest tribunal in the Empire.[392]

Another amendment in this class dealing with parties is that made in 1911 definitely extending third party procedure in a direction where there had been a conflict among courts. The third party procedure was introduced by Section Twenty-four of the Judicature Act, 1873, and its scope was at first not clearly understood. In *Fowler* v. *Knoop*, in the Exchequer Division in 1877,[393] a consignee under a bill of lading was sued for delay in

[392] A few decisions under the Rule as altered are: Drincqbier v. Wood, [1899] 1 Ch. 393, where four plaintiffs, holders of several debentures, joined in an action against a company, alleging false statements in the prospectus and claiming damages; Oxford & Cambridge v. Gill, [1899] 1 Ch. 55, which was an action by the two Universities to restrain the use of the words "Oxford and Cambridge" in the title of the defendant's publications; Walters v. Green, [1899] 2 Ch. 696, in which several employers moved for an injunction to restrain certain officials of trade unions from watching and besetting certain places for the purpose of persuading workmen not to work for the plaintiffs; and Ellis v. Duke of Bedford, [1901] Appeal Cases 1, where six several growers of fruit, on behalf of themselves and all other such growers, sued the owner of Covent Garden Market for alleged invasion of their rights in it.

[393] 36 LAW TIMES REPORTS, 219 (1877).

unloading; he brought in as third party the person to whom he had transferred the bill of lading while the goods were still afloat; that person desired to bring in as fourth party another one to whom he had, in turn, transferred the bill of lading while the goods were still afloat. The court, at first doubtful, permitted the step after argument by Mr. (now the Right Honorable Sir) Arthur Wilson, the draftsman of most of the 1875 Rules. But in the same year, in *Walker* v. *Balfour*,[394] in the Common Pleas Division, a similar permission was refused, Mr. Justice Denman declaring it was not open to defendants to postpone the plaintiff indefinitely by bringing in other persons *toties quoties*. Many years later Mr. Justice Eve in the Chancery Division decided in *Klawanski* v. *Premier Company*[395] that the third party could, if he chose, step aside and bring in a fourth party to defend. After that case a Rule was added to Order XVI to authorize the procedure and to set at rest any doubt as to its correctness.[396] Under the new Rule "third party notices" have been issued in an action by successive parties even up to the eighth and ninth party. The Rule is not of frequent application, but it is exceedingly useful in cases where there have been successive transfers of mercantile documents, or of leases containing repair clauses, *etc.*

It will be recalled that one of the improvements introduced sued in the firm name and to require, thereupon, that the partners

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[394] 25 WEEKLY REPORTER, 511 (1877).

[395] WEEKLY NOTES (1911) 94. This was an action by A against a company for transferring shares on their books from A's name to B's without A's consent. The company, having acted on orders of transfer purporting to be signed by A, but presented by B, brought in B as a third party from whom indemnity could be claimed in the event of A's succeeding. B, in turn, issued a "third party notice" to C, a brother of the plaintiff, on whose representations he had presented the orders of transfer to the company as valid. At the trial C actually appeared and defended the action, taking the chief part in bringing the facts of the case to light, and the plaintiff's action was dismissed. The case was reported on the raising of a question as to whether the court had jurisdiction to order the plaintiff to pay the fourth party's costs.

[396] Order XVI, Rule 54 A: "Where any person served with a third party notice by a defendant or by a third party under these Rules claims to be entitled to contribution or indemnity over against any person not a party to the action he may by leave of the court or a judge issue a third party notice to that effect; and the preceding Rules as to third party procedure shall apply *mutatis mutandis* to every notice so issued."

by the 1875 Judicature Rules was to allow a partnership to be must enter their appearances individually; service might be effected either upon any partner, or upon the person in control of the firm's place of business, and if a person served "as a partner" failed to appear, he was penalized by having his personal property made liable to execution under a judgment against the firm. In most actions against partnerships it was the practice to effect service upon the person in control of the place of business and serve him "as a partner," although frequently he was not a partner at all, but merely an employee. In an action undefended by the firm, therefore, that employee ran the risk of having his private property taken in execution, as he would be a person served "as a partner," who failed to appear. The exact combination of facts did not arise in a very large number of actions, but it was familiar enough to cause the practice masters to issue a regulation in 1887, to the effect that when those conditions were present the Central Office should accept from the employee an appearance "with a denial of partnership," which would still leave the plaintiff free to sign judgment against the firm itself for default of appearance. In 1890 this device was brought to the attention of the Court of Appeal in *Davies and Company* v. *André and Company*,[397] and they ruled that there could be no such thing as a conditional appearance; the person served, they said, either is a partner or is not a partner; if he is a partner he must appear unconditionally, and if he is not a partner he must not appear at all. That decision put the employee to the risk of having to prove, when execution against his private property was applied for, that he was not a partner—a risk augmented by the mysteries of the law of partnership. A few weeks after the decision, an employee in control of his firm's place of business was served "as a partner," and wishing to deny the partnership he tendered to the Central Office an appearance reading as follows: "Enter an appearance for A, *served as a partner* in the firm of B & Co.," but the appearance was refused under the authority of *Davies* v. *André* and that refusal was sustained by

[397] 24 Q. B. D. 598 (1890).

a Divisional Court, in *Allden* v. *Prentis and Company*,[398] on the ground that the appearance must be unconditional to be accepted. The tables were now turned, as the plaintiff soon discovered, for the situation now was that there was an unconditional appearance entered which would bar him from obtaining his judgment for default of appearance, and the firm was given, without the asking, more time before having to submit to judgment.

The anomalies in the situation were pointed out in a series of three articles in the Solicitors' Journal[399] by Mr. Francis A. Stringer of the Central Office. Not long afterward, Parliament enacted the codifying Partnership Act, 1890, and the Rule Committee decided to revise completely the Rules on suits by and against firms, scattered through the White Book, with a view to removing inconsistencies. It is supposed that Lord Justice Lindley (the author of Lindley on Partnership) was the prime mover in this decision. On June 19, 1891, the new Rules were signed; they combine in a new Order, Order XLVIII A, eleven Rules affecting partnerships as parties. They remove the difficulties raised by *Davies* v. *André* and *Allden* v. *Prentis* by expressly permitting any person served "as a partner" to enter "an appearance under protest, denying that he is a partner," without prejudicing the plaintiff's right to sign judgment against the firm itself for failure to appear.[400]

Not so comprehensive a change as to parties, but one affecting a Rule applied with equal frequency, was made in 1893 to Order XVI, Rule 8. That Rule, reproduced from Section 42 (9) of the Chancery Procedure Act, 1852, allows all trustees to sue and be sued in actions touching the property they represent, without joining as parties their *cestuis que trust* (subject to the

[398] 34 SOLICITORS' JOURNAL, 541 (1890).

[399] Vol. 34, pp. 520, 541 and 562 (June, 1890).

[400] Order XLVIII A, Rule 7. What the plaintiff must do is to serve the employee both "as a partner" and "as the person in control," giving written notice to that effect under the new Order XLVIII A, Rule 4. Therefore, although the conditional appearance may block him from treating the employee as a partner, the plaintiff may still take his judgment against the firm because his writ has been served upon the person in control of the place of business.

power of the court to order beneficiaries made parties where advisable). In *Francis* v. *Harrison*, 1889,[401] it was laid down as a general rule, despite this, that a trustee mortgagee does not sufficiently represent his *cestuis que trust* as defendant in a *foreclosure* action. In that case the trustee happened to be a bankrupt, but the judgment of North, J., was broad enough in its terms to apply to all foreclosure actions, and was so applied several times in chambers after 1889. The Rule Committee evidently thought this an unnecessary limitation, for in 1893 the following sentence was added to the end of the former Rule:

> "This Rule shall apply to trustees, executors and administrators sued in proceedings to enforce a security by foreclosure or otherwise."

Turning from the subject of parties to that of the indorsement on the writ two amendments are found in the category under discussion. The first overturns a decision of the Court of Appeal with remarkable brevity. The procedure for summary judgment on liquidated money claims, developed out of the Bills of Exchange Act, 1855, had been extended in 1883, by adding the following line to Order III, Rule 6:

> "or in actions for the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant";

the object being to provide a summary method for the recovery of tenements in cases which are practically never defended. It was early held in chambers, in 1884, by Mr. Justice Mathew, who was a member of the 1881 Procedure Committee which recommended the extension, that this part of the Rule was never intended to apply to cases where the lease had been determined which the lease had run out to its natural termination; and in two cases of forfeiture he refused leave to indorse the claim by a forfeiture for non-payment of rent, but only to those in specially under Order III, Rule 6.[402] The Court of Appeal gave

[401] 43 Ch. Div. 183 (1889).

[402] Burns v. Walford, WEEKLY NOTES (1884), 31, and Mansergh v. Rimell, WEEKLY NOTES (1884), 34.

binding force to this view ten years later in *Arden* v. *Boyce*,[402] where the exact point was carried up from the Judge in Chambers through the Divisional Court, Lord Justice Davey explaining that:

> "The principle appears to be that the court will not give a summary judgment in cases where an action for recovery of land is based on a forfeiture."

But in January, 1902, when the Rule Committee were clearing away the weeds that had sprung up around the 1897 summons for directions, they added a very short phrase to Order III, Rule 6, which made its land clause read as follows:

> "or in actions for the recovery of land, with or without a claim for rents or *mesne* profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, *or has become liable to forfeiture for non-payment of rent*," *etc.*

and those few words removed *Arden* v. *Boyce* from the precedent books without further ado.

A few months later, July, 1902, the Rule Committee made an amendment affecting the indorsement of *un*liquidated claims. Under the Common Law Procedure Acts there was no such thing as a judgment for want of an appearance; the practice had been for the Court to order an appearance to be entered for the absent defendant, then to order the plaintiff to file his statement of claim, and then to give judgment against the defendant for failing to plead. The Judicature Rules of 1875, and again in 1883, contained a section improving the facilities for judgments by default. Order XIII, Rule 5, provided that where the writ was indorsed with a claim

> "for detention of goods and pecuniary damages, or either of them,"

and the defendant failed to appear, the plaintiff might, without having to file a statement of claim, sign interlocutory judgment, and proceed to assess his damages by writ of inquiry or in any other way directed by the court.

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[402] [1894] 1 Q. B. 796.

This Rule was the subject of argument in a case of *Eyre* v. *Eyre*, before Mr. Justice Bucknill in 1901.[404] There the claim was for pecuniary damages for slander, and no appearance being entered the plaintiff signed interlocutory judgment and issued his writ of inquiry under Order XIII. Rule 5. The defendant then sought to have the interlocutory judgment set aside on the ground that Order XIII, Rule 5, applied only when the pecuniary damages were for the detention of goods, not for *other* forms of injury. The judge was inclined to agree that the defendant's contention was sound, but being confronted with the fact that the practice not only of the English but of the Irish and Colonial courts for twenty-five years, under Order XIII, Rule 5, had been to apply it to *all* cases where pecuniary damages were claimed, he avoided the difficulty by setting aside the judgment under the general power of the court to set aside default judgments on proper terms.[405] At the same time he said that Order XIII, Rule 5, if it was intended to apply to the case in hand, was "about as badly worded as it possibly could be," and he promised to "communicate with the Rule Committee, pointing out to them the difficulty which had arisen, in the hope that they would deal with similar cases." His representations to the Committee (of which he was not himself a member) resulted in an amendment to Order XIII, Rule 5, among the Rules of July, 1902, which made it apply thenceforth to all cases

> "where the writ is indorsed with a claim for *pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages,*"

and no doubts have since been thrown upon the meaning of the Rule. The Solicitors' Journal said of the case at the time: "It will stand almost alone among reported cases, because Mr. Justice Bucknill withheld his decision on the real point at issue with the avowed purpose of allowing time for the matter to be brought to the attention of the Rule Committee in preference to giving a

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[404] Reported in 45 SOLICITORS' JOURNAL, 653 (July 13, 1901).
[405] Order XXVII. Rule 15.
[406] 45 SOLICITORS' JOURNAL, 648 (July 13, 1901).

judgment which would have the effect of upsetting the established practice on an important point."[406]

Two amendments of some importance as to interlocutory matters fall within this category. The first relates to the obligation of infant parties to make discovery of documents and to answer interrogatories under the Rules in Order XXXI. Under the old Chancery rules, in effect before the Judicature Acts, they had never been obliged to give discovery or to answer interrogatories, and for that historical reason it was held repeatedly in the High Court that neither the guardian *ad litem*[407] nor the next friend[408] of an infant could be compelled to answer, although it was also conceived that they were not the "parties to the action" to whom Order XXXI applied. Two cases explicitly exempted the infant himself from filing an affidavit of documents[409] and from answering interrogatories,[410] solely because he could not have been compelled to do so before the Judicature Acts. All these memories of the dead hand of the old chancery practice were dissolved away by a short new Rule added to the end of Order XXXI in 1893, which states:

> "This Order shall apply to infant plaintiffs and defendants, and to their next friends and guardians *ad litem*."

The other amendment, an early one, touches the liability of a plaintiff to give security for costs. The Judicature Rules do not prescribe the cases in which he may be ordered to do so, but the well-known rule that a plaintiff resident out of the jurisdiction may be ordered to give such security is perpetuated by the section of the Judicature Act saving existing procedure not repealed. In 1879, in a case of *Redondo* v. *Chaytor*,[411] the Queen's Bench was called upon to decide whether a plaintiff should be ordered to give security for costs, who, though ordinarily resident in Spain, was then temporarily residing in Eng-

[407] Ingram v. Little, 11 Q. B. D. 251 (1883). Answers to interrogatories.
[408] *In re* Corsellis, 52 L. J. Ch. 399 (1883), and Dyke v. Stephens, 30 Ch. D. 189 (1885), both as to discovery of documents.
[409] Curtis v. Mundy, [1892] 2 Q. B. 178.
[410] Mayor v. Collins, 24 Q. B. D. 361 (1890).
[411] 4 Q. B. D. 453 (1879).

land, and Lord Justice Thesiger, after an exhaustive review of the authorities both in common law and in equity, delivered a judgment to the effect that there was a well established rule of practice that a plaintiff who is residing even temporarily within the jurisdiction of the court cannot be compelled to give security for costs. Several years later, in *Ebrard* v. *Gassier*,[412] the Chancery Division with great reluctance admitted it was bound by this decision in a case where the plaintiffs were a firm resident in Mexico, one of whose members had gone to England solely for the purpose of prosecuting the action. The Rule Committee corrected this state of things in the following year, 1885, by a new Rule which recites that:

> "A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs though he may be temporarily resident within the jurisdiction."[413]

Sometimes a decision upon an old rule of practice is the means of calling attention to possible changes in it, as the following shows. Under the old chancery practice, of which an illustration is *Hinings* v. *Hinings*,[414] it had been the custom when a legatee of a sum less than £20 died, and no administration issued upon his estate, for the court to pay out the sum to his next of kin without requiring an administration to be raised. In 1901 it was sought to persuade a judge in the Chancery Division, by the analogy of the old practice, to pay out a small sum of money which was in a fund in court to the next of kin of the person entitled, without requiring an administration to be raised,[415] but the application was refused, the court conceiving it could not make such an extension of its powers. The watchful Rule Committee, in the following year (when some of the best amendments were written), then passed a Rule which in effect overruled the decision by extending the practice to cover the order sought.[416] Now any sum in court less than £100 will be paid out to the next

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[412] 28 Ch. Div. 232 (1884).
[413] Order LXV, Rule 6 A.
[414] 2 Hemming & Miller, 32 (1864).
[415] Frogley v. Phillips, 50 WEEKLY REPORTER, 184 (1901).
[416] Order XXII, Rule 18 A.

of kin of an intestate distributee, without requiring letters of administration to be taken out, provided the total assets of the deceased, including his share of the fund in court, do not exceed £100. This means a most acceptable saving of expense in cases where the pennies count.

Sodeau v. *Shorey*[417] was a case that might have caused sheriffs great concern, but for the prompt action of the Rule Committee. In levying execution under a *fieri facias* a sheriff seized some goods belonging not to the debtor but to the debtor's brother, who at once claimed them. The sheriff notified the execution creditor, who wired back: "Admit claim; please withdraw." The sheriff, being threatened by the real owner with an action for trespass, then took out an interpleader summons under which he applied for an order to stop the action, but the order was refused; on appeal the Court of Appeal decided the sheriff could not so protect himself, as an interpleader proceeding would merely bring in, to contest the owner's claim, the creditor who had already admitted it. This would have thrown upon sheriffs generally an extra risk in the prosecution of their duties, so the Rule Committee was prevailed upon to act, and less than three weeks after Lord Esher's judgment was delivered a draft Rule was signed to meet the situation and free the sheriffs from the risk the decision imposed.[418] It provides that:

> "When the execution creditor has given notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from possession of the goods claimed, and may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods, and the Judge or Master may make any such order as may be just and reasonable in respect of the same. . . ."

The protection thus afforded seems to have caused satisfaction, as no cases have been reported under the new Rule.

Personal service of writs out of the jurisdiction is one of the facilities regulated by the R. S. C. which arouses great curiosity in an American; the privilege is limited to certain classes of

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[417] 74 LAW TIMES REPORTS, 240 (March 18, 1896).
[418] Order LVII, Rule 16 A.

cases enumerated in Order XI, Rule 1. One of these, as worded in 1883, was

> "whenever the whole subject matter of the action is land situate within the jurisdiction."[419]

This was always considered to refer only to actions in which the *title* to the land came into question, but in 1912 that restriction was removed in a curious way. Under a settlement, certain estates in Yorkshire were limited to the sons of X in tail male, first to A and his sons, then to B and his sons, then to C and his sons, *etc.*, successively. A son was born to A in California, and A registered the infant there as a legitimate child. The other sons of X thereupon brought an action in the High Court to perpetuate testimony tending to prove the child was illegitimate, so that when A might die the evidence should not have been lost. As the infant was in California, they sought to obtain an order for service upon him out of the jurisdiction, on the theory that the *land* in question was situate within, but the Court of Appeal decided the Rule did not apply; this was an action relating merely to *evidence*, they said, not to the title to the land.[420] The resulting inconvenience must have been plainly apparent not only to the court, but to the Rule Committee as well (Cozens-Hardy, M. R., being at the time a member of both), for just nineteen days later, April 3, 1912, the Committee published an amendment adding to the Rule the following words:

> "or the perpetuation of testimony relating to the title to land within the jurisdiction."

While the application of this part of the Rule is rare, the amendment is of interest as holding, together with the interpleader amendment just noted, the record for swiftness of arrival.

Another amendment in the same Order is distinguished for the fact that it overrules more decisions than any other in this category. It is the one authorizing service of *interlocutory* summonses, orders and notices out of the jurisdiction, in all actions

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[419] Order XI, Rule 1 (a).

[420] Slingsby v. Slingsby, [1912] 2 Ch. 21.

in which the writ itself might be so served.[421] This was made in 1909 and upset the whole previous course of the practice under the Order, as established by numerous reported decisions from 1883 down.

A number of other amendments in this category might be described, but they require more intimate acquaintance with their context than it is possible to give here.[422] They all have this in common, that they were issued by the Rule Committee to destroy the effect of judicial decisions without expressly referring to them. The power to do this is not altogether a power to overrule, as that would be inherent only in a higher court; the word "counteract" is a happier description, and the foregoing paragraphs illustrate how, in exercising their delegated legislative powers, the Rule Committee can counteract the decisions of any court in England, not being circumscribed even by the judgments of the House of Lords.

XIII.

Of the other five categories the one of most consequence is that containing the amendments which create new departures in procedure—what might be called the solid substance of procedure, as distinguished from mere rules of practical direction. Many such have been noticed above, in the historical review of

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[421] Order XI, Rule 8 A.

[422] Among them are five amendments on costs and six of a miscellaneous nature:

Order LXV, Rule 26 A (1903), which counteracts *Re* Pollard, 20 Q. B. D. 656 (1888), and *Re* Collyer-Bristow & Co., [1901] 2 K. B. 839; Order LXV, Rule 27 (17a) (1902), Wicksteed v. Biggs, 54 L. J. Ch. 967 (1885), and Brown v. Sewell, 16 Ch. Div. 517 (1880); Order LXV, Rule 27 (17b) (1902), Silkstone Coal Co. v. Edey, [1901] 2 Ch. 652; Order LXV, Rule 27 (29A) (1909), Sadd v. Griffin, [1908] 2 K. B. 510; Order LXV, Rule 27 (48) (1886), *Re* Harrison, 33 Ch. Div. 52 (1886).

Order XVIII, Rule 2 (1888), on joinder of claims, which counteracts Sutcliffe v. Wood, 53 L. J. Ch. 970 (1884); Order XXII, Rule 2 (1913), on payment into court, Penny v. Wimbledon, [1898] 2 Q. B. 212, and Beadon v. Capital Syndicate, 28 TIMES LAW REPORTS, 394, 427 (1912); Order XXXV, Rule 5 (f) (1894), on interpleader orders, Hood v. Yates, [1894] 1 Q. B. 240; Order XXXVI, Rule 1 A (1884), on abolition of venue, Philips v. Beale, 26 Ch. Div. 621 (1884); Order LII, Rule 24 (1899), on solicitors, *Re* Davidson, [1899] 2 Q. B. 103; Order LVIII, Rule 15 A (1885), on chancery chambers, Cummins v. Heron, 4 Ch. Div. 787 (1876); and White v. Witt, 5 Ch. Div. 189 (1877).

the period from 1883 to the present, as they are the strands out of which the history of procedure is woven. But there are many which found their way into the fabric independently of each other and were not contributed as part of any general design, and some of these are worthy of attention.

Among them the most characteristic is that which deprived the plaintiff of the right to select the place of trial of his action. Local *venue* had been abolished in 1875, and the plaintiff was then given the right to name, in his statement of claim, the county or place in which he proposed the action should be tried, which would then bind the defendant unless the court could be persuaded, for good cause, to alter it. In 1897, when the summons for directions was reconstructed, it was provided that the place of trial should be one of the matters dealt with on the hearing of that summons, but the defendant was still obliged to accept the place nominated by the plaintiff unless he could convince the master that the balance of convenience was heavy enough on his side to warrant a change. When the pleading Orders were smoothed out in 1902, the place of trial Rule was altered to read:

> "There shall be no local *venue* for the trial of any action, . . . *but in every action in every Division the place of trial shall be fixed by the court or a judge.*"[423]

so that the selection of the place of trial was taken completely out of the plaintiff's hands. It is now a matter solely for the master to decide on the summons for directions; in doing so he is guided, it is true, by the same considerations he had to weigh previously in hearing the defendant's application to alter the place of trial, but he approaches the matter now without being influenced by the thought that, all other things being equal, it is for the plaintiff to choose the place. The master is free to fix the place wherever it will be most convenient for the majority of the parties and their witnesses to attend. This is one of the further developments of the tendency under the Judicature Acts to take the control of the litigation out of the hands of the plaintiff and repose it entirely in the court.

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[423] Order XXXVI, Rule 1.

Procedure on motions for new trials has been altered considerably since 1875. Under the first Judicature Rules[424] all such motions went to a Divisional Court—the modern form of the old sittings *in banc*.[425] In 1883 a distinction was made between actions in which the trial had been before a judge alone, and those in which there had been a jury trial; in the latter the old procedure was retained, but in the former it was ruled that the motion should be made direct to the Court of Appeal and should be in form an appeal. In 1890 a fresh Judicature Act[426] reduced the jurisdiction of Divisional Courts, the intention being to do away with them altogether by degrees, and in conformity to it a Rule was added to Order XXXIX in 1892 directing that after jury trials as well the motion for a new trial should be direct to the Court of Appeal and should be in form an appeal. At the same time this important clause was added, that

> "upon the hearing of such motion the Court of Appeal shall have all such powers as are exerciseable by it upon the hearing of an appeal."

To appreciate the full force of this it is necessary to read Order LVIII, Rule 4, which bestows the powers so exerciseable. It says:

> "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact . . . by oral examination in court, by affi-

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[424] Order XXXIX, Rule 1.

[425] In the King's Bench and the Probate Divisions, Divisional Courts as constituted by §17 of the Appellate Jurisdiction Act, 1876, consist of two or three judges of the Division. Any two judges may sit together as a Divisional Court, and there may be more than one Divisional Court sitting in the same Division at the same time. In the King's Bench Division the Lord Chief Justice allots the work of the Divisional Courts among the *puisne* judges, as the need arises; often a Divisional Court will be constituted to sit for a half hour in the morning before taking the regular business. In the Chancery Division it is not customary to have Divisional Courts. In the Probate Division there are only two judges, and they sit together whenever a little work accumulates for a Probate Divisional Court. There has always been a prejudice against the system of Divisional Courts, and their jurisdiction has been steadily reduced in favor of sending applications direct to the Court of Appeal. At present the bulk of their work consists in hearing appeals from inferior courts, and their powers and procedure are regulated by Order LIX of the R. S. C., 1883.

[426] 53 & 54 Vict., c. 44, s. 1.

davit or by deposition. . . . The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and such powers may also be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. . . ."

In the light of this comprehensive Rule, the complete assimilation of motions for new trials to appeals explains the comparative rarity of re-trials in English courts. In 1913 Order XXXIX was re-cast and the wording of the opening Rules condensed into two short Rules.

A provision wholly original and unique, for the protection of infant and weak-minded plaintiffs, was made in the R. S. C. 1883. That was Order XXII, Rule 15, which directed that if a sum of money was recovered in the Queen's Bench Division by an infant or a "person of unsound mind not so found by inquisition" the judge might, at or after the trial, order the sum to be paid into court, and from time to time make such order as to the income or the principal as he might deem proper. This wise Rule was intended to protect helpless incompetents from the ignorance of inexperienced guardians and the wiles of sharp practitioners, especially in the large class of cases known as "running-down actions." It frequently occurred that a child would be injured by a tram or omnibus; the parents, poor, would entrust the matter to one of the solicitors who are specialists in negligence cases. The father would be named the child's next friend to prosecute the action; and if any sum of money was recovered, it would be paid by the defendant to the solicitor, to be handed over to the father as guardian. Many cases came to light in which the money so recovered was frittered away by the solicitor in extra work for which there was no need, or in which the guardian was persuaded to make some investment which turned out to be for the solicitor's benefit and not for the child's; in some instances there were even found agreements between

the solicitor and an equally unscrupulous father to divide up the proceeds, regardless of the child's claims altogether. The new Rule put a stop to these abuses. The money would be paid into court, the usual order being that the income should be paid out from time to time for the child's maintenance. When the infant attained maturity, the court would usually consider its duty had been done and pay the principal over to the child itself.

This Rule was not applied in every case in which an infant plaintiff recovered a verdict, but it was applied with great frequency and it was open to the judge to apply it of his own motion if the circumstances appeared to him suspicious. In 1906, Parliament acceded to a long-continued demand for the creation of a Public Trustee,[427] and that office was established to administer trusts of all sorts under a government guaranty. After two or three years the remarkably able administration of the office won the approval even of its most skeptical opponents, so that in 1909 the King's Bench masters proposed to the Rule Committee that it would be a decided advantage if moneys set apart under Order XII, Rule 15, were paid over to the Public Trustee, as he had the facilities and equipment for looking after each case individually and really standing *in loco parentis.* Accordingly the Rule was altered, and since then the Public Trustee has had the administration of the fund. The Rule was further strengthened by a much needed addition. Previously there was no power in the judge to make an order under the Rule *before* trial; only "at or after the trial" could he do so.[428] But in a very large proportion of accident cases a compromise would be effected; the defendant would prefer to pay a lump sum to settle the dispute and prevent the action going before a jury. In those cases the court was powerless to apply the Rule. Moreover the few solicitors at whom the Rule was aimed would advise a settlement even where it was not to the plaintiff's advantage, simply to evade the court's watchfulness.

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[427] 6 Edw. VII, c. 55.

[428] In 1905 a short amendment extended Order XXII, Rule 15, to actions settled before trial, but provided no means by which the court could interfere of its own motion.

To meet that situation the Rule Committee took advantage of the 1909 opportunity to alter the opening sentences of the Rule so that they now read as follows:

> "In any cause or matter in the King's Bench Division in which money or damages is or are claimed by or on behalf of an infant or a person of unsound mind not so found by inquisition, no settlement or compromise, or acceptance of money paid into court, whether before or at or after the trial, shall be valid without the sanction of the court or a judge, and no money or damages recovered or awarded in any such cause or matter, whether by settlement, compromise, payment into court or otherwise, before or at or after the trial, shall be paid to the next friend of the plaintiff or to the plaintiff's solicitor unless the court or a judge shall so direct. All money or damages so recovered or awarded shall, unless the court or a judge shall otherwise direct, be paid to the Public Trustee, and shall, subject to any general or special direction of the court or a judge, be held and applied by him in such manner as he shall think fit for the maintenance and education or otherwise for the benefit of the plaintiff."

Under the new Rule the money is paid over in every case, with few exceptions. Since 1909 there have been several additions to the Rule to make the power of the court over costs more extensive, so that even where there is a compromise the costs may be taxed and the plaintiff fully protected.

When pleadings were shorn of their splendor and reduced to the bare necessities of stating the party's case, the great safeguard of an opponent became the right to ask for particulars. If a pleading states insufficient facts to enable the opponent to answer intelligently, he can apply under the summons for directions for particulars, and then for further particulars. This has the additional virtue of pinning the pleader down to a line of attack, as particulars, when delivered, are considered to be incorporated with the pleading which they amplify. This explains the Rule added in 1901 to the pleading Order:[429]

> "In Probate actions it shall be stated with regard to every defence which is pleaded what is the substance of the case on which it is intended to rely; and further, where it is pleaded that the testator was not of sound mind, memory and under-

[429] Order XIX, Rule 25 A.

standing, particulars of any specific instances of delusion shall be delivered before the case is set down for trial, and, except by leave of the court or a judge, no evidence shall be given of any further instances at the trial."

It makes obligatory the furnishing of particulars in a class of cases where they are always asked for, and defines the extent to which they must go, thus saving the expense of the customary application and the delay caused by making it. Somewhat akin to this is the change commanded in 1903 in the form of general indorsement on the writ in an action for libel. The form previously given in Appendix A to the Rules was:[430]

"The plaintiff's claim is for damages for libel."

This was all the information the writ furnished the defendant, so he was frequently without means of knowing whether he should appear and fight the action, or acknowledge himself in the wrong and apologize or settle. To remedy the fault a Rule was added to Order III[431] stating that the indorsement should thereafter contain "sufficient particulars to identify the publications in respect of which the action is brought." As the defendant in a libel action is usually a large newspaper publisher it is obvious that the change is appreciated. Careful plaintiffs had often inserted the particulars even before the new Rule, to make assessment of damages easier if the defendant failed to appear.

Among the amendments due to the work of Lord Herschell in 1893 are two interesting extensions of the powers of chancery judges in dealing with rights in which classes of persons share, when all the members of a class are not before the court. The first is that:

"Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the court and assenting to the compromise, the court or a judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to

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[430] Appendix A, Part III, Sec. IV.
[431] Order III, Rule IX.

require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts."[432]

There had always been power in the court, in a *suit* properly constituted, to bind the rights of some members of a class whose interests were represented by others before the court, but the power to declare a *compromise* binding was new. The other amendment is even more useful. It reads:

"In any . . . case in which an heir-at-law, or customary heir, or any next of kin, or a class, shall be interested in any proceedings, the court or a judge may, if, having regard to the nature and extent of the interest of such persons or any of them, it shall appear expedient on account of the difficulty of ascertaining such persons, or in order to save expense, appoint one or more persons to represent such heir, or to represent all or any of such next of kin or class, and the judgment or order of the court or judge in the presence of the persons so appointed shall be binding upon the persons so represented."[433]

This extended to all cases a power which the court had previously exercised only in cases based upon the construction of a written instrument.

How complete is the control of the court over those who practice before it is illustrated by a Rule added in 1901. It provides a summary remedy for the clients of solicitors who retain money or securities which ought to be handed over.

"Where the relationship of solicitor and client exists, or has existed, a summons may be issued by the client or his representatives for the delivery of a cash account, or the payment of moneys, or the delivery of securities, and the court or a judge may from time to time order the respondent to deliver to the applicant a list of the moneys or securities which he has in his custody or control on behalf of the applicant, or to bring into court the whole, or any part of the same, within such time as the court or a judge may order."[434]

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[432] Order XVI, Rule 9 A.
[433] Order XVI, Rule 32 (b).
[434] Order LII, Rules 25 and 26.

An order made upon a solicitor under this Rule can be enforced like a judgment. Recent events had made some such check upon solicitors necessary, and it is curious to observe that they are considered so integral a part of the court that execution may issue against one without an action having been commenced against him.

Not all the Rule Committee's procedural innovations meet with whole-hearted approval, as the following amusing episode will bear witness. To assure defendants who have paid money into court, which has been refused by the plaintiff, that the jury will not be prejudiced by the fact of such payment, a Rule was inserted in 1893 stipulating that

> "no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into court, or of the amount paid in."[435]

In consequence of this Rule if counsel mention to the jury either that money has been paid in, or the amount that has been paid, the judge will, in ordinary cases, stop the trial, discharge the jury, and make such order as to re-trial as he thinks proper. But Lord Russell of Killowen, who succeeded to the Lord Chief Justiceship soon after the Rule was made, had scant sympathy with it. In two cases before him he not only refused to recognize it, but himself told the jury how much had been paid in,[436] and in one of these cases he did not hesitate to express the opinion that the Rule was "foolish and inconvenient!"[437]

Examples from the amendments in this category could easily be multiplied, as it is the largest in point of numbers. These illustrations will suffice to point out their general trend, which is clearly towards an ampler measure of official supervision over every detail in the course of the litigation. One need not accept entire the guiding principle, to see that this category of amendments is the one most rich in suggestions which can with profit be followed out in other procedural systems.

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[435] Order XXII, Rule 22.

[436] Mentioned in the White Book in the footnote to the Rule.

[437] Klamborowski v. Cooke, 14 TIMES LAW REPORTS, 88 (1897).

XIV.

In the third category into which the amendments since 1883 are here divided can be seen more plainly than in the others how nearly legislative the powers and functions of the Rule Committee are. It is composed of Rules issued for the operation of specific Acts of Parliament in which special duties are thrown upon the Supreme Court, and in which directions are usually inserted requiring the Rule Committee to issue such Rules. This method of legislation has the double advantage of relieving Parliament from the discussion of technical details of legal procedure, and of saving the Supreme Court procedure from inconsistencies and irregularities which might be pitched into it for the benefit of any particular Act of Parliament. Over thirty statutes since 1883 have delegated to the Rule Committee the duty to prescribe Rules to regulate legal proceedings brought under them; the list is widely varied, and only a few of them will be mentioned, to illustrate the method.

The various Finance Acts that are so prominent a feature of the collectivist legislation of the present generation create a large body of new rights and obligations the determination of whose nature and extent often involves most important issues and very large sums of money. Parliament has provided an admirably simple means through which dissatisfied persons can obtain a judicial review of decisions by the officials who administer these Acts; instead of the Continental method, which is to create separate administrative courts, or the American method, which is to send appeals to the executive head of the department, the Acts very briefly provide that aggrieved persons may, in certain specified cases, appeal to the High Court under Rules to be prescribed by the High Court for that especial purpose.

Part One of the Finance Act, 1894,[438] creates the Estate Duty which is now payable upon the principal value of all property, real or personal, settled or not settled, which passes upon the death of its owner; the Act consolidates and extends previous taxes laid upon personalty and realty separately, defines the

[438] 57 & 58 Vict., c. 30.

forms of property subject to the new tax, describes the manner in which the Commissioners of Inland Revenue shall determine the value of property subject to the tax, and gives directions for the manner in which the tax shall be collected. The two principal sources of dispute in the administration of the Act are the determination of value of the property, and the apportionment of the tax upon its various parts—which are both questions for the Commissioners, in the first instance, to decide. Trouble over the first of these is settled according to the following section of the Act:[439]

"(1) Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the Commissioners, whether on the ground of the value of any property, or the rate charged or otherwise, may, on payment of, or giving security as hereinafter mentioned for, the duty claimed by the Commissioners or such portion of it as is then payable by him, *appeal to the High Court within the time and in the manner and on the conditions directed by Rules of Court*, and the amount of duty shall be determined by the High Court, and if the duty as determined is less than that paid to the Commissioners the excess shall be repaid.

"(2) No appeal shall be allowed from any order, direction, determination, or decision of the High Court in any appeal under this section *except with the leave of the High Court or Court of Appeal.*

"(3) The costs of the appeal shall be in the discretion of the court. . . .

"(4) Provided that the High Court, if satisfied that it would impose hardship to require the appellant, as a condition of an appeal, to pay the whole or, as the case may be, any part of the duty claimed by the Commissioners or of such portion of it as is then payable by him, may allow an appeal to be brought on payment of no duty, or of such part only of the duty as to the court seems reasonable, and on security to the satisfaction of the court being given for the duty, or so much of the duty as is not so paid. . . ."

Under this section the Rule Committee issued a special set of Rules early in 1895, identified as the R. S. C. (Finance Act) 1895, which provide a method of bringing proceedings, placing the arguments of both sides before the court, hearing the dispute,

[439] §10.

and making an appeal from the decision arrived at.[440] By reference certain Rules from the general Orders are incorporated into the special Finance Act Rules, so the proceedings under the section are made to fit in smoothly with the other work of the court. These proceedings are before what is called the Revenue Side of the King's Bench Division—the modern remnant of the Court of Exchequer of old. Where the principal value in dispute does not exceed £10,000, the proceedings are in the local County Court, and Rules have also been issued by the County Court Rule Committee for the special purposes of the Act.[441] The Irish and Scotch Courts charged with similar duties have also issued Rules for their execution.

As to the second source of dispute, the following section applies:[442]

> "Any dispute as to the proportion of Estate Duty to be borne by any property or person may be determined upon application by any person interested *in manner directed by Rules of Court, either by the High Court, or, where the amount in dispute is less than £50, by a county court* for the county or place in which the person recovering the same resides, or the property in respect of which the duty is paid is situate."

To meet the requirements of this section all that was done was to add the following to the body of the R. S. C. 1883:[443]

> "An application under Section 14 (2) of the Finance Act, 1894, for the determination of a dispute as to the proportion of estate duty to be borne by any property or person shall be made by originating summons in the Chancery Division."

That amounts to a complete code of procedure for the section, as the R. S. C. give full directions for the disposition of originating summonses and provide forms to be used in connection with them.

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[440] The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 1577; also in Hanson's and other works on Death Duties.

[441] See Hanson.

[442] §14 (2).

[443] Order LV. Rule 9 C.

The 1910 Finance Act [444] introduces a form of taxation to which American legislatures have not yet been converted. It is known as Increment Value Duty; it amounts to a gift to the public revenue of twenty *per cent.* of any increase in the value of land, upon the occasion of any sale thereof, or upon the occasion of its title passing on the death of its former owner. Where land is held upon charitable or other permanent trusts, the duty is payable upon periodical occasions as provided in the Act. Another part of the Act creates a Reversion Duty,[445] which is payable "on the determination of any lease of land," and amounts to a levy of ten *per cent.* "on the value of the benefit accruing to the lessor by reason of the determination of the lease." It is designed to take in the long-term improvement leases so common in England. In addition there is created an Undeveloped Land Duty of two and one-half *per cent. per annum* on the site value of undeveloped land.[446]

All this requires a highly technical system for valuing the different attributes of real property. The sections defining valuation treat of "gross value," "full site value," "total value," and "assessable site value," and place much stress upon the hypothetical sensibility of "a willing seller in the open market." It is not surprising that careful provision should be made in the Act for a review of administrative decisions made under it. There is set up a panel of expert referees, to whom disputes on questions of valuation and duty can be referred from the valuers who, in the first instance, compute the value. If the referee's decision is likewise unsatisfactory, an appeal can be carried to the High Court, as in the following section:[447]

> "Any person aggrieved by the decision of the referee may appeal against the decision to the High Court *within the time and in the manner and on the conditions directed by Rules of Court* (including conditions enabling the court to require the payment of or the giving of security for any duty claimed); and Subsections two, three and four, of Section Ten of the Finance Act, 1894, shall apply with reference to any such appeal."

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[444] 10 Edw. VII, c. 8.
[445] §13.
[446] §16.
[447] §33 (4).

Where the total or site value does not exceed £500 the appeal lies to the local county court. Under this section the Rule Committee issued the R. S. C. (Finance [1909-1910] Act) 1911, assigning these proceedings to the Revenue Side of the King's Bench Division, providing for a system of mutual notices of fact and argument which amount to pleadings, and applying the ordinary rules of amendment and discovery to them.[448] These sections illustrate how Acts already technical in their nature are relieved of the burden of legal procedural details which are essential to their successful operation.

An Act throwing heavy responsibilities on the High Court is the great Trustee Act of 1893, which consolidates the law as to the powers, duties and liabilities of trustees.[449] It makes the High Court the tribunal to which applications must be directed for the appointment of new trustees, the making of vesting orders, the completion of conveyances, the payment of funds into and out of court, and sanction for sales and conveyances of property subject to the trust. To regulate the manner in which these applications should be heard and determined Order LIV B was added to the R. S. C. in 1893, without any express provision in the Act that Rules should be made. The new Order assigns all applications under the Act to the Chancery Division, and prescribes the method in which they should be presented to the court, whether by petition, ordinary summons, or originating summons. Another comprehensive consolidating statute which refers to the Supreme Court the final determination of disputes over administrative rulings is the Patents and Designs Act, 1907.[450] Appeals lie from the decision of the Comptroller General of Patents, Designs and Trade Marks, on questions of the extension, restoration and revocation of patents; the Supreme Court is also specifically required to draft rules regulating applications for the extension of patents for further terms.[451] Rules

[448] The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 1578; also in Hanson, *etc.*

[449] 56 & 57 Vict., c. 53.

[450] 7 Edw. VII, c. 29.

[451] §18 (1).

for these subjects, and for the conduct of actions based on patent infringement, were passed by the Rule Committee in 1908, and appear in the R. S. C. as Order LIII A.

No statute of recent years bestows greater power upon the High Court than the Companies (Consolidation) Act of 1908;[452] it refers to the High Court's decision nearly all the questions which in American States are brought before special administrative tribunals like commerce and public service commissions. To take one example, Sections Forty-six to Fifty-six codify the law as to the right of private corporations to make reductions in their share capital; their effect is to make the reduction subject to confirmation by the court, upon showing that the rights of all shareholders and creditors will be properly protected. Later in the Act occurs this section, of general application:[453]

> "(1) Subject to the provisions of this Act . . . *rules of procedure for the purposes of this Act, including rules as to costs and fees, may be made*
>
> "(a) *As regards the High Court in England, by the authority having power to make rules for the Supreme Court in England.* . . .
>
> "(2) The authority having power to make rules under this section may by any such rules repeal, alter or amend any rules made by the like authority under the Companies Act, 1862, or any Act amending the same, which are in force at the commencement of this Act."

The Act received the Royal Assent in December, 1908, and early in the following year Rules were issued to regulate the making of applications under its numerous provisions. In May, 1909, an Order was issued containing Rules applying specifically to procedure under Sections Forty-six to Fifty-six;[454] the Order repeals the old General Orders of the Court of Chancery on this subject, which were still standing; it contains twenty-five Rules on the preparation of the application for leave to reduce capital, the parties who must appear, the evidence which

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[452] 8 Edw. VII, c. 69.

[453] §238.

[454] The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 2168 and White Book at p. 2215; also in Palmer's and other works on Company Law.

must be presented, the affidavits and advertisements which must be made, and the costs and fees for the proceedings; and it gives a complete schedule of forms for use in the course of the application and its final disposition by the court. A further and even wider rule-making power is conferred by the Act in respect of the procedure upon "winding-up of companies"; this power is bestowed, however, not upon the Supreme Court Rule Committee but upon the Lord Chancellor, to be exercised with the concurrence of the President of the Board of Trade.[455] The Winding-Up Rules were also issued in 1909, and as they contain two hundred and twenty Rules and over one hundred Forms, they are a code of procedure of themselves.[456]

Payment into court is turned to a novel use in the Life Assurance Companies Act, 1896.[457] It frequently happens that life assurance companies, upon the death of a policy-holder, are doubtful about the persons entitled to a claim upon them as beneficiaries. Rival claimants can be forced to interplead, but sometimes there is only one claimant and yet the company feels that it cannot safely pay, although it is willing to, because of the risk of possible superior claims in future, to which it would be no answer to set up payment to the prior claimant. To meet such a contingency an Act was passed in the following terms:[458]

> "Subject to rules of court any life assurance company may pay into the High Court . . . any moneys payable by them under a life policy in respect of which, in the opinion of their board of directors, no sufficient discharge can otherwise be obtained.
>
> "The receipt or certificate of the proper officer shall be a sufficient discharge to the company for the moneys so paid into court, and such moneys shall, subject to rules of court, be dealt with according to the Orders of the High Court."

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[455] §237 of the Act. The Board of Trade is a Government Department, corresponding somewhat to the United States Department of Commerce and Labor. The President of the Board of Trade is a member of the Cabinet.

[456] They appear in Palmer, *etc.*

[457] 59 & 60 Vict., c. 8.

[458] §§3, 4.

[459] Rule 2. These rules are supplemented by Rule 41 (c) of the Supreme Court Funds Rules, 1905.

This is practically the whole Act—an excellent instance of a statute which expresses a desire of the Legislature, leaving it to rules to be made subsequently to provide the means for its satisfaction. To clothe the skeleton with flesh the Rule Committee added Order LIV C to the R. S. C. in October of the same year. The Order limits the benefit of the Act to cases where no action is pending in relation to the policy, and prescribes the terms upon which the payment will be accepted—for instance, that

> "The company shall not deduct any costs or expenses of or incidental to the payment into court."[459]

It also points out the proper procedure for parties desiring to obtain payment to them of any sums so paid into court.

Under a very different Insurance Act, the High Court is charged with a similar duty to give relief to those who pay benefits—the epoch-making National Insurance Act, 1911.[460] In a schedule to that Act are enumerated the classes of employment in which persons must be engaged who are to benefit by the operation of the Act, and the Insurance Commissioners appointed under the Act are, in general, the persons who decide whether any specific employment falls within one of the classes enumerated in the Schedule. Sometimes that question is a most difficult one, and to relieve the Commissioners of their responsibility in such a case, the following section was inserted in the Act:[461]

> "The Insurance Commissioners may, if they think fit, instead of themselves deciding whether any class of employment is or will be employment within the meaning of this Part of this Act, submit the question for decision to the High Court *in such summary manner as subject to rules of court may be directed by the court*, and the court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question, and the decision of the court shall be final."

Directions under this section form the subject of Order LV B, added to the R. S. C. in May, 1912. The Order briefly directs that such a submission should be made by proceedings instituted in the Chancery Division by an originating notice of motion, to

[459] 1 & 2 Geo. V, c. 55.
[460] §66 (iii).

be served by the Commissioners on the person or persons as to whom the question has arisen, and to follow the same course and be subject to the same regulations as any other originating motion in the Chancery Division.

Alterations in substantive law frequently carry with them the necessity for corresponding accommodation in procedural details. The Guardianship of Infants Act, 1886,[402] is a case in point. That Act increased materially the right of an infant's mother to have a voice in its guardianship. Before the Act she had no power to appoint a testamentary guardian for her infant; the Act empowers her to do so if the father is dead. It also makes her the infant's guardian if the father dies without having appointed one. A new right given her is that of nominating someone to serve after her death as guardian jointly with the father, if the latter is for any reason unfitted to be the sole guardian of the child. Finally the Act expressly provided that the Court, in making orders regarding the custody of the child, shall have regard to "the conduct of the parents, and to the wishes as well of the mother as of the father." To carry out these provisions, Section Eleven says:

> "Rules for regulating the practice and procedure in any proceedings under this Act, and the forms in such proceedings, may from time to time be made
>
> "(a) so far as respects the High Court or Her Majesty's Court of Appeal in England or Ireland *by Rules of Court*. . . ."

By virtue of this section the Rule Committee, in December, 1887, issued a set of thirteen Rules, cited as the R. S. C. Guardianship of Infants.[403] They assign to the Chancery Division applications made under the Act, apply to them specifically certain Orders of the R. S. C. 1883, and direct what evidence they must contain, and upon what persons they must be served, in order to satisfy the court before it will act.

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[402] 49 & 50 Vict., c. 27.

[403] The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 1563 and White Book at p. 2140; also in Daniell's and other works on Chancery Practice.

Other statutes effecting alterations in substantive law, for which practical details were supplied by the Rule Committee, were the Bills of Sale Acts, 1878 and 1882,[464] and the Partnership Act, 1890.[465] Under the former, Rules have been issued by the Committee to provide a method for registering bills of sale—one of the salient requirements of the Acts.[466] The Partnership Act contains a section[467] conferring upon any judgment creditor of an individual partner the right to have an order charging that partner's interest in the firm property and profits with the payment of the debt, and to have a receiver appointed to receive that partner's share of the firm profits. The section also permits the other partners in the firm to redeem an interest so charged, or to buy it in at a sale. Directions for the practical operation of this section were added to the R. S. C. in June, 1891, as Rules 1 A and 1 B of Order XLVI, which define what is sufficient service to bind the partnership for the purposes of the section.

Mention has been made of the fact that for the purpose of making rules to regulate the winding-up of companies the rule-making power is reposed not in the Rule Committee but in the Lord Chancellor, to be exercised with the concurrence of the President of the Board of Trade. Certain other large bodies of rules have likewise been issued by authorities other than the Rule Committee, under the direction of specific statutes. Of these the Rules whose application in the daily business of the High Court is most frequent are the Supreme Court Funds Rules of 1905,[468] which are made, under the authority of various Judicature Acts,[469] by the Lord Chancellor with the concurrence of the Treasury, and now consist of one hundred and eleven Rules.

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[464] 41 & 42 Vict., c. 31, and 45 & 46 Vict., c. 43.

[465] 53 & 54 Vict., c. 39.

[466] The Rules are not incorporated with the R. S. C., 1883; they appear in the 1914 Red Book at p. 1589. Also in Reed's and other works on Bills of Sale.

[467] §23 (2).

[468] These appear in the 1914 Red Book at p. 1654 and White Book at p. 1720.

[469] §18 of the Chancery Funds Act, 1872; §§17 and 30 of the Judicature Act, 1875; §6 of the Judicature Act, 1894; §4 of the Supreme Court Funds Act, 1883.

They constitute a complete code of directions to parties and to the Paymaster's office regulating the payment of funds into and out of court for every possible purpose, and their disposition while they are subject to the court's control. A generous appendix of forms is part of the Rules.

These examples illustrate the special service the Rule Committee is able to perform for the Legislature. It not only relieves the latter of the burden of debating purely procedural matters connected with the ordinary practice of the courts, but in every case where the creation of new substantive rights and liabilities, or the inauguration of policies throwing open wider fields of administrative discretion, makes it necessary or advisable to refer disputes to the court, the filling in of details for the regulation of legal proceedings can safely be left to the court itself; and that has the further advantage of giving the court that control over its own procedure which is essential to maintain it as a consistent and organic whole.

XV.

Three categories of amendments still remain to be examined —the fourth, dealing with the duties and powers of officers of the court, the fifth, altering the time within which different steps in a litigation may be taken, and the sixth, on the subject of costs. Of these three only the last has the same attraction, from the comparative standpoint, as the three classes previously summarized, but a few samples will be presented from each, for the sake of completeness.

The amendments in the fourth category embody directions to officers of the court for the proper distribution and administration of business coming before it. There is a considerable staff of quasi-judicial officers and of clerical officials of varying degree, whose powers and duties are subject to alteration by Rules of Court. Occasionally the distribution of work among the judges themselves is made the subject of an amendment, although it is usually left to be regulated by Resolutions of the judges in each Division, as when the judges in the Queen's Bench Division issued the Resolutions of May, 1894, or the Notice as to Commercial Causes, in

1895. Two most important amendments in the R. S. C. altering the arrangement of the judges' work have already been described in a different connection—one is the creation of the linked-judge system in the Chancery Division, and the other is the creation of the Short Cause List in which a large part of the trials under Order XIV are entered to avoid delay.

One group of amendments in this category is for the benefit of the masters in the different departments of the Supreme Court. One amendment permits any master, on the application of any party, to hear and dispose of any application in a cause which has been assigned to another master;[470] this is to facilitate the speedy determination of interlocutory points when, for any reason such as illness or pressure of other work, the master to whom the cause has been assigned is not available. Another concerns Chancery masters alone;[471] it instructs them to report, at the beginning of each sittings, all the cases in which they consider there has been any undue delay in the proceedings before them. This is an echo of the work of the Chancery Chambers Committee in 1885, the belief then having been expressed that much of the delay in Chancery chambers was due to the laxity of solicitors themselves. Frequent amendments are made to increase or alter the powers of the King's Bench masters; two of the most useful are those which empower such masters to try issues in garnishee proceedings,[472] and which extend to them the power to make charging orders, under the 1 & 2 Vict. c. 110[473]—both powers which are invoked almost every day in the master's work.

At present the assessment of damages after an interlocutory judgment is not, in actual practice, usually procured upon a writ of inquiry. The usual course is for the matter to be referred to the master who has had *seisin* of the action, to hear the evi-

[470] Order LIV, Rule 9 A (1888).

[471] Order XXXIII, Rule 8 A (1893).

[472] Order XLV, Rule 4 (1902).

[473] Order LIV, Rule 12 (e) (1911). If any judgment debtor has stocks or shares standing in the books of any company in his own name or in trust for him, his judgment creditor can obtain an order charging those stocks or shares with the payment of the debt, and if the debt is not paid within six months after such order, the creditor can have the stocks or shares sold to satisfy the charge.

dence and assess the damages; but by virtue of an amendment made in 1888,[474] if the assessment is of a particularly involved and complicated nature it may be referred to one of the official referees, who are specially equipped for the taking of lengthy accounts, and so the master's time is not taken up.

From the King's Bench masters an appeal lies to a judge of the King's Bench Division who sits in chambers daily for the purpose. At present the King's Bench judges take the chamber work in rotation, each generally remaining there throughout a single sittings of the court. This is the result of a series of changes in Order LIV in an attempt to arrive at the most satisfactory arrangement; the procedure before the Judge in Chambers is regulated by Rules Thirty to Forty-two of that Order, and they were recast in 1908 and 1909. There will probably be further changes in this Order, as the opinion has recently been expressed that it would be advisable to do away altogether with the appeal to a Judge in Chambers.[475]

When the revisers in 1883 gathered together the scattered strands of chancery procedure, they abolished completely the old system of administering interrogatories through the official Examiners in Chancery, a cumbersome and unsatisfactory method of getting answers; under it only the set questions could be asked, and no cross-examination was possible. Upon the retirement in 1884 of the old Examiners in Chancery a new set of officials was provided, called merely examiners and available for all Divisions of the Court. They are persons appointed by the Lord Chancellor before whom witnesses may be examined and cross-examined outside the court whenever permission is given to do so, especially in cases where expert testimony is to be taken. The method of referring examinations to these examiners, the procedure before them, the fees to be paid, and the filing of evidence taken, are all regulated by Rules issued principally in 1884, and partly in 1888 and 1900.[476]

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[474] Order XXXVI, Rule 57 A.

[475] See Appendix VIII (vol. II, p. 236) of Minutes of Evidence taken before the Royal Commission on Delay in the King's Bench Division. Parl. Pap. Cd. 7178 (1913).

[476] Order XXXVII, Rules 40 to 50.

Another group practically of great concern to the Law Courts deals with the matter of office hours and vacations, the subject of Order LXIII. This Order has been amended quite frequently,[477] and fixes the limits of the Long Vacation, the holidays during the legal year and the daily office hours to be observed in the different departments of the Central Office. At present, most of the offices are open daily from 10.30 to 4.30, and Saturday to 1. In the courts, the Long Vacation lasts from August 1 to October 12: the Christmas recess lasts three weeks, the Easter recess two weeks, and the Whitsun recess ten days. The offices, however, are not so generously dealt with, as they are open every day in the year except Sundays, Good Friday, Easter Eve, Easter Monday and Tuesday; Whit Monday, August Bank Holiday (the first Monday in August), Christmas Day and the next day, and the King's Birthday.[478]

A great administrative power regulated by Rule of Court is the proper investment of funds "in court." These often amount to very large sums, especially in the Chancery Division, and the office of Paymaster-General is one of great responsibility. The securities in which he may invest are enumerated in Order XXII, Rule 17, and the list is frequently altered by the deletion or addition of names according to the financial situation and the appearance of new issues that are officially safe.[479] The Rule applies to all "Cash under the control of, or subject to the order of the Court."

The new Poor Persons Rules of 1914[480] are the latest addition to the administrative group of amendments, as they create a new bureau to perform the functions of a Legal Aid Society, but it is too early to judge of their usefulness.

The fifth series of amendments relates to the time within which steps may or must be taken by parties in the course of an action. Under the far-reaching influence of the compulsory summons for directions, rules on time present little or no difficulty

[477] 1883, 1907, 1908, 1912.
[478] Order LXIII, Rule 6.
[479] 1888, 1897, 1899, 1901, 1903, 1904, 1905, 1908, 1911.
[480] Order XVI, Part IV; WEEKLY NOTES, January 24, 1914, p. 63.

to practitioners, as there is always the possibility of obtaining from the master leave for an extension of time; in fact it is strongly felt that too great indulgence is shown in this regard, the practice being that any party will be allowed *one* extension of time at some point in the action, as of course, the costs being made costs in the cause and paid by the ultimately losing party. Quite one-fourth of the applications made to the masters in the King's Bench Division are upon these "time summonses." The power to grant such applications is contained in the following Rule:[481]

> "The court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

The manifest advantages of the right to exercise such a discretion seem to offset the inconvenience it sometimes entails.

The principal time provisions in the Rules are in respect to the delivery of pleadings. At first it was not compulsory for parties to issue a summons for directions—they could simply follow the times laid down in the Rules and deliver pleadings mutually accordingly. Since 1897, however, the time within which any pleading must be delivered is a matter for the master to decide upon the hearing of the summons for directions, as well as the question of whether or not there shall be any pleadings at all, so that the times stipulated in the Rules are not of any importance. The present time Rule for statements of claim, for instance, reads as follows:[482]

But the order for pleadings commonly made includes a line to the effect that a statement of claim shall be delivered in four-

> "When delivery of a statement of claim is ordered the same shall be delivered within the time specified in the order, *or, if no time be so specified*, within twenty-one days from the date of the order, unless in either case the time be extended by the court or a judge."

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[481] Order LXIV, Rule 7.

[482] Order XX, Rule 1 (c).

teen days, and a defence ten days thereafter, so that the twenty-one days mentioned in the Rule serves no other purpose than to stand as a guide to the master's discretion when extensions are asked for. The Rule as to the time for defence is similarly worded and fixes the time at ten days,[483] so there is no divergence between the Rule and the practice. Replies are very commonly put in by plaintiffs because of the great latitude of counterclaim that defendants may plead, although no reply will be allowed by the master, as a rule, where no counterclaim has been pleaded. The Rule on replies allows ten days from the defence for their delivery,[484] and the order made is usually for the same period. The times stated in the first and third of these Rules were much longer under the original Rules of 1883; then the plaintiff was allowed six weeks for his statement of claim and twenty-one days for his reply. The abridgement was made in 1902 when the pleading Orders were revised to eliminate the confusion caused by the newly compulsory summons for directions. The time for defence, on the other hand, was then increased from eight days to ten.

A most useful privilege allowed the plaintiff is that he may, without having to obtain leave, amend his statement of claim once at any time within ten days after the defence is delivered;[485] the time was cut down from twenty-one days to ten in 1905, to make it conform to the Rule on replies.

Several changes have been made in the time prescribed for interlocutory steps. The Order on chamber procedure directed that every summons must be served at least two clear days before the time when it was to be heard in chambers;[486] it was found that when a party desired to apply for an extension of time he was usually in a hurry, and to require him to serve two clear days' notice of his intention to apply would practically defeat the object of his application. An addition was made, in 1891, to the effect that

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[483] Order XXI, Rule 8.
[484] Order XXIII, Rule 2.
[485] Order XXVIII, Rule 2.
[486] Order LIV, Rule 4 E.

"in case of summonses for time only, the summons may be served on the day previous to the return thereof,"

and the difficulty was no longer felt. Another alteration in the same Order was made, in the time within which appeals must be carried to the Judge in Chambers from the decision of a master.[487] The Rule required that the appeal must be entered in the Judge's list within four days after the decision complained of, but there was no limit within which notice of the appeal had to be served on one's opponent. In 1905 this was extended to five days, with a proviso that notice of the appeal must be served at least one clear day before the hearing. This assures to the respondent a fair opportunity to prepare, which previously a discourteous appellant could deprive him of by serving the notice late. A small change was made in the Order on payment into court. When a defendant paid money into court the plaintiff had four days in which to decide whether to accept the sum in satisfaction of his claim or leave it;[488] in 1913 this was extended to seven days, to give him a little more time to think it over.

Under the English Rules, when the pleadings have reached a certain point the plaintiff, if he proposes to push his case to trial, must give his adversary a "notice of trial" and then, within forty-eight hours, enter the action for trial. Formerly he was allowed six weeks "after the close of the pleadings" within which to serve his notice of trial, but that time has been curtailed. He is now entitled to give the notice with his reply, whether there are subsequent pleadings or not, and if he fails to do so within six weeks thereafter, the defendant may either apply to have the action dismissed or may himself give notice of trial.[489] In practice it rarely occurs that there are pleadings after the reply, so this change is not an important one. There are certain cases in which, even though the order made on the summons for directions has been for a *non*-jury trial, the defendant has the right, after receiving notice of trial, to elect that the trial *shall* be before a jury; he must then apply to the master for an order to that ef-

[487] Order LIV, Rule 21.
[488] Order XXII, Rule 7.
[489] Order XXXVI, Rule 12.

fect.[490] When this Rule was framed in 1883, no time limit was placed upon the defendant, so he could upset his opponent by delaying the application, but in 1885 the defect was corrected by requiring that the application must be made "within ten days after notice of trial has been given."

Appeals must now be entered much earlier than they were formerly allowed. The 1875 and 1883 Rules fixed the time at twenty-one days for appeals from interlocutory orders and one year for other appeals;[491] in 1893 both of those limits were cut down, the former to fourteen days, and the latter to three months. And in 1913 the three months was further reduced to six weeks, so that now appeals from interlocutory orders must be entered within fourteen days, and appeals from final judgments within six weeks. This is subject to the right either of the court below or the Court of Appeal to extend the time if it sees fit—a reservation explicitly stated in the Rule in 1913 to counteract certain decisions which held that very special circumstances were required. Motions for new trials have been very largely assimilated to appeals, and this is reflected in the time allowed; previously it was ten days from the trial, not counting vacations; in 1913 it was altered to six weeks from the trial, irrespective of vacations.[492]

The sixth and last category in the arbitrary classification here attempted contains the amendments on costs. These refer principally to the incidence of or liability for costs—a kind of question which frequently is the source of more animated discussion in an action than the principal issue itself. It is partly due to what has been called the "apothecary's bill" method of itemizing bills of costs, and partly to the fact that both solicitor and barrister are employed at so many stages of an action, that the costs for every trifling interlocutory application in the course of an action in the English Supreme Court are sufficient in amount to make their payment a matter of consequence, and to

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[490] Order XXXVI, Rule 6.
[491] Order LVIII, Rule 15.
[492] Order XXXIX, Rule 4.

raise the whole status of legal costs to a plane quite disproportionate to its true relation to the rights involved. It is illuminating to notice that the Order on costs in the R. S. C. (Order LXV) is by far the longest Order of the whole seventy-two. With the foot-notes it takes up one hundred and ten pages in the last number of the Red Book, and one hundred and thirty pages in that of the White Book; the average Order occupies only seventeen. However, the evil is one that has flourished for many long years and is almost taken for granted, and it is of interest to observe how the Rule Committee has endeavored to put the burden of costs where it should most justly fall, whenever there seemed reason for intervention. Only a few instances can be given here, as the subject is necessarily one requiring an intimate acquaintance with the procedural steps involved.

On the common law side (ever since the Statute of Gloucester) costs are recovered by a successful litigant from his unsuccessful opponent, but in the Chancery Division the usual order is that the costs be paid out of a fund which is the subject of dispute. The court is consequently obliged to look at the question of the incidence of costs from a different angle than in the King's Bench Division, and to decide how best the fund itself can be protected. With this object in view, a few Rules were added among the Rules of 1893 to serve as a guide in certain puzzling situations. One is:[493]

> "The costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of the estate unless the judge shall otherwise direct."

This warns the custodians of trust property against needless litigation, the practice being that if the claim or resistance was reasonable, the judge will "otherwise direct." The second of these Rules is more obviously beneficial:[494]

> "The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct."

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[493] Order LXV, Rule 14 A.
[494] Order LXV, Rule 14 B.

This affords a just protection to the residuary beneficiaries against errors not their own. The third Rule is a complement to the second:[495]

> "Where some of the persons entitled to a distributive share of a fund are ascertained, and difficulty or delay has occurred or is likely to occur in ascertaining the persons entitled to the other shares, the court or a judge may order or allow immediate payment of their shares to the persons ascertained without reserving any part of their shares to answer the subsequent costs of ascertaining the persons entitled to the other shares."

In a country where it is so common for property to be distributed several generations after the method of distribution is marked out, these two Rules are an unmixed blessing to waiting distributees.

Probate costs are also charged upon the estate of the testator, and similar questions sometimes arise in the Probate Division. A most salutary Rule, made part of the one just above described, in 1904, is:[496]

> "In any probate action in which it is ordered that any costs shall be paid out of the estate, the judge making such order may direct out of what *portion or portions* of the estate such costs shall be paid, and such costs shall be paid accordingly."

In one case, for instance, it was decided that the costs of proving the will should be charged upon certain realty, the *corpus* of the estate, and not paid by the life tenant, the judge throwing out the suggestion that the amount might be raised by a mortgage upon the property.[497] In another case, the costs of all parties were ordered to be paid out of the residuary share of four defendants (there being six residuary beneficiaries), these four defendants being held to have caused the litigation.[498] Another amendment on probate costs is on a matter connected with pleading. The R. S. C. 1883 continued a practice of the old Ecclesiastical Courts whereby a caveator had the right to demand that the

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[495] Order LXV, Rule 14 C.
[496] Order LXV, Rule 14 D.
[497] Dean v. Bulmer, [1905] Prob. D. 1, *per* Jeune, P.
[498] Mentioned in the headnote to Dean v. Bulmer.

proper execution of the will be strictly proved, without having to pay the costs of the proceeding. The Rule was:[499]

> "In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall be subject to the same liabilities in respect of costs as he would have been, under similar circumstances, according to the practice of the Court of Probate."

But this left it open to parties to contest a will wantonly and force the executors to prove its proper execution at the expense of the estate, whether there was reason for it or not. The loophole in the generosity of the old practice was stopped by an amendment to the Rule in 1898 which makes it end as follows:

> "and he shall thereupon be at liberty to do so, and shall not in any event, be liable to pay the costs of the other side, *unless the judge shall be of opinion that there was no reasonable ground.. for opposing the will.*"

A few months later an opportunity came to apply the new Rule. In *Spicer* v. *Spicer*,[500] the President of the Probate Division (Sir Francis Jeune) said:

> "The case is an example of the precise abuse which the new Rule was intended to prevent,"

and ordered the defendants to pay the executors' costs.

Several of the costs amendments apply more particularly to questions common to the King's Bench Division. It has been described how a defendant may pay money into court, as a means of compromise, "with a denial of liability." If the plaintiff accepts the money so paid, he must withdraw his action; if, however, he rejects it and goes on with the action, certain consequences as to costs ensue. If he eventually wins a verdict greater than the amount paid in, the defendant of course gets no benefit from the payment in. But if the plaintiff recovers *less* than was paid in, the defendant ought not to be liable for any costs incurred subsequently to the time of payment in. The old practice was that in such a case the defendant was liable only for the costs of issues on which he failed; this was not a rule of court but a

[499] Order XXI, Rule 18, before amendment.
[500] [1899] Prob. D. 38 (November, 1898).

rule of practice confirmed by a long line of decisions.[501] But this benefit was wholly illusory; the principal issue would usually be that of *liability*, and the issue of *amount due* only a minor one. The defendant, therefore, although he had actually paid in a sum greater than he was found to owe, would be obliged to pay the costs on the principal issue in the action, because that was an issue on which he failed. To relieve defendants of this, and to furnish a real inducement for them to pay money into court so as to avoid further litigation, the following sentence was added to the R. S. C. in 1913:[502]

> "A plaintiff who does not accept money paid into court with a denial of liability, but proceeds to trial and does not recover more than the sum paid into court, *shall not be allowed his costs of the issues as to liability* unless the judge is satisfied that there were reasonable grounds for not accepting the sum paid in."

Under this Rule the defendant will have practically no costs to pay after the time of payment into court.

Similar in character is an addition made earlier to the interpleader Order. When a sheriff, who had by mistake seized goods of some one other than the debtor, was notified by the execution creditor to release the goods, there was always a question about how the costs of seizing the goods and of releasing them should be distributed; the sheriff would contend he must be completely reimbursed by the execution creditor, while the latter would argue the sheriff ought to bear the costs of his own mistake. To put an end to the difference a Rule was made in 1889 dividing the liability. The Rule states that if, upon hearing of the third party's claim, the execution creditor notifies the sheriff that he admits it,

> "he shall only be liable to such sheriff or officer for any fees and expenses incurred prior to the receipt of the notice admitting the claim."[503]

The question of execution involving a third party was also the cause of an amendment to the Order on attachment of debts.

[501] Cited in the footnote to Order XXII, Rule 1, in the White Book.
[502] Order XXII, Rule 6 (c).
[503] Order LVII, Rule 16.

Garnishee proceedings under the R. S. C. are aimed principally at the attachment of *debts* due the judgment debtor. In cases where the garnishee disputed his liability, there was a diversity of opinion as to how the costs of proving it should be borne—whether they should come out of the sum recovered, or fall upon the execution creditor, or upon the garnishee. To settle this a Rule was added in 1901, and now the practice is that, as regards the costs of the judgment creditor, they

> "shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order, and in priority to the amount of the judgment debt."[504]

An amendment on costs which applies to all classes of actions and is constantly being acted upon was made to Order LXV, Rule 23, in 1902. Previously the Rule allowed the masters, when they directed the costs of any *interlocutory* application to be paid by any party, to fix and order a lump sum to be paid, to save the expense and delay of taxation. In 1902 the Rule was extended to cover the costs of the *whole* action, and it is often applied especially in smaller actions of the running-down type, and in actions entered in the Short Cause List where with the court's approval settlements are often effected before trial.

This conspectus of the amendments since 1883 does not pretend to have mentioned all the changes of prominence and importance. The effort has been to select, from the various types to which they conform, such amendments as will illustrate, to one not closely familiar with the R. S. C., the wide range of the Rule Committee's powers and the gain in flexibility to be derived from entrusting the regulation of civil procedure to a professional body rather than to a well-intentioned but overworked legislature.[505]

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London.

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[504] Order XLV, Rule 9.

[505] Section XVI of this article will be published in the Law Quarterly Review, April, 1915, under the title "Rule-making in the County Courts"; Sections XVII and XVIII in the Journal of the Society of Comparative Legislation (London), July, 1915, under the title "Rule-making in the Courts of the Empire"; Section XIX has appeared in the Law Magazine and Review (London), February, 1915, under the title "The Rule Committee and its Work".