MANUAL

OF

PRACTICAL INSTRUCTIONS

FOR THE

CONDUCT OF CIVIL CASES

WITH PARTICULAR REFERENCE TO THE
RULES CONTAINED IN THE CODE OF
CIVIL PROCEDURE AND THE
HIGH COURT'S RULES AND
ORDERS (CIVIL)

FOR THE GUIDANCE OF

THE SUBORDINATE CIVIL COURTS

ISSUED BY THE

HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL (APPELLATE SIDE)

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PREFACE

This small Manual*—probably the first of its kind to appear—owes its origin to the inability of many of the presiding Judges to apply, even after the lapse of more than six years, the provisions of G. L. No. 2 of 1928 to the conduct of civil suits in the lower courts of Bengal and Assam. Where inspection reports by District Judges on their subordinate courts do not disclose a complete disregard or want of appreciation of the principles laid down in that letter, they do at least indicate that more detailed and probably more up-to-date instructions are now needed to supplement what was in the nature of an experiment and to complete the structure of which the foundation was laid in 1928. On the other hand, where attempts have been seriously and conscientiously made to follow the scheme propounded in that year, the results achieved have been such as to encourage the hope that a manual of instructions such as the present will lead to still further improvements in the work of those officers who have already applied their mind to the more orderly administration of justice in civil courts, and at the same time provide material for use by those who have for one reason or another failed to make any progress towards the elimination of those undesirable features which received such ample and learned demonstration at the hands of the authors of the report of the Committee appointed to investigate the causes of delay in the administration of civil justice throughout this country.

It was during the extensive revision of the High Court's Civil Rules and Orders, which has been in progress since the middle of 1932, that the need for some vehicle of instructions at once more composite and less formal than a set of rules suggested itself. The preparation of the two publications has proceeded more or less side by side, the Manual making its appearance rather in advance of the Civil Rules and Orders, copious references to the 1935 edition of which will be found in the present text. The directions in the two books should be read and applied together, but it was mainly

*The short title of this manual is "Civil Suit Instructions Manual". It has been devided into a number of sections each headed by a Roman numeral. Each Section is divided into a number of paragraphs, numbered in one serial from start to finish. In making any reference to this Manual, correspondents will find it convenient to use the short title, quoting either the paragraph or the sub-paragraph and, if desired the section and page also.

with the idea of collating the materials contained in the Civil Procedure Code, the Rules and Orders of the High Court, the report of the Civil Justice Committee and the case laws in a compendious form that the present Manual has been complied. By reference to it, presiding officers will, it is hoped, find a useful guide to the solution of the more common difficulties with which they are almost daily confronted, while inspecting officers will be provided with some indication of the points they should look out for in testing the ability of their subordinate officers to conduct the more complex contested cases with diligence and despatch without doing violence to the ordinary principles of fairness and justice to all the parties concerned.

It is hardly necessary to add, by way of conclusion, that the instructions in this Manual on matters touching discretion contain what the High Court hold to be directions commonly applicable to, and indicative of a proper and reasonable exercise of such discretion, as vested in the courts by the various Codes, which they have to apply, and it is far from the intention of the High Court to restrict or hamper that discretion in special cases requiring different treatment.

N. L. HINDLEY,
Registrar.

HIGH COURT, CALCUTTA,
March, 1935.

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Manual of Practical Instructions for the Conduct of Civil Suits

I

EXAMINATION OF PLAINT AND ISSUE OF PROCESSES

Examination of plaint.

1. (*1*) As soon as the plaint is filed, it should be examined with special reference to ascertaining whether :—

(i) the requirements of Or. 7, r. 9 (*1A*) have been followed,

(*ii*) the subject-matter of the suit has been properly valued, and

(*iii*) the plaint has been properly stamped.

(2) If the plaint is defective in any of these respects, the orders of the Court must be taken and the plaintiff should be required to remedy the defects within a period not ordinarily exceeding seven days. Undue latitude should not be allowed to plaintiffs in allowing extensions of time and presiding officers should not hesitate in suitable cases to reject plaints under Or. 7, r. 11 (*c*) and (*e*) of the Civil Procedure Code in case of non-compliance with their orders.

Note.—As to examination of the plaint, *See* also rule 59*, Chapter 2, Part I, High Court's Rules and Orders, Civil, Vol. I.

As to the exercise of the power under section 149, P. C. Code to make up deficiency of court-fees *see* paragraph 37 (*1*) post.

Issue of Process.

2. If, after examination of the plaint, it has been found to comply with the requirements of the law and to be properly stamped, the processes filed should issue at once.

Rejection of Plaint.

3. On the date fixed under paragraph one the record must again be placed before the court [*see*. para. 21 (2)], in order that the plaint may be rejected under Or. 7, r. 11(c) or (*e*), Civil Procedure Code, if there has not been compliance with the last order or for consideration of any cause that the plaintiff may have to show for the omission.

Valuation.

4. (*1*) Presiding officers should remember that they are responsible for the performance of important fiscal duties under the provisions of the Court-fees Act and the Stamped Act and they are expected to make themselves thoroughly acquainted with the provisions of those statutes. It is a matter of

*The references to the Civil Rules and Orders are to the numbers of the rules in the 1935 edition.

common knowledge that, especially in suits relating to land, deliberate attempts are frequently made to undervalue the subject-matter of the suits with the connivance of all the parties concerned, in order to reduce the costs of litigation and to evade the payment of Government revenue. It is the duty of all presiding officers to check this practice.

(2) In order to deal effectively with this matter, presiding officers should instruct their **sheristadars** that, in examining plaints regarding land, they should not merely see whether the court-fees paid correspond with the value mentioned in the plaint, but should endeavour to ascertain whether there are **prima facie** grounds for thinking that the subject-matter of the suit has been incorrectly valued. With this object in view, **sheristadars** should be instructed to record a brief note on the back of the plaint summarising such information as may be available therein as to the description, class and area of the land claimed and draw the attention of the presiding officer to any obvious undervaluation.

(3) The presiding officer should, if he is of opinion that additional court-fees should be paid, call upon the plaintiff to pay such fees or to supply any additional information that may be required, and, if necessary, should initiate **suo motu** the requisite proceedings under the Court-fees Act.

Note.—*See* also rule 29, Ch. 1, Part I, High Court's Rules and Orders, Civil Volume I.

(4) Careful attention should also be paid to this matter when suits relating to land come before the court on appeal and at this stage, it may sometimes be found necessary to remand the case to the lower court for a finding with reference to the correct valuation of the subject-matter of a suit.

(5) In suitable cases it may also be found desirable in suits in which commissions for local investigations are issued to ask the commissioners to make an enquiry with regard to the valuation of the land and to report on this matter in addition to other points on which a report has been directed.

Processes.

5. (1) Presiding officers should take steps to ensure that processes are ordinarily sent to the nazarat on the day on which formal orders for their issue are passed and any delays due to the defective organisation of the process-serving department should be promptly brought to the notice of the officer-in-charge, of the nazarat. (*See* rule 107, Chapter 3, Part I, High Court's Rules and Orders, Civil, Volume I.)

(2) When returns of service are received they should be carefully examined in order to enable the court to record an order declaring that the summons has been duly served or that further steps should be taken regarding the issue of fresh process.

(3) If the issue of a fresh process is directed the record should again be placed before the court after the expiry of the period fixed for filing process-fees, etc. [cf. paragraph 1 (2)], in order to ensure that the directions of the court have been complied with.

(4) In order that the clerk concerned may have sufficient time to scrutinise the returns, the nazarat should be instructed to send all processes to the court promptly as soon as they have been returned by the peons after service and at least two clear days before the date fixed for hearing of the case or matter. (*See* rule 113, Chapter 3, Part I, High Court's Rules and Orders, Civil, Volume I.)

Form of Summons.

6. Before summons is issued, the court shall determine under Or. 5, r. 5 of the Civil Procedure Code, the purpose for which the summons should issue. Or. 5, r. 5, Civil Procedure Code, has been recently amended and it has now been provided that summons may issue for the ascertainment whether a suit will be contested and a new form of summons (Form I-A) has been provided in Appendix B to the Civil Procedure Code. [*See* Form No. (P) 5, Civil Rules and Orders, Vol. II.] As the majority of suits in the subordinate courts are uncontested, it will usually be found convenient to issue summons in Form I-A in all suits except Small Cause Court suits, rent suits and money suits of a simple nature, for which the summons must issue for the final disposal of the suit.

Separation of uncontested from contested suits.

7. (*1*) In many courts it will be found convenient to allot certain fixed times during the week or during each day for dealing with uncontested and **ex parte** cases.

(*2*) It will ordinarily be safe to fix the first hearing date a month ahead of the date on which the requisite process-fees have been paid whether put in with the plaint or on some subsequent date fixed by the court for the purpose under paragraph 1 (*2*) *ante*.

(*3*) There should ordinarily be no reason why all uncontested suits should not be decided on the first hearing date, and any application made for further adjournment should be rigorously discouraged.

(*4*) As regards rent suits, the attention of all presiding officers is directed to the provisions of rule 362 **et seq** Chapter 15, Part II of the High Court's Rules and Orders, Civil, Volume I.

(*5*) As stated by the Civil Justice Committee in paragraph 5 of the Appendix to Chapter I of their Report, it is desirable that contested and uncontested cases should be separated at as early a stage in the proceedings as possible.

(*6*) If a case is called on for hearing and the defendant does not appear, although the summons has been served, the case may at once be decided **ex parte**. If he appears and admits the claim, judgment may be pronounced forthwith in accordance with his admission. If, on the other hand, he appears and applies for an adjournment informing the court that the claim is contested, a suitable date should be fixed to enable into file his written statements (*vide* paragraph 10 *post*.)

Similarly having regard to the principles laid down in paragraphs 10 (*2*) and (*3*) if the defendant has not filed a written statement within the time which has been allowed him by the court, the court may also consider the propriety of deciding the case **ex parte**.

Note.—In this connection, the attention of courts is particularly directed to the remarks of the Civil Justice Committee in Chapter I of their report. In Paragraph two of that Chapter, page 2, the Committee state: "When the parties have been given a full opportunity of appearing before the court, uncontested suits should—and in most cases can—be decided forthwith without a single adjournment". Similarly, in paragraph 15 of Chapter I, page 6, the Committee state: "The first object to be attained at the first hearing should be the knowledge whether the suit is contested or uncontested. *If it is uncontested, it should be decided at once.*"

II.

SMALL CAUSE COURT CASES

Small Cause Court Cases.

8. (*1*) Cases brought under the Small Cause Court procedure are also frequently found to have been filed with deficit court-fees. Not more than one adjournment [*see* sub-paragraph (*2*) below] to put in the required deficit court-fees should ordinarily be granted and, if they are not paid within the time allowed, the court should consider the propriety of rejecting the plaint [*see* paragraph 1 (*2*)].

(*2*) Processes and process-fees are required to be filed with the plaint by Or. 7, r. 9 (*1*-A) but, if they are not so filed not more than three days should ordinarily be allowed for their deposit.

(*3*) In these cases there should ordinarily be no difficulty in fixing the first hearing date 21 days ahead of the date on which the requisite process-fees, etc., are filed and special steps should be taken to expedite the service of the processes by the nazarat staff.

(*4*) In contested cases an adjournment (where necessary) not exceeding seven days should ordinarily be sufficient to enable the defendant to file his defence should he desire to do so and no further adjournment will usually be found necessary, but as a rule, if the summons is found to have been served a reasonable time before the date fixed for final hearing the court should insist on the filing of the written statement on the same day.

(*5*) As soon as the defence has been filed the case should ordinarily come up for hearing forthwith.

Note.—As to trial of Small Cause Courts suits, *see* rule *et. seq.*, Chapter 15, Part II, High Court's Rules and Orders, Civil, Volume I.

III

APPEARANCE OF DEFENDANT AND FILING OF WRITTEN STATEMENT

Particulars of Plaint.

9. On the appearance of the defendant, it may sometimes be necessary to give directions as to the filing of particulars of the plaint under Or. 6, r. 5, Civil Procedure Code. The particulars that the plaint should contain are set out in Or. 7 rr. 1—9, Civil Procedure Code. It should be seen that the allegations in the plaint are not unduly vague, but are sufficiently specific to enable the defendant to know the precise nature of the case he has to meet. In cases where such directions are necessary, a short date should be fixed for the purpose of supplying the information before fixing the date for filing the written statement.

Written Statements.

10. (*1*) If a direction for particulars under Or. 6, r. 5, Civil Procedure Code, is not required and the defendant states that the claim will be contested and cannot file his written statement at once, an adjournment may be granted on his applying for the same. The length of such adjournment should depend on the nature of the dispute and on the time which has already elapsed since the summons was served. Ordinarily the adjournment should not exceed 10 to 15 days.

Note.—It should be noted that in cases in which the summons has been issued for final hearing the written statement should ordinarily be filed on the date fixed for appearance, if the suit is desired to be contested [*cf.* para 8(*4*)].

(*2*) Parties frequently fail to file their written statement on the first date fixed for this purpose. Laxity in this matter should be strenuously discouraged. A further adjournment should only be granted, if a genuine excuse can be established for the default, but such adjournment should ordinarily be subject to the payment of adjournment costs.

(*3*) The penalty for neglect or failure on the part of the defendant to file a written statement when he has been ordered to do so, is provided in Or. 8, r. 10, Civil Procedure Code, and presiding officers would exercise a wise discretion in proceeding under this provision of the law in suitable cases.

Particulars of defence.

11. Necessary orders under Or. 6, r. 5, Civil Procedure Code, should be given when the defendant pleads facts which are not sufficiently specific, or which do not give a clear idea of the defence. The particulars which the written statement should contain are set out in Or. 8, rr. 2—8, Civil Procedure Code, and in determining the nature of the direction to be given it should be seen whether the written statement satisfies the requirements of those rules. The object of the court should be to fix a party to definite statements on all points in order to narrow the issues in controversy as far as possible.

IV

FRAMING OF ISSUES

Issues.

12. (*1*) In suits in which the summons are issued in Form 1-A of Appendix B of the Civil Procedure Code, if directions under Or. 6, r. 5, Civil Procedure Code, are not required, a date ordinarily not exceeding 10 to 15 days ahead should be fixed for the framing of issues with a direction on the parties to file within a date not exceeding seven days all documents in their possession or power, on which they intend to rely and which have not already been filed. The language of the order should make it clear that neglect or disregard of the provisions of Or. 13, r. 1, Civil Procedure Code, regarding the production of documents may be followed by the enforcement of the

penalty provided in Or. 13, r. 2, Civil Procedure Code. Any party seeking an adjournment should be ordered in suitable cases to pay adjournment costs.

Note.—In cases in which summonses are issued for final disposal issues may, where necessary, be framed on the day the written statement is filed.

(*2*) Issues should be settled on the date fixed for the purpose by the presiding officer himself. Issues must be based on the pleadings and the Judge is required to read the pleadings and then frame issues. He is also expected to question the parties or their pleaders where the facts are not stated clearly or correctly in the pleadings and it may further be necessary to scrutinize the documents which have been filed. The parties or their pleaders may suggest or file draft issues but the duty of framing issues under the law must be performed by the Judge himself.

(*3*) The correct decision of a suit depends to a large extent on the correct determination of the points in controversy and the utmost care and attention is, therefore, needed in ascertaining the real matters in dispute and in fixing the issues in precise terms. It should be observed that the party is to produce evidence "in support of the issues he is to prove" (Or. 18, rr. 2 and 3, Civil Procedure Code) and that the court shall state its finding on the issues (Or. 20, r. 5, Civil Procedure Code).

(*4*) Every issue should form a single question and, as far as possible, issues should not be put in an alternative form. An issue in such vague and general form as "Is the plaintiff entitled to a decree?", or "Has the plaintiff any cause of action?", is often meaningless. When there is any question of limitation (general or special) or other bar, reference should be made to the particular article or section of the Limitation Act or other statute which is said to bar the claim.

(*5*) The framing of unnecessary issues should be avoided. In many courts formal issues are frequently framed on matters which do not require decision. This practice only leads to confusion and waste of time.

Note.—As to how issues should be framed, *see* rule 155, Chapter 8, Part I, High Court's Rules and Orders, Civil, Volume I.

(*6*) Where the Court is of opinion that there are issues of law going to the root of a case, it may raise such issues only and try them first (Or. 14, r. 2, Civil Procedure Code). In this connection, see also Or. 15, r. 3, Civil Procedure Code, under which some of the issues framed can be tried at the first hearing the Court is satisfied that the argument or evidence that the parties can at once adduce is decisive of the matter in dispute. Issues regarding valuation of suit and similar issues may conveniently be disposed of at a very early stage of the suit without keeping them for trial along with the other issues affecting the merits of the case.

V.

PREPARATION FOR TRIAL—DISCOVERY, ADMISSION AND INSPECTION

Preparation for Trial—Dicovery, etc.

13. (*1*) For preparing a case for trial particular attention should be paid to the proper use of the rules relating to Discovery, Inspection and Admission

in Ors. 11 and 12, Civil Procedure Code. It is mainly with regard to these matters that the practice of the subordinate courts is defective and unbusiness-like. The Rules of Practice with regard to these points, for which provision was made in the Code in 1908, are still imperfectly understood and seldom followed. Many cases are allowed to drift to trial without any preliminary preparation with the result that time and money are wasted. On this subject, the attention of all presiding officers is particularly directed to the remarks contained in Chapter III, paragraphs 13 to 23 of the Report of the Civil Justice Committee (*see* Appendix I, page 33).

(2) The advantage of a systematic use of these rules has been thus expressed by Sir Cecil Walsh*, late Chief Justice, Allahabad High Court.

The throughness with which cases in England are prepared before they come to court, and the preliminary skirmishes which take place in Chambers over interlocutory applications in most cases of any importance, result in the settelment of many of those subsidiary points which arise in the majority of cases, before the trial begins. It has been truly said that cases are often won or lost in Chambers. The machinery of "Discovery," if rightly understood and utilised extracts from either side all the material documents in its possession, and with the aid of inspection and the supply of copies, enable both sides to go to trial fully equipped with all the relevant documents relied upon by either party. Nearly all questions relating to the relevance of the documents have already been determined in Chambers before the trial begins. Facts within the knowledge of one party, but unknown to the other have been disclosed, and elucidated, by admissions and interrogatories. Thus nearly all the cards are on the table, and the risk of "surprise" is reduced to a minimum." * * *

"The value of perfecting your tackle in this way before the real struggle begins cannot be over-estimated. Not only is each side fully armed at all points which foresight, judment and experience can suggest but the hearing is concentrated on the main issue or pivot of the dispute, and is confined within limits which eventuate in a saving to the parties of time and money—the one essential in all litigation if the administration of the law is to merit and maintain the confidence of the commercial public. Moreover, the exhausting and embarrassing struggles over side issue and technical objections are wholly eliminated."

(3) Presiding Judges should try to persuade parties and their pleaders to make proper admissions and make full use of the provisions of the law relating to Discovery, Admission, Interrogatories and Inspection. In suitable cases they should themselves take the initiative as regards the introduction and application of these rules.

(4) By an intelligent and judicious use of the powers under section 30 and other sections of the Civil Procedure Code, it should be possible for presiding Judges with the co-operation of the Bar to initiate a systematic practice as regards the preparation of cases before trial. Presiding Judges must regard it as a part of their ordinary duty to take action at suitable times **suo motu** under section 30, Civil Procedure Code, even when parties or their pleaders fail to do so. [*See*, sub-paragraph (12).]

(5) In this connection, the attention of all presiding officers is directed to the provisions of Or. 12, r. 2, Civil Procedure Code of which use should be made on all appropriate occasions ; Or. 12, r. 2, Civil Procedure Code, contains the salutory provision that, after receipt of a notice to admit documents, when a party has refused or neglected to do so, the subsequent costs of proving the documents should be paid by the party so neglecting or refusing, whatever the

*Foreword to Sarkar's Law o f Evidence in India, 5th Edition, page (10).

result of the suit may be, unless the court otherwise directs, and that no costs of proving the documents should be allowed, unless such notice is given, except where the omission is, in the opinion of the court, a saving of expense. This provision, which is intended to save costs and time, is often overlooked.

Note.—The special attention of all judicial officers is drawn to these Rules of Practice and the High Court desire it to be clearly understood that, in forming an estimate of the merit and general efficiency of such officers, their ability to apply these rules enelligently and effectively will be taken into consideration. The question of enforcing these rules should be treated not merely seriously but systematically.

In this connection, *see* further rules 153 and 154, Chapter 8, Part I, High Court's Rules and Orders, Civil Volume I.

Affidavit of documents.

(6) In cases in which it appears to the court that documentary evidence will play an important part in the decision of the case, with due regard to the proviso to Or. 11, r. 12, Civil Procedure Code, both parties should be directed to file affidavits of documents under Or. 11, rr. 12 and 13 of the Code. Ten days should ordinarily be sufficient for the purpose. In this connection, the attention of presiding officers is directed to the provisions of Or. 11, r. 21, Civil Procedure Code.

Admission of documents.

(7) Parties and their pleaders should be invited to admit as many as possible of the documents on which the plaintiff and the defendant rely for the purpose of the suit. The attention of presiding Judges is directed on this point to Or. 12, rr. 2 and 3, Civil Procedure Code. Although difficulties may sometimes arise through the absence of a proper standard of candour or co-operation or on account of the ignorance of the litigants, there should not ordinarily be any difficulty in getting parties to admit the execution of registered documents or documents which require only formal proof. In order to save time and expense it is desirable that admission with regard to documents, the execution of which is undisputed or not seriously disputed, should be obtained at as early a stage as possible before a case comes on for final hearing.

Admission of facts.

(8) If it appears that certain facts relevant to the case are not likely to be seriously disputed at the time of final hearing, the parties should be required to issue notices for the admission of such facts under Or. 12, r. 4. Recourse should also be had to this provision whenever a party doubts whether any fact material to the issues will or will not be admitted at the trial.

Note.—Admissions regarding facts or documents made in court at or before the hearing should be recorded in the order-sheet in the hand of the presiding Judge.

Interrogatories.

(9) It should be ascertained whether the parties wish to deliver interrogatories under the provisions of Or. 11, Civil Procedure Code, for the purpose of extracting information as to facts material to the questions in issue or for the purpose of securing admissions as to such facts. In such cases requisite orders should be made to ensure that such interrogatories are delivered and answered within a reasonable time.

Inspection of documents.

(10) After knowledge has been obtained as to the documents in the possession of the other party either from pleadings or by means of an affidavit under Or. 11, r. 13, Civil Procedure Code, a party may compel their production

and inspection under Or. 11, rr. 14 and 15 of the Code. Enquiries should be made at appropriate times whether any party requires inspection and he should required to issue notices for the purpose and necessary orders should be passed. The court may at any time order the production of documents for inspection (Or. 11, r. 14, C. P. Code).

(*11*) It should be understood that directions with regard to many of the matters mentioned above may be given, if necessary, at any stage of the suit, and applications filed with regard to these matters at a later stage must be considered on their merits.

Standing order for directions of the court under section 30, Civil Procedure Code.

(*12*) In many courts it will be found convenient to issue a standing order to the effect that as soon as possible after the framing of issues, contested suits should be placed automatically before the court for the issue of suitable directions with reference to the abovementioned matters read with section 30 of the Civil Procedure Code.

Note.—If the provisions of Ors. 11 and 12 are made use of by pleaders, costs may be awarded under rule 724 in addition to any fees prescribed in rule 717 to 723 of Chapter 28, Part V, High Court's Rules and Orders Civil, Volume I.

VI

STRIKING OUT AND AMENDMENT OF PLEADINGS

Striking out pleadings.

14. The attention of all courts is directed to the remarks of the Civil Justice Committee on the subject of pleading in Chapter 3, paragraphs 11 and 12 of their Report (*see* Appendix II, page 38). Pleadings often offend against the cardinal rules of pleading which are quoted in paragraph 12 of Chapter 3 presiding officers to encourage the legal practitioners who appear before them disclose immaterial facts and suppress material facts. It is the duty of all presiding officers to encourage the legal practitioners who appear before them to draw their pleadings accurately and scientifically and, in suitable cases, the court should not hesitate to order matter to be struck out from a pleading under Or. 6, r. 16, Civil Procedure Code, or to direct that the pleading should be otherwise amended.

Note.—*See* rule 27, Ch. I, Part I, High Court's Rules and Orders, Civil, Vol. I which requires that every pleading should contain the signature or a signed endorsement giving the name of the pleader or other person who has drafted it.

Amendment of pleadings.

15. (*1*) When the court has before it the pleadings, the statements of parties or their pleaders (under Or. 10, rr. 1 and 2, Civil Procedure Code; see also paragraph 16), answers to interrogatories, admissions as to facts and

documents, etc., it is sometimes found that the pleadings do not represent the real assertions and contentions of the parties. In such cases it may be necessary to direct the amendment of the pleadings.

(2) The law as to amendment is contained in section 153 and Or. 6, rr. 16 and 17, Civil Procedure Code. The courts have a wide discretion in this matter and amendment may be allowed at any stage of the proceedings.

(3) Courts should remember that amendment is in the discretion of the Judge and is not the right of the suitor. Attention is specially drawn to the provision that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties" (Or. 6, r. 17, Civil Procedure Code.) This rule is subject to the limitation that the amendment sought should not be such as will materially alter or transform the nature of the suit. Pleadings amended should be signed or initialled by the Judge.

VII

EXAMINATION OF PARTIES BY COURT

Examination of parties by the court.

16. (1) The attention of presiding officers is directed to the provisions of Or. 10, r. 1, Civil Procedure Code, which are rarely observed. If the allegations of fact made in the plaint or written statement are not admitted or denied in the pleadings, either expressly or by clear implication, the court should at the first hearing proceed to question the party or his pleader and record categorically his admission or denial of those allegations (Or. 10, r. 1, Civil Procedure Code).

(2) Attention is also invited to the amended section 148(i) of the Bengal Tenancy Act, 1885, which requires that the court must record reasons for granting or refusing permission to file a written statement in suits for the recovery of arrears of rent. (*see* also rule 367, Civil Rules and Orders, Vol. I.) A brief examination of the defendant may often enable the court to determine whether the filing of a written statement is really necessary.

(3) Order 10, r. 2, Civil Procedure Code, empowers the court at the first or any subsequent hearing to examine any party appearing in person or present in court, or any person accompanying him, or his pleader. This is another valuable provision of the Code which, if properly used, will save much time and enable the court to ascertain at an early stage the real matters in controversy.

(4) Examination of the parties is specially useful in cases in which illiterate litigants are concerned or in which vague and irrelevant statements have been made. Many irrelevant or inaccurate allegations are frequently made in the pleadings, but once the parties are examined by the court it will often be found that the real matters in controversy lie within a very small compass. The discovery of the real points in issue at an early stage of the suit will facilitate speedy disposal.

VIII.

COMMISSIONS FOR LOCAL INVESTIGATION, ETC.

Commissions for local investigation.

17. (*1*) It is in connection with commissions for local investigations and partitions that undue delay commonly occurs in the disposal of complicated suits and it is of the highest importance that presiding officers should see that necessary steps are promptly taken with reference to such matters and they should exercise a close supervision over the work of the commissioners.

(*2*) Commissions for local investigations should ordinarily be issued as soon as possible after issues have been framed and orders for the issue of such commissions should not usually be made at a later stage, unless the circumstances are exceptional.

(*3*) After issues have been framed, the court should, in all suitable cases, ascertain whether a local enquiry is required and cases in which such enquiry may be necessary should be adjourned to a date not more than 14 days ahead to enable the party, at whose instance the commission will issue, to apply for such commission.

(*4*) The application for a commission should state briefly :—

(*i*) the reason for the commission supported by an affidavit unless the court is otherwise satisfied ;

(*ii*) the value of the suit or subject-matter.

(*iii*) the specific points on which the inquiry is desired ;

(*iv*) the details regarding the locality where the investigation should be held, its distance from the court and the time when the land will be fit for such investigation if it is not so at the time of the application ;

(*v*) the number of days likely to be occupied by the enquiry ; and

(*vi*) the estimated expenses.

Both parties should ordinarily be heard with reference to the application and care should be taken only to issue commissions in cases in which they are really necessary.

Note.—*See* rule 273, Chapter II, Part I High Court's Rules and Orders, Civil, Volum I.

(*5*) If any application is made on the day fixed and the court decides that a commission should issue, it should immediately cause to be drawn up an estimate of the expense of the commission with due regard to the provision of Or. 26, r. 15, Civil Procedure Code and rule 705 **et seq**, Ch. 27, Part V, High Court's Rules and Orders, Civil Vol. I.

(*6*) The presiding officer should exercise great care in drawing up the order for the enquiry, which should contain clear instructions to the commissioner and fix the limits within which the local investigation should be conducted. Vagueness in the instructions issued to commissioners has been found to be a frequent source

of delay and confusion and the filing of unnecessary objections to commissioners' reports. The order should be written in the order sheet of the case by the presiding officer in his own hand.

Note.—*See* Rules 313 and 314, Ch. 11, Part I, High Court's Rules and Orders' Civil, Volume I.

(7) When the requisite order has been made, the court should fix a date, ordinarily not more than 10 days ahead, to enable the party at whose instance the commissions is being issued to deposit the estimated amount of the expenses of the commission and to file the requisite documents.

(8) The court should insist upon strict compliance with orders made with regard to the deposit of the commissioners' fees and the filing of the requisite documents and, except on strong and cogent grounds to be recorded by the court, time should not be extended. The deposit of costs in instalments should be strenuously discouraged. Default in compliance with the orders of the court should ordinarily be penalised by cancellation of the order for the issue of the commission. In appropriate cases defaulting parties should be made to pay adjournment costs under Or. 17, r. 1 of the Civil Procedure Code and the court should also consider the propriety of proceeding under Or. 17, rr. 2 and 3 of the Code.

Note.—*See* Rule 274, Chapter 11, Part I. High Court's Rules and Orders, Civil, Volum I.

(9) As regards partition suits, it has been held that, after a decree has once been made in a suit, such suit cannot be dismissed unless the decree is reversed on appeal. In such cases, therefore, the court cannot ordinarily proceed under Or. 17, r. 2 of the Civil Procedure Code, inasmuch as a preliminary decree for partition has already been passed. This decision does not, however, appear to affect the power of the court to proceed to decide the suit under Or. 17, r. 3 of the Civil Procedure Code, where time has been granted to a party for depositing the requisite costs, if the commissioners' fees have not been paid. In such cases, where suitable materials are available on the record the court should proceed to decide the suit in such manner as may be appropriate.

(10) As soon as the requisite fees and documents have been filed, appropriate steps should be taken to appoint a commissioner and a date should be fixed for the submission of the commissioner's report, with due regard to the nature of the case and the quantity of the work to be done. The date fixed for the return of the commission should be entered in the order sheet and on that date the record should invariably be placed before the presiding officer for orders.

Note.—*See* Rule 319, Ch. 11 Part I. High Court's Ruls and Orders, Civil, Volume I.

(11) The date of the appointment of the commissioner and the date on which the writ of commission together with the necessary papers are sent to him should be noted in the order sheet. It must be definitely understood that there must be no delay between the date of the commissioner's appointment and the date on which the writ and the requisite papers are sent to him.

Note.—Attention is drawn to rules 272 to rule 284 and rules 312 to 328 of Chapter 11 Part I, of High Court's Ruels and Orders, Civil, Volume I which contain instructions regarding the issue of commissions and the procedure to be followed thereafter.

(12) Enquiries in any particular locality should ordinarily be entrusted to commissioners who have experience of that locality and the practice of entrusting several commissions simultaneously in different parts in a district to the same commissioner should be avoided.

(13) Before proceeding to the locality, the commissioner should examine the record and ascertain whether all the requisite papers have been made over to him and he should obtain from the presiding officer any further instructions which may be necessary to enable him to complete his work expeditiously.

(14) Every change of his address must be promptly communicated by the commissioner to the presiding officer of the court concerned. The latter must examine carefully the commissioner's diaries and, and as far as possible, maintain personal touch with commissioners who are conducting local investigations in cases in their files and give them such advice and instructions as may be necessary from time to time.

(15) It must be understood that when work connected with a local investigation has been begun by one commissioner it should ordinarily be completed by him and no commissioner should be changed before the final report has been presented until the presiding officer has had an opportunity of expressing his view with reference to such matter.

(16) Disciplinary action in respect of defaulting commissioners should be taken promptly in accordance with rule 281, Chapter 11, Part I, of the High Court's Rules and Orders, Civil, Volume I.

(17) (*i*) When a commissioner's report is received, a date not exceeding 10 days ahead should be fixed for filing objections to the report, if any, and a suitable date should be fixed for hearing such objections. On the latter date such objections should be finally decided unless they are of such a nature, that it will be found convenient to deal with them at the hearing of the case.

(*ii*) Objections to commissioner's reports and interlocutory work connected with commissions must be heard promptly by the presiding officer and should ordinarily be given priority over other work, as it has frequently come to the notice of the court that discreditable delays occur in connection with such matters.

(18) The principles outlined in the above paragraph should also be observed, as far as may be, in connection with commissions for the examination of witnesses, for accounts, for partition, etc.

IX

FIXING DATES OF HEARING

Fixing dates of hearing.

18. (1) As soon as the requisite steps in connection with the preparation of cases for hearing have been taken, a date should be fixed for settling the date of final or peremptory hearing called the "settling date." The period that must elapse before the "settling date" can be fixed must naturally vary in different courts according to the state of the file and the nature of the case. This "settling date" should be fixed in such a way that the date for peremptory hearing is not likely to be more than two months ahead of it. Thus, if the state of the file be

such that a suit cannot be heard before five months, the "settling date" should be fixed three months ahead so that a date for peremptory hearing may be available within the next two months.

(2) There should ordinarily be a specified day or days at the beginning of each calendar month on which the court in addition to other work, will fix peremptory hearing dates.

(3) Peremptory hearing dates should be fixed in such a way as to enable the parties to get processes served on any witnesses whose attendance may be required, and if on the due date it is found that necessary steps have not been taken to secure the attendance of witnesses, to produce the requisite documents, or otherwise to make the case ready for trial, the presiding officer will in many cases, exercise a wide discretion in refusing any further adjournment and in proceeding forthwith with the trial of the case.

(4) If special dates are set apart for fixing peremptory hearing dates and the presiding officer devotes personal care and attention to this important matter, the attendance of the parties concerned will not ordinarily be necessary on intermediate dates after a case has once become ready for hearing and they will only be required to attend with their witnesses on the date which has been peremptorily fixed.

(5) (*i*) On the "settling date" the court should insist on the parties filing their lists of witnesses and applying for any commission (if not already done before) that may be required for examination of witnesses, arranging for requisitioning any further records and documents that may be required, or taking any other steps that may still be necessary for bringing the case to trial. Parties failing to take any such steps on this day will do so at their risk and any application for the purpose made at a later stage will be dealt with on its merits.

(*ii*) On the "settling date" if it is found that any case has become unready owing to the death of parties or for any other reason, the requisite orders should be passed with reference thereto.

Note.—Presiding officers should exercise the greatest care in not settling a peremtory hearing date for a case unless they are satisfied that all requisite stpes have been taken to ensure that the case will really be ready for hearing on the date so fixed.

(6) On the "settling date" the presiding Judge should himself fix the date for peremptory hearing with due regard to the directions in rule 1[illegible]4 of Chapter 7, Part I, High Court's Rules and Orders, Civil, Volume I. The practice of leaving the fixing of dates to the clerical staff leads to abuses and results frequently in confusion of work. Dates should be fixed, as far as possible, with reference to the state of the file, the nature of the contest, the convenience of the parties and their pleaders and also after reference to the Court's Diary.

(7) In fixing peremptory dates for hearing the principles to be observed are—

(*a*) that suits should not have dates fixed without something approaching to certainty that they will actually be finally heard on the date so fixed; and

(*b*) that all suits should be brought to arial chronologically according to the date of their institution.

(8) The rule as to the hearing of suits in their chronological order may sometimes be relaxed at the discretion of the presiding Judge in the case of simple money, rent and ejectment suits, suits under section 9 of the Specific Relief Act and other suits of an urgent or simple nature, the speedy disposal of which is required for convenience of litigants.

(*9*) It is essential that the daily file should be arranged so as to ensure that the court will have sufficient work on each day to keep it occupied and that due precaution should be taken to avoid fixing more work for any day than it is possible for the court to accomplish. At the same time, in order to provide for the contingency that cases may break down or be compromised or withdrawn or adjourned at the last moment for some unforeseen reasons, it is sometimes wise to provide for a reserve of work which may be taken up in such circumstances.

Note.—As to fixing dates for peremptory hearing, *see* also rule 144, Chapter 7, Part I, High Court's Rules and Orders, Civil, Volume I.

(*10*) It should be clearly understood that after a peremptory hearing date has been fixed, no further adjournment should be granted except for the most urgent or special reasons. It is most undesirable that parties and their pleaders should become accustomed to the idea that an order for peremptory hearing date recorded by the court is a mere formality.

Note.—As to this, *see* further rule 146, Chapter 7. High Court's Rules and Orders, Civil, Volume I.

(*11*) A party who for some unforeseen or special reason desires an adjournment in a case fixed for peremptory hearing should give timely notice in writing to the other party or his pleader, of his intention to apply therefor. On such notice being given, the procedure indicated in rule 147 of Chapter 7, Part I of High Court's Rules and Orders, Civil Volume I, should be followed.

(*12*) (*i*) If at any time ahead of the peremptory date itself, by reason of the court having to be absent on leave or having to remain away on account of illness or on account of the case or cases on which the court is already engaged extending beyond the estimated time, or for any similar contingency, it is found that a case for which a peremptory hearing date has been fixed will not be able to be taken up on that date, the case in question should be adjourned and the pleaders concerned should be given as early a warning as possible to enable them to inform their clients that they with their witnesses will not be required to attend. Before making such an adjournment order it should be ascertained whether any of the other courts at the station are in a position to try the case on the peremptory date fixed, in order that arrangement may, if necessary, be made for its transfer. It is, of course, expected that all courts should cooperate in this matter in order to avoid postponing cases which have been peremptorily fixed for hearing. If this be not possible but a short date can be fixed in any court at the station for hearing such cases without dislocating the programme of the court's work, this should be done on the date on which the adjournment order is passed.

(*ii*) If it is found on the "peremptory day" itself that pressure of work renders unavoidable the adjournment of any case peremptorily fixed, the court should enquire of the other courts at the station whether they are in a position to take up such case and only if no such assistance is forthcoming should an order of adjournment be made.

(iii) Any case so adjourned under clauses (i) and (ii) of this sub-paragraph should be given precedence as regards the fixing of peremptory dates for the following months.

(*13*) The principle underlying the procedure indicated in the foregoing paragraph of this section is that all possible inconvenience to the litigant public should be avoided by arranging that the parties and their witnesses should only

be brought to court on occasions on which their attendance is absolutely necessary. According to the practice which is now followed in many courts, litigants are made to attend court when it is impossible to do anything except to pass formal adjournment orders. Litigants are thus obliged to incur unnecessary costs on travelling, diet expenses and formal applications for adjournment.

(*14*) It may be noted that when a peremptory date has been fixed, it may occasionally happen that for unavoidable reasons one or more important witnesses may be absent while the majority of witnesses are present. In such cases, it may be desirable, if the parties concerned are not at fault, in order to avoid inconvenience to such parties and their witnesses, in special cases, to examine such of the witnesses actually present in court whose examination may be legally practicable and to fix another date for the attendance of the absent witnesses. A careful exercise of the court's discretion in this respect would not be deemed to offend against the important principle to the effect that piecemeal trial should be avoided [*vide* the proviso to Or. 17, r. 1(2), Civil proceedure Code and rule 152, Chapter 7, High Court's Rules and Orders, Civil Part I, Volume I].

(*15*) On the various dates on which cases come before the court in their preliminary stages, enquiries should be made from the pleaders concerned, especially in cases in which the parties are numerous, whether any further steps are required as regards the substitution of heirs of deceased persons. It is frequently found that applications for adjournment on this ground are made at the last moment after a case has been peremptorily fixed and when some of the parties have died two months or more before the date of the application. Careful enquiries should invariably be made on this point on the "settling date."

Cause lists, etc.

19. Cause lists of cases for which peremptory hearing dates have been fixed should be carefully prepared and exhibited in accordance with the provisions of rule 145, Chapter 7, Part I, High Court's Rules and Orders, Civil, Volume I.

Note.—In this connection attention is invited to the fact that it is one of the important duties of every presiding judge to satisfy himself everyday that the daily cause list in form No. (M) 2 (*vide* rule 14, Chapter 1), the register of processes, process-fess, etc., due from the parties in form No. (R) 37 (*vide* rule 15, Chapter I), the daily list of plaints, appeals, miscellaneous cases, execution cases, etc., registered in form No. (M) I (*vide* rule 57, Chapter I), the list of draft decrees drawn up in form No. (M) 5 (*vide* rule 185, Chapter 9) and all other lists or information books prescribed by the High Court are written properly and made available to the parties and their pleaders for their inspection at the hours prescribed in the rules in the High Court's Rules and Orders, Civil, Volume I.

Interlocutory applications.

20. All applications for injunctions or other interlocutory orders in which an appeal is allowed should be heard independently of the proceedings for the preparation of the suit for trial and should not be affected by the directions in the paragraphs in the foregoing sections. It must always be borne in mind that interlocutory applications are usually of an urgent nature and delay in their disposal may cause unnecessary hardship to the parties and may sometimes render the proceedings infractuous. They should ordinarily be heard on the first date fixed for appearance and hearing, and certainly on the next succeeding date, if a short adjournment is necessary in exceptional circumstances. **(See section XIV et seq.)**

X.

DIARY OF THE COURT.

Diary.

21. (*1*) In order to comply effectively with the procedure indicated in the foregoing paragraphs it is essential that the Diary should be methodically maintained. It will ordinarily be found useful to enter cases in the Diary on each date under the following heads according to the purpose for which they are fixed :—

(*a*) for filing deficit court-fees, process-fees or processes, etc. ;

(*b*) for final disposal at first hearing ;

(*c*) *for issue of processes ;

(*d*) *for appearance of defendants ;

(*e*) for ascertaining whether suit will be contested ;

(*f*) for filing written statement ;

(*g*) for the framing of issues ;

(*h*) for compliance with orders of the court regarding admission, discovery, inspection, etc. ;

(*i*) for investigation of pauperism ;

(*j*) for substitution of heirs ;

(*k*) for appointment of a Commissioner ;

(*l*) for submission of the Commissioner's report ;

(*m*) for hearing objections to the Commissioner's report ;

(*n*) for compromise ;

(o) for filing award ;

(*p*) for hearing of interlocutory application (state nature) ;

(*q*) for settling the final or peremptory date of hearing ;

(*r*) for peremptory hearing ;

(*s*) for argument ;

(*t*) for judgment, or order or any other direction ;

etc., etc.

Note.—As to the maintenance of Diary and the arrangement, etc., of cases, *see* further rule 12, Chapter I, Part I, High Court's Rules and Orders, Civil, Volume I.

(*2*) Presiding officers should themselves see that the various orders which have been passed do not become mere formalities. Whenever time is granted to a party for taking any step in a case, a forward date not exceeding the time that may reasonably be necessary for taking such a step should be fixed and on that date the record must invariably be placed before the presiding officer in order that the requisite order may be recorded.

**See* Sub-paragraph (4), page 18.

(3) Presiding officers should pay particular attention to cases for which dates have been fixed for the passing of interlocutory orders. Applications with regard to the matters are usually of an urgent nature and they should be speedily disposed of. Delay in their disposal may cause unnecessary hardship to parties. (See para 20.)

(4) It must, of course, be understood that some cases, after they have once become ready for hearing, will again become unready on account of the death of the parties or other similar reasons. In such cases, therefore, processes will be issued and the cases will have to be entered in the Diary under the heading "for issue of processes" or "for the appearance of defendants" as the case may be.

(5) Very little attention is paid in some courts to the instruction contained in rule 148, Chapter 7, Part I of the High Court's Rules and Orders, Civil, Volume I, to the effect that payment of adjournment cost should be ordered in suitable cases. When cases are adjourned on the payment of adjournment costs it would be convenient that an appropriate entry in red ink should be recorded against the case in question in the Diary.

Note.—As to adjournment and other costs and the manner in which they should be dealt with, *see* rules 148 to 150, Chapter 7, Part I, High Court's Rules and Orders, Civil, Volume I.

(6) Among the important matters which required the presiding officer's personal attention is the disposition of cases and their proper spacing out in the Diary. It is essential that uncontested cases should be heard within the shortest possible time, but it has been noticed that in many courts the disposal of such cases is unduly delayed. Contested cases should be separated in the Diary from uncontested cases so that the latter may not be crowded out by other work. [See rule 12(4),Chapter I, Part I, High Court's Rules and Orders, Civil, Volume I, and note thereto.]

(7) When the defendant appears and notifies his intention to contest, the suit, if adjourned, should go to the page for defended cases in the Diary. When there is no appearance and the Court is satisfied about the due service of summons, or when the defendant appears and takes a plea which is only a pretence for a contest, the suit should and in most cases can be decided forthwith without a single adjournment. The plaintiff must not be allowed repeated adjournments for bringing **ex parte** evidence merely because it suits his convenience or purpose to delay the hearing (See paragraph 7 and the Note thereto). If for any special reason an adjournment is granted to the plaintiff for production of evidence, the suit should go to the page for undefended cases.

XI

OPENING OF A CASE AND EXAMINATION OF WITNESSES

Opening of a case.

22. (1) The provisions of Or. 18, r. 2, Civil Procedure Code, regarding the opening of a case are seldom followed. The great importance of insisting upon a case being properly opened has been stressed by the Civil Justice Committee in Chapter IV, paragraph 1, of their Report (see Appendix III, page 41). It is essential that the requirements of the law should be observed in this respect, and much time will be saved by doing so.

(2) In his "opening" the pleader should state his case and give the substance of the facts which he proposes to establish by his evidence. The case thus stated ought to be in accord with the party's pleadings, for no litigant can be allowed to make at the trial a case different from that which he has placed on record and which his adversary is prepared to meet. The Judge should make a short note of the opening statement so that the party can during the trial be firmly held to the case stated at the opening. Further, the failure of a party to open his case, and to state exactly the line which he proposes to take, provides an opportunity to him to change the case which he originally had in mind and not only to call the witnesses whom he had originally intended to call, but to call other witnesses on different points to support a different case if he sees that the case which he had in his mind is not progressing as satisfactorily as he desires. If the case is not opened, a party cannot be confined to his original case, for the court does not know what the original case is.

(3) When the party having the right to begin has stated his case and the witnesses adduced by him have been examined, cross-examined and re-examined, and the documents tendered by him have been either admitted in evidence or rejected, the opposite party, or each of the opposing parties having a distinct case, should state their respective cases in succession, if they desire to do so, and then produce their evidence.

Cross-examination.

23. (1) Every attempt should be made to keep cross-examination within reasonable bounds. In the opinion of the Civil Justice Committee "it is not too much to say that cross-examination frequently extends over a period which is more than six times as long as is necessary to produce useful results. The waste of time is most noticeable in cases of larger value, especially in which the dispute relates to valuable landed property."

(2) It is the duty of the court to disallow of its own motion either examination or cross-examination upon matters irrelevant or addressed directly or indirectly to a purely ulterior or collateral object and not to the questions, in issue or calculated to elicit either directly or indirectly the disclosure of matters protected from disclosure by section 125 of the Indian Evidence Act. This duty is not only consistent with the Evidence Act but directly arises out of it. The same observations apply to the undoubted rule of law that the court shall take as conclusive (save as excepted by section 153 of the Evidence Act) the answer of a witness upon a question put as to credit only and shall not treat the mere making of the suggestion involved in the question as indicating any foundation for it.

(3) The existing provisions of the Indian Evidence Act, provide sufficiently for the exclusion of irrelevant matters and the imperative language of the Act (see, section 5, 60, 136, 165) indicates that it was the intention of the Legislature that a court should, irrespective of objections made by the parties, compel observance of the provisions of the law. The Judge has power under the law to exclude any irrelevant evidence.

(4) It is of the utmost importance that judicial officers should keep in view the powers conferred upon them by the Indian Evidence Act and should exercise their discretion in using these powers to disallow cross-examination on immaterial and irrelevant matter or needlessly lengthy cross-examination on relevant matter.

Admissibility of evidence.

24. Questions as to admissibility of evidence (oral or documentary) should be determined as they arise instead of admitting the evidence in the first instance and reserving the question of law as to its admissibility or relevancy until the final decision. Documents should never be admitted in evidence subject to the question of their admissibility being decided at the end of the case.

Court questions.

25. The attention of all courts is directed to the provisions of section 165 of the Evidence Act as regards the power of the court to ask questions. This power may often suitably be used after a witness has been cross-examined and re-examined, in order to clear up doubtful points in the testimony of a witness and time is frequently saved by a proper use of the discretion vested in the court by this section.

XII

DOCUMENTARY EVIDENCE

Documentary evidence.

26. (*1*) Under Or. 7, r. 14, Civil Procedure Code, it is compulsory for the plaintiff to produce at the time the plaint is presented the document upon which the suit is brought and to deliver the document itself or a copy thereof to be field with the plant. He is further required at this time to furnish a list of all the documents, whether in his possession or power or not, on which he proposes to rely as evidence in support of his claim.

(*2*) Courts should insist on the strict enforcement of the provisions of Or. 7, r. 14, Civil Procedure Code. The penalty for not complying therewith is prescribed in Or. 7, r. 18(*1*) of the Code. If the documents are not so field or entered in the list, they cannot be received in evidence at a later stage without the leave of the court, which should not be given unless a genuine cause for the omission is established to the complete satisfaction of the court. This rule, however, does not apply to documents produced for the cross-examination of the defendants' witnesses [Or. 7, r. 18(*2*), Civil Procedure Code.]

(*3*) Order 13, r. 1, Civil Procedure Code, lays down that the parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in court and all documents which the court has ordered to be produced.

(*4*) Although the production of all documents at the "first hearing" is a mandatory duty cast upon the parties, it will usually be convenient for the court after the filing of the written statement (and before the settlement of issues) to record an order fixing a definite date not ordinarily exceeding seven days for filing all documents on which both parties intend to rely (see. paragraph 12).

(5) (*i*) The penalty for non-compliance with the requirements of Or. 13, r. 1, Civil Procedure Code, is that provided in Or. 13, r. 2, Civil Procedure Code, which states in clear terms that no documentary evidence in the possession or power of any party which should have been but has not been produced as required by rule 1 of Or. 13, shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the court for the non-production thereof; and the court receiving any such evidence shall record the reasons for so doing.

(*ii*) The under leniency displayed by the courts in admitting documentary evidence at a late stage has deprived Or. 13, r. 1, Civil Procedure Code, of much of its efficacy.

(6) (*i*) The above provisions as regards the production of the documents at the initial stage of a suit are intended to minimise the risk of fabrication of documentary evidence as well as to prevent surprise, by giving the earliest possible notice to each party of the documentary evidence on which the opposite party relies.

(*ii*) Insistence upon the proper observance of the abovementioned provisions of the law will also facilitate the due application of the law relating to Discovery, Admission, Interrogatories (**see**, paragraph 13) and will lead to the adoption of a business-like procedure in the preparation of suits for hearing.

(7) Courts should carefully bear in mind the distinction between mere "production" of documents and their "admission in evidence" after being either "admitted" by the opposite party or "proved" according to law. When documents are "produced" by the parties they are only temporarily placed with the record subject to their being "admitted in evidence" in due course. Only documents which are "admitted in evidence" should form part of the record. Documents not admitted in evidence should be removed from the record as soon as the trial is concluded and returned to the parties (Or. 13, r. 7).

Note.—*See* also rule 482, Chapter 17, Part III, High Court's Rules and Orders, Civil, Volume I.

(8) A party who intends to use a document against his opponent must formally tender it in evidence and "prove" it unless it is admitted. If no objection is made to the document being admitted in evidence, an endorsement to that effect should be made by the presiding Judge with his own hand. The admission of the party or his pleader may also be usefully recorded on the order-sheet and the signature of the pleader obtained. If a document is not admitted by the other party it must be proved in accordance with law before it is "admitted in evidence". It must then be signed and endorsed by the presiding Judge with his own hand as required by Or. 13, r. 4, Civil Procedure Code. The importance of strict compliance with this procedure has been emphasised by the Judicial Committee in Hussain *v* Hashim, I.L.R. 38 All 627, at p. 663, P.C.

(9) (*i*) Documents which are rejected as being inadmissible must similarly be endorsed with the particulars specified in Or. 13, r. 6, Civil Procedure Code, together with a statement of their being rejected and the endorsement must be signed or initialled by the presiding Judge.

(*ii*) Attention is invited to the fact that an erroneous omission to object to evidence not admissible under the Evidence Act does not make it admissible. The court is bound to consider **suo motu** whether any document sought to be given in evidence is relevant and whether there is any legal objection to its admissibility.

Reading and Interpretation of evidence.

27. The provisions of Or. 18, rr. 5 and 6, Civil Procedure Code, as regards the reading over interpretation of evidence to witnesses in the presence of the Judge, are frequently overlooked. These provisions of the law should be strictly followed.

XIII

ARGUMENTS AND JUDGMENT.

Arguments.

28. Pleaders should ordinarily be called upon to argue their cases as soon as the evidence has been closed and the practice of allowing an adjournment for this purpose should be avoided.

Note.—Attention is invited to Rule 146 (6) Chapter 7, Part I, High Court's Rules and Orders, Civil, Volume I.

Judgment.

29. (*1*) It is the duty of the court, before proceeding to judgment under Or. 20, r. 1, Civil Procedure Code, finally to revise the whole record in order to see whether it contains all that has been formally admitted in evidence and nothing else. The Bench Clerk should pay particular attention to this matter before making the record over to the Judge for preparing the judgment in cases in which judgment is reserved. Any papers still found with the file, which have not been admitted in evidence, should be removed and returned to the parties (**see**, rule 485, Chapter 17, Part III, High Court's Rules and Orders, Civil, Volume I).

Note.—As to the preparation of judgment and its contents, *see* the directions in rules 161 to 163 Chapter 9, Part I, High Court's Rules and Orders, Civil, Volum I.

(*2*) Appellate Courts should examine the records of cases coming before them on appeal or revision in order to satisfy themselves that the lower courts have complied with the provisions of the law and instructions of the High Court on this subject.

Note.—Documents admitted in evi dence and exhibited may be returned subject to the provisions of Or. 13 r. 9. If an application is made for the return of a document before the expiry of the period for filing an appeal or before the disposal of the appeal (if on has been filed) care should be taken to see that a certified copy is placed on the record and an undertaking is given for the production of the original, if necessary, unless its detention is considered necessary for inspection by the Appellate Court or for other reasons.

(*3*) Judgments should be written and delivered without undue delay (**see,** rule 164, Chapter 9, Part 1, High Court's Rules and Orders, Civil, Volume I). Every Judge proceeding on leave or transfer must write judgments in all cases and appeals in which arguments have been heard (**see,** rule 167 **ibid**).

Note.—All judicial officers have to submit a monthly statement in Form No (S) 3 on or before the 15th of the month succeeding that to which it relates, showing the cases and appeals in which arguments have not been heard and judgments have not been delivered (*see*, rule 166, Chapter 9, Part I, High Court's Rules and Orders, Civil, Volume I).

(4) If a judgment is reserved, a definite date should be fixed by the Court for its delivery and notice of such date should be given to the parties or their pleaders.

Note.—As to this *see* rule 165, Chapter 9, Part I, High Court's Rules and Order, Civil, Volume I.

(5) Courts should ordinarily insist upon pleaders for the parties being present when judgment is pronounced and such judgments must invariably be delivered and signed in **open court** in accordance with the requirements of Or. 20, rr. 1 and 3, Civil Procedure Code.

(6) After a decree, judgment or order is signed the court has no power to modify or alter it except that clerical or arithmetical mistakes or any accidental slip or omission may be corrected at any time under section 152, Civil Procedure Code. If a decree is not in conformity with the judgment, the court has inherent power to amend the decree under section 151, Civil Procedure Code, so as to bring it into accordance with the judgment.

XIV

ARREST OR ATTACHMENT BEFORE JUDGMENT

Arrest or attachment before judgment.

30. (1) If at the time of filing a suit or at any stage afterwards an application is made by the plaintiff for the arrest of the defendant or the attachment of his property before judgment, the court should proceed to consider the application with due regard to the provisions of Or. 38, Civil Procedure Code. It has been noticed that orders of this nature are often passed **ex parte** when the affidavit merely repeats the words used in rules 1 and 5 of Or. 38, Civil Procedure Code. It should be remembered that the jurisdiction of the court with reference to this matter should be carefully and sparingly used and **ex parte** orders should only be passed in very exceptional circumstances. Greater caution should be exercised when movables are sought to be attached or when the attachment will have the effect of closing down a business.

(2) The power under Or. 38, Civil Procedure Code, was not meant to be exercised lightly. Vague or general allegations that the defendant is about to abscond or to remove the whole or any part of his property from the local limits of the jurisdiction of the court are easily made and may often be disregarded. The court must be satisfied not only that (*a*) the defendant is about to abscond or dispose of his property or remove it from the jurisdiction of the court, but (*b*) that his object is to obstruct or delay the execution of any decree that may be passed.

(3) If in the special circumstances of a case a "conditional order of attachment is made, it has to be implemented by a subsequent order, making it

absolute if it is intended to maintain the attachment and to make it effective. It is noticed that in many cases no final order is recorded.

Note.—When applications are made for attachment before judgment, affidavits should be critically examined and it should be particularly seen whether the provisions of rules 35, 39 and 40, Chapter I, Part I, High Court's Rules and Orders, Civil, Volume I, have been strictly complied with.

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XV

INJUNCTIONS

Temporary Injunctions.

31. (*1*) Interlocutory injunctions are sometimes granted too freely and without sufficient care to impose terms. With reference to such matters care should always be taken not to place a plaintiff in a position of unfair advantage by the injudicious issue of an *ex parte* order.

(*2*) In dealing with applications for temporary injunctions the courts should be guided by the following principles :—

(*i*) Plaints and affidavits should be critically examined (*see* in particular rules 35, 39 and 40 Civil Rules and Orders, Vol. I) and the courts should satisfy themselves that there has really been an invasion of rights sufficient to justify interference.

(*ii*) The Courts should appreciate that an interlocutory injunction should be granted **ex parte** only in **very exception** circumstances, and ordinarily only in cases in which the applicant establishes that by no reasonable diligence on his part, could he have avoided the necessity for making the application. In this connection attention is invited to rule 3 of Or. 39, Civil Procedure Code, which directs that notice "shall" be given unless the emergency is so grave that notice will defeat the object of the injunction.

Particular care should be taken in dealing with applications for temporary injunctions against local bodies and similar institutions.

(*iii*) Temporary injunctions when granted should ordinarily be limited to hold good only for the minimum time required for the defendant to appear before the court to show cause against the injunction.

(*iv*) When granting such an injunction the greatest care should be taken to state in precise terms the particular acts which are forbidden. A vague and general order that the application for injunction is granted should never be recorded. Without such specific direction injunction orders are frequently drawn up by copying out a long rambling statement from the plaint or application for injunction.

(*v*) The defendant should be served with copies of the plaint and affidavit and should be allowed a few days thereafter within which to appear and object. The presiding Judge should ordinarily dispose

of the application on the date so fixed and adjournments should be very sparingly granted. It is of the utmost importance that injunction applications should be heard and determined with the greatest expedition. (See ante, paragraph 20.)

(3) What is contained in the foregoing paragraphs is not intended to restrict the discretion of courts under the Code, but is intended to stress the desirability of adhering to the general principle that temporary injunctions should not be granted unless very strong and cogent grounds are made out.

Note.—As to *ex parte* injunctions, *see* rule 332, Chapter 13, Part I, High Court's Rules and Orders, Civil, Volume I, and the observations of the Civil Justice Committee in Chapter XLV of their Report. (*See* Appendix IV, Page 42.)

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XVI

COMPROMISE OR ADJUSTMENT OF SUITS

Compromise or Adjustment of suits.

32. (1) When a suit is compromised or adjusted between the parties, the court should satisfy itself that the compromise or adjustment is lawful and has been effected in the manner alleged and should then record the terms of the agreement as required by Or. 23, r. 3, Civil Procedure Code.

(2) The provisions of section 147-A of the Bengal Tenancy Act, 1885, are specially applicable to compromises of suits between landlords and tenants and courts are required to scrutinise all such compromises and to ratify or reject them according to whether they are in conformity with or in contravention of the provisions of the Act and to record reasons in writing.

(3) When a compromise is alleged by one party and denied by the other party, the court should frame an additional issue to decide by evidence whether a lawful agreement has been effected between the parties as alleged.

Note.—As to how decrees should be drawn up when a compromise goes beyond the subject-matter of the suit, *see* Note 6 to rule 178, Chapter 9, Part I ; High Court's Rules and Orders, Civil, Volume I.

(4) When a minor is a party to a compromise, the court should consider the terms and record a finding as to whether the compromise or adjustment is for the benefit of the minor and pass an express order granting or refusing leave for the purpose, as it may think fit (Or. 32, r. 7, Civil Procedure Code).

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XVII

WITHDRAWAL OF SUITS

Withdrawal of suits.

33. (1) A plaintiff is at liberty to withdraw from a suit at any time (subject to any order as to costs that the Court may pass), but if he wishes to reserve his right to bring a fresh suit on the same cause of action, he must

obtain the permission of the Court under Or. 23, r. 1, Civil Procedure Code. Permission can be granted only where the Court is satisfied that (*a*) there is some formal defect fatal to the suit, or (*b*) other sufficient grounds are present. The words "other sufficient grounds" in the rule have been interpreted to mean that the ground must be one **ejusdem generis** with the formal defect (**i.e.**, of the same nature as a formal defect).

(*2*) It has been frequently noticed that the provisions of Or. 23, r. 1, Civil Procedure Code, are not properly appreciated and that withdrawal with liberty to sue afresh is often allowed by many courts without due regard to the provisions of the law. The object of the rule is to prevent a defeat of justice on technical grounds and not to enable a plaintiff, after he has failed to make out his case to obtain an opportunity of re-opening the dispute at a future period. In his application for withdrawal the plaintiff must specifically state the nature of formal defect and a mere general statement that there are formal defects without stating the particulars thereof is not sufficient.

(*3*) The court should make a serious enquiry as to whether the alleged formal defect does exist as a matter of fact and whether the suit must fail or not. A defect which goes to the root of the plaintiff's claim is not a formal defect. Court should be careful to see that the allegation of the existence of a formal defect is not a mere pretext to get out of an inconvenient or ill-advised litigation with a right reserved to harass the defendant on another occasion. It is incumbent upon the court, when giving permission to withdraw liberty to sue afresh, to record its reasons. Absence or incompleteness of evidence inability to prove a party's case, etc., are not sufficient grounds for permitting withdrawal under Or. 23, r. 1. The need for scrutiny of the reason is the greater when the application for withdrawal is filed at the appellate stage after a case has been fully tried and a decision recorded.

XVIII

INHERENT POWERS OF THE COURT

Inherent powers of the Court.

34. (*1*) Inspection reports have shown that the principles governing the exercise of the inherent powers of the court under section 151, Civil Procedure Court, are frequently misunderstood, with the result that many applications which in no sense fall within its purview are made and admitted under the section.

(*2*) The section is widely worded to enable the court to make a particular order which is essential in the interests of justice, but courts should be careful to remember that the inherent power under section 151, Civil Procedure Code, should not be invoked, where there are express provisions of law in the Code which apply to the case in question. The power to act **ex debito justitiae** is intended to supplement the other provisions of the Code and not to evade or ignore them or to invent a new procedure according to individual sentiment. Thus, when a plaint is rejected under Or. 7, r. 11, Civil Procedure Code, no

application can be entertained under section 151 of the Code as the order being a decree under section 2 (2), Civil Procedure Code, is appealable. Similarly, suits dismissed under Or. 9, Civil Procedure Code, or decreed ex parte cannot be revived under section 151, Civil Procedure Code, as there are specific provisions in the Code to govern such cases.

XIX

EXECUTION OF DECREES

Execution of decrees.

35. (1) It has been said that in India "the difficulties of a litigant begin when he has obtained a decree". This question has been fully discussed by the Civil Justice Committee and the attention of presiding officers is directed to the remarks made on this subject in the Committee's Report in Chapter 29 to 33.*

(2) In the course of the inspection of subordinate courts it has been noticed that Execution cases and Miscellaneous cases are frequently allowed to drag on almost indefinitely, and this fact causes great hardship to the parties. Presiding officers must understand that their efficiency will be considered not merely in the light of statistical returns relating in disposals of original suits but great attention will also be paid to the manner in which they dispose of the important interlocutory work in their courts and to their method of disposal in Execution cases and Miscellaneous Cases.

Note.—*See* further, rule 193, Civil Rules and Orders, Volume I.

(3) It is a matter of common experience that many of the objections which are filed with, reference to proceedings in execution [*e.g.*, under section 47, Or. 21, r. 90, Or. 21, r. 2(2), Or. 21, r. 58, Civil Procedure Code, section 173, Bengal Tenancy Act, etc.] are of a frivolous nature, and it is undesirable that such applications should be allowed to drag on through adjournment after adjournment at the request of the parties. Presiding officers must give their personal attention to these matters at the time of admitting them, and, if it is found on the first date fixed after such applications have been filed that the petitioner has not taken the requisite steps in the matter they should consider the propriety of rejecting such applications, for default. Further, they should regard applications for the exection of decrees as urgent matters and remember that the courts may be brought into discredit if the decree-holders are put to unnecessary difficulty and harassment in the execution of decrees which they have obtained.

(4) Complications frequently arise in execution matters owing to carelessness in drawing up decrees. Presiding officers have a personal responsibility in connection with this matter and their attention is directed to the remarks of the Civil Justice Committee in Chapter 29, paragraphs 6 to 8, of their Report.

Note.—In this connection, *see* rule 177 *et seq.*, Chapter 9, Part I, High Court's Rules and Orders, Volume I, Civil,

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*The chapter being too long are not reproduced in the Appendices.

(5) As pointed out by the Civil Justice Committee, a great deal of delay frequently occurs in the initial stages of execution proceedings partly on account of delays in the Copying Department in preparing copies of decrees and partly on account of the obstructive attitude by the ministerial staff in checking application for execution under Or. 21, rr. 11—15 of the Civil Procedure Code, which results in such applications being frequently returned to the decree-holders on inadequate grounds. Presiding officers are expected to exercise proper administrative control over their office establishment in order to remove causes of complaint, such as those to which the Civil Justice Committee have referred and they will be held responsible for any unnecessary delay or harassment to the parties which may occur owing to dilatory or obstructive methods employed by members of their ministerial establishment.

Note.—*See* further, rule 197, Civil, Rules and Order's Vol. I.

(6) Courts must be careful to make a proper use of the discretion vested in them under Or. 21, r. 40 of the Civil Procedure Code. In this connection the attention of the presiding officers is invited to the following extract from paragraph 19, Chapter 29 of the Report of the Civil Justice Committee :—

"We think that in not a few cases much maudlin sympathy is shown to the judment-debtor, who supposed to be an innocent victim of the decree-holder. If a man is really poor, the decree-holder is not likely to throw good money after bad to feed him in prison. He will as a rule ask for commitment on in cases where he believes that the judgment-debtor has secreted his properties—a not unsual proceeding. Experience shown that when once an order for commitment is made money appears in many cases in spite of protestations of proverty. We would, therefore, suggest not that the law should be altered but that it should be administered with less laxity."

(7) In order to avoid misunderstanding and delay in connection with the attachment of the salary of an officer under Or. 21, r. 48 of the Civil Procedure Code, it is desirable that the officer to whom the attachment order is directed should be asked to send a report under Or. 21, r. 48(2) to the Court as to whether or not the attachment has been made.

(8) It is desirable that there should be no delay between the date on which an attachment order is passed and the date on which the order is proclaimed under Or. 21, r. 54, Civil Procedure Code. If delay occurs it is possible that, after an attachment order has been made, the judgment-debtor may get information with reference thereto and, between the date of the order and the proclamation, he may transfer his property to others and put the decree-holder to the trouble and expense of filing a suit under section 53 of the Transfer of Property Act. Presiding officers should, therefore, be careful to see that unduly long dates are not fixed for the service of attachment orders. In suitable cases, they should send such orders to the **nazarat** with a request that they should be served forthwith by specil reliable peons.

(9) It is important that courts should not allow undue delay to occur in the disposal of claim cases under Or. 21, r. 58, Civil Procedure Code. With regard to such cases the Civil Justice Committee observed :—

"Many of the witnesses before us have stated, and we think their view is substantially correct, that very many of these petitions are frivolous ones put in at the instance of the judgment-debtor himself to defeat or delay his creditor. One object with which such petitions are filed is the gaining of the time taken by the investigation of the claim.

(10) As regards claim cases, very little use is made of the authority vested in the court under the proviso to Or. 21, r. 58, Civil Procedure Code, of rejecting summarily applications in which the court considers that the claim or objection was designedly or unnecessarily delayed. The court should not hesitate to deal under this section with claims which have been filed after an unreasonable delay.

(*11*) Much delay is frequently caused by unnecessary injunctions being granted with reference to execution proceedings. Such injunctions should not be granted, save in very exceptional circumstances and on this point the attention of all courts is directed to sub-paragraph two of paragraph 26 in Chapter 29 of the Civil Justice Committee's Report.

(*12*) It is found that sales are frequently postponed on inadequate grounds under Or. 21, r. 69 of the Civil Procedure Code. Although the Court is vested with a discretion under that section, it should be seen that sales are not unduly delayed on any frivolous pretext put forward by the judgment-debtor which may operate very much to the detriment of the decree-holder.

(*13*) In most civil courts it is customary to allot one day a week for the disposal of execution and miscellaneous work. It is found that there is too much work of this nature pending on the file of any court to enable a presiding officer to deal with it promptly by allotting only one day a week for this purpose, the court should have no hesitation in devoting a few extra days in the month for disposal of such matters which have been pending for considerable time.

(*14*) It is essential that the work connected with the disposal of miscellaneous and other cases arising in connection with execution proceedings should be conducted in a business-like and efficient fashion and the general principles laid down in the paragraphs of this Manual regarding the conduct of proceedings in the trial of suits should be followed with reference to such cases. Adjournments should not ordinarily be granted at the request of the parties except in unforeseen circumstances of a very exceptional nature and, even then the party for whose benefit adjournment is allowed should be made to pay adjournment costs. If proper steps are not taken by the parties in sufficient time before the dates fixed for hearing, the cases in question should be dismissed or decided **ex parte.**

(*15*) In such cases the parties should ordinarily be directed to apply (where necessary) for summonses or to take other steps when the applications or objections are registered allowing them sufficient time to come ready on the date fixed for hearing and, on that date, the case should be heard. No adjournment should ordinarily be granted, because the opposite party happens to file an objection or to enable the parties to produce evidence when they already have had an opportunity to do so or to apply for summonses. There is usually no reasons why such cases should not be heard and determined within two months at the most from the date on which the application is filed.

Note.—If any time is granted for taking any steps the direction in paragraph 21 (2), *ante* should invariably be followed.

(*16*) Special arrangements should ordinarily be made with the **nagarat** to the effect that all processes connected with execution cases should be returned and put up for the orders of the court not later than 15 days after passing of the order in connection with which the process issued.

(*17*) Presiding officers should see that no delay occurs in connection with the despatch to the registration office of sale certificate under the provisions of section 79 of the Indian Registration Act.

(*18*) It has been found that considerable delay occurs in many courts in connection with the issue of payment orders. Such orders must usually be

examined both by the Accountant and by the Record-keeper. The requisite examination should be made without delay so as to ensure that payment orders should be ready for delivery to the parties concerned within four days after the receipt of the application and in any case not later than a week.

Note.—*See*, rule 778 (3), Chapter 30, Part VI, High Court's Rules and Orders, Civil, Volume II.

XX

EXPEDITIOUS DISPOSAL OF CASES AND COMMON CAUSES OF DELAY.

Expeditious disposal of cases.

36. (*1*) The expeditious disposal of cases should engage the serious attentions of every officer charged with the duty of administering civil justice. As the majority of litigants are of limited means, undue delay in the disposal of cases has the effect of placing the redress obtainable through court beyond the reach of many. Further, delay in the disposal of cases bring the administration of justice into disrepute.

(*2*) It is realised that the difficulties are many, it is not always possible to provide adequate staff for courts and offices; the ministerial agency is not always as efficient as might be expected; the majority of the litigants being ignorant and illiterate, they have to depend at every step upon their advisers whose interest is not always to expedite the disposal of litigation; lengthy formalities of judicial business also depends largely on the capacity and co-operation of legal practitioners. Although these and various other causes contribute to the delay, much of it could be avoided if the progress of a suit the ministerial work in all stages attracted the personal attention of the presiding Judge.

(*3*) The proper despatch of court work depends not merely on the ability of an officer but also to a large extent on the personal attention regularly paid by him in its adjustment and control. Occasional but systematic examination of pleadings and records of the cases is very helpful in discovering irregularities and checking delay and undesirable tactics.

(*4*) Judicial officers should satisfy themselves that the ministerial officers attached to the civil court—more particularly Bench Clerks and Sheristadars—are well acquainted with the procedure prescribed by the Civil Procedure Code and the rules prescribed by the High Court as well as the instruction in this Manual. Such officers are expected to bring to the notice of the presiding officers all cases of irregularity, delay and non-compliance with the court's orders and obstructive procedure on the part of litigants.

Note.—As to the more important duties of the Sheristadar, *see* rule 1035, Chapter 46, Part IX, High Court's Rules and Orders, Civil, Volume I.

Common causes of delay.

37. It has been noticed that unnecessary delay in the disposal of cases is frequently due to the following causes :—

(*1*) Too many and unduly long adjournments are often granted as a matter of course for filing deficit court-fees on plaints, process-fees, processes, costs of commissions, etc., without an enquiry as to

whether there are sufficient legal grounds for the exercise of the Courts' discretion. This discretionary power under section 149, Civil Procedure Code, to make up deficiency of court-fees is not intended to be used in cases of a deliberate attempt to delay payment to suit the convenience of party or in plain cases of default.

(2) Orders for the issue of a fresh summons are given without ascertaining the cause of failure of service, without specifying a date by which processes and fees must be filed, and without directing that the record should be put on the due date for necessary orders, [*See* paragraph 21(2).]

(3) Many adjournments are frequently granted as a matter of course for filing written statements and the payment of adjournment costs is rarely ordered; if ordered, default in payment allowed to go unnoticed.

(4) The parties are allowed to amend the pleadings at a late stage of the case even when they could have taken the requisite steps at a much earlier stage.

(5) Inadequate attention is paid by the court to matters connected with the substitution of parties and the appointment of guardians **ad litem.**

(6) No steps are taken to shorten litigation by obtaining admissions or denials of facts and documents by the examination of the parties in person by the court, nor are cases prepared for tril by making use of the valuable provisions of the law regarding affidavits of documents, interrogatories, discovery and inspection.

(7) Documents which must under the law be filed either with the plaint or at the first hearing are allowed to be produced at any stage of the case.

(8) Cases are adjourned with undue leniency. Even fixed for "peremptory hearing" on a certain date are frequently adojurned at the request of the parties.

(9) Insufficient attention is paid by the courts to matters connected with the issue of commissions for local enquiry.

(10) The cause lists are unscientifically arranged and too much work is fixed for one day.

(11) Examination and cross-examination are not subjected to adequate control.

(12) Adjournments are frequently granted to enable pleaders to prepare their arugents. Arguments should be heard as soon as the evidence in a case has been completed.

(13) Suits which have been dismissed for default or decided *ex parte* are too frequently restored on inadequate grounds.

(14) Draft orders written by the clerical staff are not properly scrutinized before signature and hence orders inconsistent with the facts appearing on the record find place in the order sheet and contribute to the delay.

(15) When a party to whom time has been granted for doing any act or taking any step fails to do so within the time specified, repeated extensions are granted as a matter of course even in plain cases of default which admit of no explanation.

(16) Processes filed by parties are not promptly sent to the **nazir** for service with the result that much time is wasted. Similarly processes returned by peons after service are not sent from the **nazarat** to the respective courts with despatch. There is also delay in the **nazarat** in the distribution and issue of processes.

(17) Delay in the service of processes or improper service giving rise to proceedings for setting aside decrees or orders is not uncommon owing to insufficient supervision over the process-serving establishment. Stricter control should be exercised over the work of the peons and the duties of the **Nazir.**

38. Presiding Officers should pay special attention to the above points and observe carefully the procedure prescribed in the Civil Procedure Code and the instructions issued by the High Court on the subject from time to time. Their attention is particularly directed to the recommendations of the Civil Justice Committee which are summarized at page 643 of the Report **(see** Appendix V, page 45).

APPENDICES

Extracts from the Civil Justice Committee Report.

I

CHAPTER III.

FILING DOCUMENTARY EVIDENCE.

Discovery.

13. The next period during which delay occurs is the period when the law requires documentary evidence to be filed. Great delay occurs here. This is accentuated by the manner in which the documentary evidence is handled by the courts.

Before the English rules as to "Discovery" were introduced into the Code of 1908, the production of documentary evidence in India was in accordance with a somewhat rudimentary practice contained to some extent in rules requiring the filing or production in court of documents, copies of documents or lists of documents. The English rules now subsist side by side with others which embody with some amendments the old Indian practice. On the subject of discovery of documents the present Code in effect presents us with two different strata, the old rudimentary practice the basis of which is to require parties to lodge in court the documents on which they intend to rely, and the English practice in which the question of lodging anything in court seldom arises, and which provides specially for the due disclosure by a party of documents which may assist his opponent's case or relieve his opponent from the burden of giving unnecessary proof. The English practice may be regarded as consisting of three types of discovery. It is not confined to documentary evidence. First there is the right to administer interrogatories. Second the right to require from the opposite party on oath a statement of the relevant documents which are or have been in his possession or power. Third the right to call on him to admit either facts or documents. It is plain that the English practice overlaps the old Indian practice, and that the present Code does not dovetail the two successfully. A diligent study of the rules in Order XI will do much to enable a neophyte to grasp main principles of the law of discovery, but to apply those principles in practice requires a considerable amount of experience and a certain knowledge of case law. The field is not as yet covered by Indian decisions, though there is now no lack of annotated editions of the Code which give ample assistance and direction to a competent lawyer. Outside the High Courts and a very few other courts the subordinate judiciary and the legal profession do not appear to have awakened to the fact that there is a "law of discovery", still less to a realization that it is a highly important and not altogether easy branch of law, based on important principles, and that without a thorough knowledge of those principles and a steady application of them, none but a simple case can be properly prepared or tried. The possessor of a copy of the Code who has looked at the rules in Order XI is not equipped forthwith with the necessary knowledge. It has been and still is a serious defect in the legal training given by most Law Schools in India, that they have paid no attention to or at least laid no stress whatever upon this important branch of the law.

14. The framers of the Code anticipated that in mofussil courts the members of the Bar would not easily or quickly accustom themselves to the new procedure provided and would not avail themselves of its provisions.

They, therefore, inserted in section 30 of the Code a provision which gives the court authority to order discovery and inspection of its own motion. Their anticipations have unfortunately been fulfilled and the power given to the court has not been utilised. When any real "discovery" has been enforced under the new provisions in mofussil courts it has usually been because leading counsel from outside have been employed to conduct the cases. The novelty of the provisions in question is by no means the only cause of their neglect; if so, they would before now have come into more general use. Circumstances in India do not favour the methodical preparation of cases. The poverty and ignorance of the litigent, the sporadic engagement of the pleader for particular purposes, only *e.g.*, for the written statement, for the hearing; the ineradicable tendency to give him his instructions late and even then piece-meal are all against good ground work. Again when meeting a "false case", parties and their advisers often think that to insist on proper particulars is merely to ensure that their opponent will have worked out his false story more fully and tutored his witnesses more carefully. Again the law of discovery depends on the first principle that the party's oath is **prima facie** final save in special cases. But the chief reasons why the law of discovery is not applied are undoubtedly that the great majority of cases are simple cases about matters of small money value, and because the old practice as to lodging in court the documents relied on is for so many cases regarded as sufficient.

15. It is clearly necessary to retain the requirement that at an early stage of every case each party should give a list of the documents in his possession upon which he intends to rely. It is also necessary to maintain the requirement of lodgment in court as being the best safeguard against forgery, unfounded charges of forgery, and the suppression of documents. Where the parties commence by handing over to their lawyers all the documents which they have, so that A's lawyer can readily inspect B's documents at the office of B's lawyer, production in court is not necessary until at the hearing the document is tendered in evidence. In India it is otherwise. To bring documents into court at an early stage is the best protection a litigant can provide for himself against the frequent and almost common-form suggestion of forgery or falsification. It affords also the easiest and most convenient facility for inspection.

16. This course however brings its own difficulties; only those who are fully conversant with the complicated suits for interests in land that so frequently come before Indian courts can realise the enormous mass of unnecessary documents that is sometimes brought into court, and put upon the record under present methods Documents which prove nothing material to the case or bear only upon small and remote points upon the utmost fringe of the controversy, are filed in hundreds. Very generally there is a complete absence of arrangement: even as regards ordinary correspondence it is nothing unusual to find that the first letter is the seventh in order, and that replies generally precede the letters to which they are an answer. The practice is so bad at times, that the admissibility of some documents is not decided till the judgment, and it is not unknown for the matter to escape attention, and the question of admissibility to remain undecided at the end of the case. Sometimes a mass of documents is brought into court in a locked box, copious allegations being made in the written statement as to the danger of theft or forgery if the plaintiff be allowed to go near them.

17. It is not unknown for parties to go to the High Court on questions of the right to "inspect a document" without either party having obtained an affidavit of documents from the other, so as to ascertain what documents the other has. It is plainly necessary, therefore, to lay down quite clearly that any question as to whether a party has or has not in his possession or power any

particular document, any question as to whether its discovery can be compelled on the ground of relevancy, any question of privilege, should be agitated only under the provisions of Order XI. We would further draw the attention of presiding officers of courts and of the Bar not merely to the necessity of treating the question of discovery seriously, but of attending to it systematically. Presiding officers at the time of settling issues or immediately thereafter—in some few cases possibly even before—should regard it as part of their ordinary duty to see to this, even where parties or their advisers fail to do so. Their powers under section 30 are express and clear. In complicated cases a very great saving of time will result. Title suits and commercial suits should never be allowed to drift to trial. Even in the smaller suits it will frequently be possible to avoid useless expense and delay to parties and to remove from our courts the reproach that must always attach when futile and unnecessary controversy is permitted. If parties and their advisers understand that a false answer to an interrogatory or a false and insufficient affidavit of documents will result infallibly in the gravest inferences being drawn against them—we know of nothing more fair and reasonable then such a rule—they will conduct themselves accordingly after a time. We do not minimise the difficulty, nor do we suppose that it is easy to exact a proper standard of candour or of diligence, but not enough—not nearly enough—progress has been made in the sixteen years that have elapsed since 1908. We fully appreciate that there is grave injustice in attributing the blame in this matter solely to the bar or the subordinate judiciary. In their efforts after improvement the latter have much too frequently been "let down" by superior courts; it would enormously facilitate the work of the better class of practitioners as well as of the subordinate courts it it were adequately appreciated in High Courts whether in appeal or revision, that "flabbiness" which in respect of the subordinate judiciary is at worst a "besetting sin" is in the superior courts a pestilence which affects all the courts below them.

18. The rules as to "production" of documents in the sense of lodging them in the office of the court before the hearing are at present too strict, too lacking in precision and too little insisted on.

Under Order VII, rule 14, the plaintiff is obliged to produce in court at the time the plaint is presented any documents in his possession or power upon which he sues. This rule should be strictly enforced.

The plaintiff is further required at the time of the presentation of the plaint to furnish a list of all the documents whether in his possession or not on which he proposes to rely as evidence in support of his claim. The defendant is not required under the provisions of Order VIII to file any documents with his written statement. Orders VII and VIII do not lay down a rule as to when documents are to be produced. The rule on that subject is to be found in Order XIII. This rule was inserted in the Code of 1908. The Committee who advised on the Bill stated in their report "We have altered the language so as to compel the production of documents at the first hearing. In our opinion this will act as a substantial check on the fabrication of false evidence."

Order XIII, rule 1, enacts that the parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in court, and all documents which the court has ordered to be produced, and rule 2 states that no documentary evidence in the possession or power of any party, which should have been but has not been

produced in accordance with the requirements of rule 1, shall be received at any subsequent stage of the proceedings, unless good cause is shown to the satisfaction of the court for the non-production thereof; and the court receiving any such evidence shall record reasons for so doing.

19. The undue leniency of courts in admitting documentary evidence at late stages of the hearing has deprived Order XIII, rule 1, of any sting. It is not even the practice to admit them only upon terms of depriving the defaulter of his costs. There is no sufficient sanction to prevent the rule becoming a dead letter. If every litigant is presumed to be too poor and ignorant to behave with candour and common sense, if it is always unjust to visit on him the fault of his pleader, then civil justice must of necessity be regarded on the footing that the marvel is not that it works badly but that it works at all. A court which undertakes to dispense justice, whether the parties put it in a position to do so or not, ends always as a byword for injustice. We do not seek for one moment to take away the discretion of courts in admitting documents, however, late, but find it difficult to be convinced as to many courts, that they regard themselves as having any real discretion even in plain cases of default. The poor and ignorant litigant who keeps back a material document can in general be visited with the full penalty, not only with the completest justice but greatly to the public benefit. If he had a shrewd idea that this was a general view, neither poverty nor ignorance would take the particular form of non-disclosure.

20. It is, however, very necessary before acting on these principles to make quite certain that the rules do not require "production" of documents at too early a stage. So long as the pleadings cannot be taken as themselves making clear the issues it is plainly unreasonable to exclude or even to threaten with exclusion any documents, unless the party has had a reasonably full opportunity to consider the issues, to consider how to meet each issue, and to consider the relevancy of any documents he may possess in the light of the issues. If production is required at the earliest moment with a view to preventing forgery or because the main documents will be useful in settling the issues, there ought always to be a later time fixed within which a plaintiff or defendant can supplement his list. This should be so done as to call the specific attention of the parties to the opportunity. Otherwise some people, to be safe, will lodge in court every document they have—relevant or irrelevant. Others will lodge none and have a grievance when at the last moment documents are tendered and excluded.

We think that Order VII might provide for production by the plaintiff not only of the documents, if any, on which he sues but of any other documents upon which he relies if in his possession or power, this is to be in addition to the list at present required. The defendant filing a written statement should also be required to lodge in court any document in his possession or power upon which he relies as well as a list of all documents on which he relies. This will be an improvement on the provisions of Order XIII rule 1, which refers to the "first hearing", a phrase which in practice is a little nebulous. When issues have been settled, the court should appoint a definite date by which each party is called upon to file supplementary lists. It might be possible to provide in effect for the "exchange" of such lists; neither party to see the other's list till he has filed his own; any documents comprised in such lists which are in the possession or power of the parties to be filed therewith. Thereafter any application by a party to add to his list should be required to be brought within a month otherwise the court, save for very special reasons, should exclude further documents.

21. It is very difficult to provide effectively for the cases in which a mass of documents is brought into court. In England the court would have no concern with the matter till the plaintiff's or defendant's case is opened. Out of a mass of documents disclosed in the affidavits of documents, some would be tendered in evidence and either admitted or proved. Others in the possession of the opposite party would simply be called for and put in. The business of rummaging through a mass of documents disclosed by the other side is done by the party's solicitor who inspects them and bespeaks copies of those which he wants : Relevancy of a document and its admissibility on this and on certain other ground can only be decided at the hearing. It often depends on the particular state of the evidence at the moment at which the document is tendered. It is in opening his case that counsel makes clear, if necessary, his purpose in relying upon any document.

The spectacle of a judge or other judicial officer going through a mass of documents before the hearing in order to find out the relevancy of each and to set aside those that cannot conceivably be relevant is indeed melancholy. It results partly from a confusion between "production" in the sense of lodging a document in the custody of the court to prevent the suspicion or the chance of forgery, and "production" in the sense of tendering a document in evidence at the hearing at the time when it is being proved or admitted. The chief causes, however, lie in the circumstances that parties and their pleaders will not agree to co-operate to prepare their cases so as to present their dispute to the court in a reasonable way and that the very necessary "opening" is altogether omitted. Doubtless it will be of service that the Judge should preside over a prolonged inspection of documents, try to persuade the parties to make proper admissions, and try to help them to clear their minds as to the real points of a case. But, though in small cases the Judge may well do this sort of work at the settlement of issues, this is not really a Judge's work and complicated cases are not as ar rule best approached, so for as the Judge is concerned, by an attempt to master a mass of documents. A competent Bar should not require this form of assistance. This kind of preliminary work when it has to be done at all should not be part of the hearing, but should be done well in advance in order that when the hearing commences it should go on continuously.

22. The law in England (and now in India) permits the administration of interrogatories by a party to his opponent to obtain admissions which will facilitate the proof of the case of the party who delivers the interrogatories. A decision of the Calcutta High Court (I.L.R. 17 Cal. 840) of 1890 (before the present Code came into force) was against granting leave to a party to ascertain the nature of an opponent's case through interrogatories, but the practice is now the same in India as it is in England.

Further, party may be notice in writing call upon the other party to admit for the purpose of the suit only (Order XII, rule 2) any documents and (Order XII, rule 4) any specific facts mentioned in the notice. Order XII, rule 2 contains the salary provision that, when a party has refused or neglected to admit, the subsequent costs of proving the documents should be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs, and that no costs of proving the documents should be allowed unless such notice is given, except where the omission to give the notice is in the opinion of the court a saving of expense.

We draw the attention both of the presiding officers of the courts and of the members of the Bar to the very great saving of time that will be effected if these provisions of the Law are used intelligently in the more important cases. They will be found of peculiar advantage in the hearing of the larger title suits

and certain commercial suits. It is not only in the more important suits that they can be used with advantage. There will be found occasionally suits not of very great importance in which much time and money will be saved if these provisions of the law are complied with.

23. It is not practicable or desirable to lay down inelastic rules as to the exact stages when these acts should take place. In small and unimportant cases there will be no difficulty. In the less important cases there will be very little. But in the larger and more complicated cases it will be usually advisable after the documents have been lodged in court to allow at least one date (and more, if necessary) before, issues are framed for admissions, discovery interrogatories and the like, and to fix if necessary one or more dates after the issues have been framed for the completion of this preliminary work.

II

CHAPTER 3.

Pleadings.

11. When the plaint and the written statement are before the court, it is in a position to consider the pleadings.

The provisions of the present Code relating to pleadings were intended by the framers to introduce a new practice into India.

These are the remarks of the Select Committee upon the point.

"In our opinion it is most necessary that litigants in this country should come to trial with all issues clearly defined, and that cases should not be expanded or grounds shifted without reference to the true facts. For this purpose we think that the present system of pleadings in the mofussil, which is notoriously lax, should be improved, and we have incorporated in the rules an order on pleadings, which it is hoped, will lead to sounder and fairer methods of arriving at the real points in dispute."

In introducing the Bill, Sir Erle Richards made the following reference to this portion of the subject, and to the subject of discovery and inspection —

"I desire to call the attention of the Council to the new rules which have been inserted with regard to pleadings and admission. The Special Committee attach much importance to accurate pleadings, they think that a clear definition of the real points in dispute in a suit is a matter of substance, becaus it makes for economy both of time and expense. They also attach importance to the existence of province for enabiling fact and documents to be admitted, thus doing away with the necessity for formal proof. The rules on this heading have, therefore, been remodelled and it is hoped that High Courts will see that they are followed by subordinate courts. It may be that some of these provisions will be found too elaborate for some mofussil courts, but if that be so it will be within the power of High Court to withdraw them either generally or in regard to praticular areas."

The importance of this question can hardly be exaggerated. Pleadings are the foundation, and if the pleadings are bad, delay in decision follows as a

natural consequence, and the decision itself may be unsatisfactory. The position has been stated succinctly by Lord Parker of Waddington in Banbury **v. Bank of Montreal.** 1918 A.C. 709.

"The fault lies in the system which permits a plaintiff to set up at the trial, without amending his pleadings, a case other then that put forward in the statement of claim. When this is done the new case cannot possibly be formulated with the precision necessery to elucidate either the principles of law which may be applicable or the issues of fact which may be involved. Both the council and the Judge labour under great disadvantage and a miscarriage of justice is all too likely to occur. The system of pleading introduced by the Judicature Acts was, no doubt, intended as a compromise between the rigid system which prevailed in the common law courts and loose prolixity of the bill in Chancery. The bill stated all the facts at great length, and prayed such relief as the petitioner might be entitled to in the premises. The Chancellor or Vice-Chancellor had to fined out for himself what might be the equities between the parties. For this he could take what time he liked, and often did take a very long time. The present practice appears to me to hove most of the vices of the old procedure in chancery. There are pleadings, it is true, but the pleadings are, for all practical purposes, disregarded. The plaintiff is allowed to prove what he likes and set up any case he can. The Judge has no longer to deal with a case formulated on the pleadings, but to make up his mind whether on the facts proved there is any and what case at all. This disadvantage is accentuated when there is a jury, for the Judge cannot take time to consider the matter, and counsel have not considered it as they would have done had they been compelled to embody their case in a statement of claim. Under these circumstances there is little wonder that a Judge should misdirect a jury, and that the real questions of law or fact should, as in this case, emerge only after prolonged discussion on appeal. Head the plaintiff, after admitting that it was not within the scope of the bank's business to advise on Candian investment at large, been compelled to amend his statement of claim by stating the special circumstances which, as he alleged, brought it within the scope of the bank's business to advise the plaintiff on this particular investment, I doubt whether the action would have proceeded further, and I am clearly of opinion that the question of authority would not have been left to the jury, the impossibility of the plaintiff's case would have been manifest on the record."

12. The principal rules as to pleadings are given in Order VI. They are summarized as follows in Mulla's Commentary :—

(1) The whole case must be stated in the pleadings. That is to say all material facts must be stated (Order VI, rule 2).

(2) No matter of law is to be stated.

(3) Only material facts are to be stated. The evidence, by which they are to be proved, is not to be stated (Order VI, rules 2, 10, 11, 12).

(4) Immaterial and unnecessary facts are not to be stated.

(5) The facts are to be stated concisely.

(6) It is not necessary to allege the performance of any condition precedent ; an averment of performance is now implied in every pleading (Order VI, rule 6).

(7) It is not necessary to set out the whole or any part of a document, unless the precise words thereof are necessary. It is sufficient to state the effect of the document as briefly as possible (Order VI. rule 9).

(8) It is not necessary to allege a matter of fact which the law presumes, or as to which the burden of proof lies on the other side (Order VI, rule 13).

Very few pleadings in the suits examined comply with these rules. In the majority of instances no attempt is made to comply with them. It is the exception rather than the rule for all material facts to be stated. While material facts are omitted immaterial facts are stated. The evidence by which it is proposed to prove the facts is often set out at length. Allegations as to law are inserted. Documents are set out at length. The pleadings are generally too long, and in some instances prolix to a degree. Written statements are worse than plaints. The main defects are prolixity, argumentativeness, a disclosure of immaterial facts, and a suppression of material facts which result in a failure to disclose the exact nature of the case set up, and which provide an opportunity for a change of front. It is not easy; however, to devise a remedy.

Those in India who are responsible for the framing of pleadings have been trained for many years under an order system. It is hard to get them to change their methods. As the representatives of the plaintiff and the defendant accept equally the old principles no remedy will usually be found in the power given to each side to apply for the striking out, or amendment of matters in pleadings. Neither side sees anything objectionable in the errors of the other side. There is no recognized authority in India from which a practitioner can obtain the assistance in preparing pleadings which an English lawyer enjoys. The framers of the Civil Procedure Code hoped that the use of the forms inserted in Appendix A (which under Order VI, rule 3, are directed to be used, wherever applicable, and followed, where not applicable) would afford sufficient guidance. The use of the forms is consistently neglected, but, in any circumstances, those who have no other direction will not obtain satisfactory results from their study. The first requisite is to train pleaders to draft, and this training will be assisted appreciably by the preparation of a work on pleadings in India on the lines of Bullen and Leake. We commend this suggestion to the members of the legal profession.

In the end it is left to the presiding officer to exercise the important duty of preventing the parties offending against the rules. If he endeavours to perform this duty—few make the attempt—he is frequently represented as dictating to counsel how they should frame their cases. His powers in dealing with offending pleadings might be increased, but the remedy will not lie the striking out of please so much as in the improvement of the Bar. As the presiding officers of courts in India are overburdened with other duties, they have further very little time for this purpose.

If it be possible to introduce the registrar system one of the duties of the registrar could be to correct the pleadings and reduce them to those which are really essential, eliminating everything else. We suggest that efforts should be made in this direction. We see, however, at the same time that at the beginning more time may be lost by arguments as to whether a certain plea should or should not be taken than by leaving unsatisfactory pleadings as they are.

There is room, however, for one change which will make for improvement. In some parts of India, the pleadings are drafted by lawyers' clerks or petition writers. They are taken over by the pleader when he is engaged, and no responsibility is accepted by him for their contents. Under Order VI, rule 14, a pleader has to verify, only if he presents the pleadings. We suggest that a rule should be added, by which the name of the draftsman should appear on the pleading, and by which the pleader in charge should be obliged to add a certificate that he has accepted the pleading and takes full responsibility for it.

III.

CHAPTER IV.

Opening the case.

1. When the parties have their oral evidence ready, the law directs (Order XVIII, rule 2) that the party having the right to begin should state his case, and produce his evidence in support of the issues, which he is bound to prove. The other party has then to state his case, and produce his evidence, if any, and may then address the court generally on the whole case, the party beginning being permitted to reply generally. The law is clear on the subject. The procedure is the procedure well known in all courts in England where the plaintiff's counsel commences by "opening" the case—to use a familiar expression—and then puts his witnesses into the box. The same procedure is obligatory in India. Nevertheless, it is seldom followed outside the High Courts.

The reason given us for the refusal to follow the law on the subject was usually that the opening speech is omitted, to save time. It was occasionally added that as a general rule, the pleaders in less important cases do not know sufficient of their own case to be able to open it. We wish to draw attention to the absolute necessity of opening the case, in order to save time. The result of departing from this salutary rule of procedure tends to increase delay for the following reasons.

In the first place when a party does not open his case and does not state exactly the line which he proposes to take, it is open to him to change the case which he originally had in mind, and not only to call the witnesses whom he had originally intended to call, but to call other witnesses on different points to support a different case if he sees that the case which he had in mind is not progressing as satisfactorily as he desires. If the case is not opened a party cannot be confined to his original case, for the court does not know what the original case is. True, the court should have read the pleadings and framed the issues, but even if it has done so, it will not always have obtained sufficient information to know the points to which contest will be confined. Further, the failure to open the case puts the presiding officer at a disadvantage in dealing with the evidence of each witness as he is called.

IV.

CHAPTER XLV.

Ex parte **injunctions**

1. Much delay and injustice is occasioned by interlocutory orders for stay of proceedings, stay of execution, interlocutory injunctions and by the holding up of proceedings pending applications in revision. For this reason we have felt obliged to recommend that careful and complete statistics should be kept so as to show what has happened. We are very loath to suggest a heavy increase in the burden of the statistical work done in the offices of courts and we quite appreciate that useful figures bearing upon these matters are not easily compiled. It is urgently necessary, however, that delays occasioned by orders of the class we have referred to should be minimised.

2. It appears to us that interlocutory injunctions are, throughout India, granted much too freely and without sufficient care to impose terms. There is moreover a specially noticeable freedom in the granting of such orders **ex parte.** It seems to be very inadequately appreciated that the right to an interlocutory injunction and the right to have it granted **ex parte** are two very different things. We have been struck by the fact that in cases in which it is clear from the plaint itself that the parties have been at difference for months as to a right in immovable property, the plaintiff has been granted an **ex parte** injunction to restrain digging or building operations on the part of a defendant in possession. Having regard to the congestion in many courts one can readily see that a plaintiff by such an order is put at once into a strategic position. Indeed a lax practice in granting such orders is an open invitation to blackmail. We do not attempt to set out here the principles governing the grant of interlocutory injunctions or the special conditions under which it is right to grant them **ex parte.** It may be that reiteration of these by circular orders of the High Courts would do something to improve the practice.

3. The causes of the evil are, however, complex. The first cause is that junior officers not considered fit to exercise very high small cause court powers have under the ordinary procedure to deal with applications for injunctions. The smaller the value of the right alleged to be infringed the more likely it is that such applications will come before junior officers. Such officers are not always able to appreciate the business consequences of the orders they make. For the purposes of an **ex parte** application they are far too uncritical of plaints and affidavits. They do not appreciate the unfair advantage which plaintiffs constantly seek to get by lying by, by pretending that they have just heard of an invasion of their rights and by putting forward ludicrous suggestions of irreparable damage. Experience shows that the great majority of affidavits with the word "irreparable damage" are proof of little save the absence of irreparable damage. In many cases the plaints and affidavits fail utterly to explain that anything has happened in the last few days to justify a sudden claim to interference with the defendant from behind his back. They frequently show that the plaintiff might and should have brought his suit long before and proceed on the assumption that so long as it is conceivable that the plaintiff's right is being infringed the court is bound to restrain the defendant until the distant day when the question shall be tried out. Thus, we think that a main cause of the bad practice is inexperience and weakness on the part of officers.

4. Another cause we believe to be that courts are too apt to look merely at the rules in Order 39 of the Code. These rules are a statement of the general conditions under which interlocutory injunctions **may** be granted. They are a statement—that is to say—of the powers of the court. The question whether such an order **should** be granted involves a great deal more then mere compliance with these conditions. It involves a certain amount both of law and ccmmon sense. By rule 3 of this Order the court is required before granting an injunction to direct notice to be given of the application to the opposite party, in all cases except where it appears that the object of granting the injunction would be defeated by the delay. Accordingly, looking solely to the words of exception contained in this rule, the courts appear to grant **ex parte** injunctions to restrain all sorts of acts even although it is mainfest that the plaintiff has long known that the acts were intended. It is much to be wished that the subordinate courts would appreciate that an interlocutory injunction should be granted **ex parte** only in very exceptional circumstances and practically speaking should never be granted unless the plaintiff establishes in a convincing manner that by no reasonable diligence on his part could he have avoided the necessity of applying behind the back of the defendant; it is important to notice that the question here is not whether since the plaint was

filed he has had time to serve the defendant. Plaintiffs constantly come to court at the last moment for the purposes of getting the advantage of commencing with an **ex parte** injunction. Even in cases where this is not the deliberate purpose it is wholly wrong to reward dilatoriness at a heavy expense to the opposite party.

5. Again, we consider that a court which is not prepared to hear the defendant on an application of this sort in a few days and which gives an **ex parte** injunction which it knows must continue for weeks in exercising its jurisdiction in a highly dangerous manner. Such injunctions when granted at all should invariably be limited to hold good only until a specific and early date. By early is meant for this purpose not a month but a week or less, **i.e.**, a minimum time within which a defendant can come effectively before the court assuming that to get rid of the injunction he will be prepared to use the greatest expedition possible.

6. Again when such an injunction is granted the greatest care should be taken to state exactly what the acts forbidden are. Such orders when drawn up frequently disclose incurable vagueness or they are made up by copying out a long rigmarole from the plaint. Where it is sought to restrain a series of acts of different kinds, with respect to one of which some possible claim of urgency can be made, the **ex parte** injunction frequently embraces all the possible acts that can be objected to by the plaintiff.

7. The recklessness with which injunctions are sometimes granted **ex parte** is a special evil in a country where rights and interests in land are apt to be complicated and uncertain. It is, for example, a heavy drawback to industrial progress if a firm is buying land to build a factory, however careful it may be to get a good title and, however, good in fact be the title which it gets, should run a great risk of having expensive building operations stopped for weeks by an injunction granted by a junior officer at the instance of a plaintiff claiming a small and fractional interest in a portion of the land. Again, we understand that in recent times the ordinary operations of local bodies are being constantly interfered with by **ex parte** injunction at the suits of plaintiffs whose grievance is in no way commensurable with the damage which an interlocutory injunction is bound to do. There can be no greater encouragement to blackmailing and malicious suits. The serious interruption of public business in the interest of a protagonist in a local quarrel is by no means unknown.

8. We have been at pains to consider why it is that subordinate courts constantly grant **ex parte** injunctions in circumstances which in no way call for the exercise of this very drastic jurisdiction. We think that some part of the explanation lies in the fact that if notice goes to the defendant he is extremely unlikely to file his affidavit so as to enable the application to be heard as a contested application until after the lapse of a month or more; that when a contested application comes on for hearing parties and their pleaders will put everything in issue—even facts that are obviously true—and will be restrained only with difficulty and after much waste of time from an endeavour to fight out the whole suit upon the application. Accordingly there seems some basis for

the view that time will be saved by granting the injunction **ex parte** in the hope that the defendant, until the trial of the suit, will find it impossible to get rid of it, and the damage having been done, will put up with the injustice. All this, however, is entirely wrong. If the plaintiff's case taken by itself shows sufficient ground for an interlocutory injunction and the defendant has been given a short period within which to indicate his defence the fact that he is not able to do so fully will justify a reasonable postponement of the hearing of the application, but it will not necessarily justify an unconditional postponement. It is quite possible that a short adjournment should be granted, but that at the same time an injunction to cover this interim should be granted **ex parte**, or that an undertaking should be obtained from the defendant as a term of the adjournment. Much is gained by bringing the defendant before the court and finding out the kind of case he claims to be able to make. If diligence will pay he will be diligent. It is not the case that once notice issues to a defendant of an application for injunction the court's powers to grant in a proper case an **ex parte** injunction have come to an end. It seems to us that definite rules are required whereby the defendant shall be served with a copy of the plaint and affidavit and given a very few days thereafter within which to file his affidavit in answer; the plaintiff in like manner should have a very short time indeed within which to file his affidavit reply, and the date for hearing the contested application should be definitely fixed accordingly. The Judge should then either dispose of it or if it be necessary to adjourn, should take proper steps in the presence of the defendant to make an order covering the adjournment period, and covering this only to the extent that is absolutely necessary.

9. This matter is one which urgently requires the attention of district and High Court Judges both when dealing with appeals and at inspections. What is wanted is that the materials upon which **ex parte** injunctions are granted should be scrutinised in as many cases as possible by the inspecting officer. When he finds them to have been insufficient he should go through them with his subordinate and explain their insufficiency. If the subordinate officer's ideas are defective as to the principles which should govern the exercise of the powers given Order 39 the inspecting officer will have every opportunity to discover the defects. The order as formally drawn up should be very carefully examined. It should be noticed whether any provision has been made for ensuring to the defendant an early opportunity to be heard or whether the order made **ex parte** has been limited to take effect for a substantial or for an indefinite time. A very important matter for inquiry is whether or not the court granting the injunction **ex parte** has been played with by the plaintiff failing to pay the process fee, failing to supply an identifier or failing to serve some **pro forma** defendant in the same interest? If so, it will be desirable to inquire as to what step was taken by the court. It may be found that the same order by which the **ex parte** injunction was granted gave the plaintiff a week in which to deposit the process fee. Or it may be found that when the defendant appeared to contest the injunction the court was engaged in trying old suits and adjourned the matter for months, or adjourned it for the plaintiff or his pleader's convenience, or in order to let the plaintiff make a new case. An inspection which is worth anything will always disclose the merits or demerits of the way in which injunction matters have been handled. So far as comparatively junior officers are concerned, we are convinced that no great improvement will be effected in this matter unless they are made to appreciate that the granting of an **ex parte** injunction is a serious responsibility; that having granted they are under a duty to take the greatest pains to do everything possible to protect the absent defendant; and that they will in general be called upon at inspections to show that they have handled injunction matters not merely without breach of the rules in Order 39 but in accordance with legal principle and common sense.

V

Recommendations for consideration by presiding officers of Courts.

Serial No.	Recommendations
1 ..	Improvement in method in handling uncontested cases.
2 ..	Improvement in fixing of dates for hearing.
3 ..	Increased expendition in filing written statements.
4 ..	Stricter insistence upon proper pleadings.
5 ..	Seeing that proper discovery is made and admission asked for before trial.
6 ..	Improvement in framing issues. after such examination of parties and pleaders as may be required in the circumstances of a particular case.
7 ..	Enforcement of the rule as to "opening" a case.
8 ..	Improvement in controllig the examination-in-chief, cross-examination and re-examination of witnesses under the existing law.
9 ..	Enforcement of the rule that the hearing of a suit once begun should proceed from day to day.
10 ..	Insistence on the prompt hearing of arguments as soon as the evidence is closed, and the hearing of arguments from day to day.
11 ..	Enforcement of the rules as to granting adjournments. Insisting on the payment of costs as a condition of obtaining an adjournment, when the granting of the adjournment prejudices the other side. Failure to produce a witness to be no reason for adjournment.
12 ..	Requirement of security for amount awarded before staying execution of an award under the Indian Arbitration Act (IX of 1899).
13 ..	Improvement in presentation of a concise statement of the case in the judgment.
14 ..	Giving priority to case for the decision of which other cases are held up.
15 ..	The necessity of scrutinizing carefully applications in interlocutory matters, the admission of which will hold up the decision of the original proceedings and giving priority to such applications.
	Provincial Insolvency Act (V of 1920).
16(i) ..	(i) The necessity of enforcing strictly the provisions of section 41, and obliging insolvents to apply for discharge within the time specified and the utilisation of the provisions of section 43.
16(ii) ..	(ii) The necessity of enforcing strictly the provisions of section 22 and the utilisation when necessary of the provision of section 69 against a debtor who has wilfully failed to perform the duties imposed on him thereunder.
16(iii) ..	(iii) The necessity of correct practice under section 29.
16(iv) ..	(iv) The necessity of greater care in appointing and supervising receivers.

Serial No.	Recommendations.
	Presidency Towns Insolvency Act (III of 1909).
17 ..	Necessity of compliance with the provisions of sections 24 and 25 so as to ensure the expenditious production of the schedule.
	Execution
18(i) ..	(i) A more careful application of the rule giving the court discretion to refuse to send a judgment-debtor to the civil jail owing to his proverty.
18(ii) ..	(ii) Closer supervision over the conduct process-servers in executing warrants of arrest.
18(iii) ..	(iii) Exercise of great caution in granting injunctions, staying execution or delivery when a suit has been filed in accordance with Order XXI, rule 63, with special reference to the Punjab practice.
18(iv) ..	(iv) Appointment of a receiver of property sold in certain exceptional circumstances.
18(v) ..	(v) Appointment of receivers in execution.
18(vi) ..	(vi) Necessity of greater care in issuing notices under Order XXI, rule 37.
18(vii) ..	(vii) Necessity of greater care in staying execution under Order XLI, rule 5.
19 ..	Exercise of discrimination in issuing *ex parte* injunctions.

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