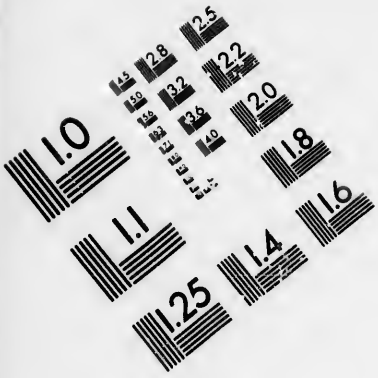

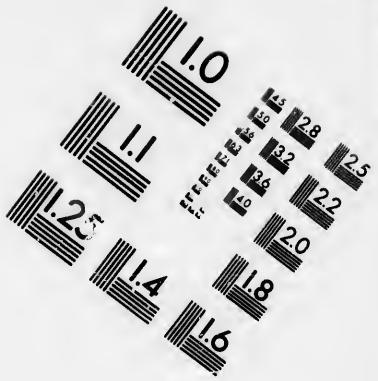

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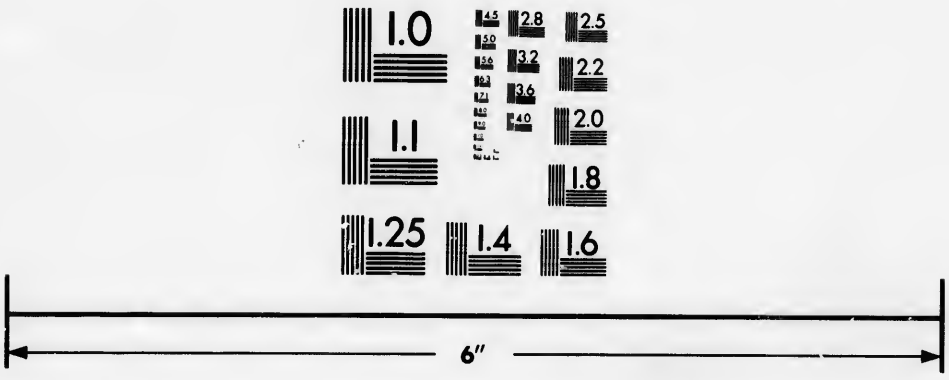

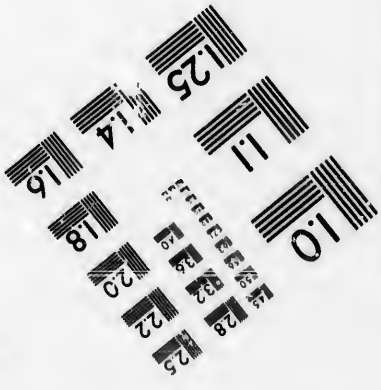

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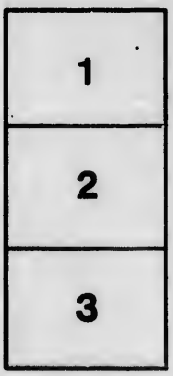

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EPITOME

OF THE

LAWS OF NOVA-SCOTIA,

BY

BEAMISH MURDOCH, Esq.

BARRISTER AT LAW.

VOL IV.

HALIFAX, N. S.
PRINTED BY JOSEPH HOWE.

1833.

CONTENTS OF VOL. 4.

The present Volume completes the original design of this work, as to the *general* laws of the Province. The *local* acts will be comprized in the 5th and last volume. The acts of the last session, 1833, did not come into my hands in time to notice any changes they may have introduced, in this volume, but I will give a summary of the new enactments in vol. 5.

Halifax, July 9, 1833.

BOOK III.

CIVIL COMMON LAW JURISDICTION.

PART 2.—CHAPTER I.

EXECUTIONS—INSOLVENT DEBTORS.

The judgment may be suspended, or arrested, or it may be appealed from by writ of error, (of which hereafter)—or if the proceedings be in the Common Pleas the cause may be removed into the Supreme Court by writ of *certiorari*. It may be agreed on between the parties that execution should not issue for a given time. If however, judgment be regularly signed and no impediment of any other kind be interposed, the execution of the judgment is a necessary and immediate incident to the final judgment. The party who recovers a judgment may in general sue out his writ of execution at any time within a year and a day after judgment is signed. If he suffers that period to elapse, he will not be allowed to take out execution without previously notifying the defendant by a writ of *scire facias* founded on the statute of Westm. 2, 13,

Ed. 1, c. 45, which calls on the defendant to shew cause why the execution should not issue, there being room for a presumption that the amount of the judgment may have been satisfied, when the prevailing party has delayed so long to enforce his demand. Where however, the issuing of the execution has been postponed by agreement, or where the parties have agreed that a *scire facias* shall not be necessary,† or where the plaintiff is hindered by a writ of error sued out by the defendant, or restrained by an injunction from the Court of Chancery from taking out his execution, in any of these cases after the obstacles is removed, he may take out his execution, although a longer period than a year and a day has elapsed.—2 Tidd. Pr. 1031, 1152 to 1156. The plaintiff may prevent the necessity of taking out *scire facias* to revive his judgment, by taking the execution within due time and having it returned, although nothing be done upon it, or he may bring his action of debt on the judgment, although a day and a year have elapsed and no execution has been issued.—3 B. C. 422.

The execution in replevin, directs the return of the goods to him (if judgment be given in favor of defendant.) If the judgment be for the plaintiff the execution will be for the damages and costs awarded to him. In *ejectment*, the execution authorizes the sheriff to give possession of the premises to the claimant, and is called a *habere facias possessionem* or writ of possession. (If judgment be for the defendant the execution is for the costs only.) The sheriff may if necessary break open doors in order to execute this writ. If the possession of more than is recovered should be given under it, the court on motion will order it to be restored.—2 Tidd. Pr. 1081. In *partition* the execution is by writ of partition which the sheriff and a jury execute

† This agreement is usual in England when judgments are confessed as a collateral security in annuity transactions.—2 Tidd. Pr. 1155.

and the return is confirmed by a second judgment confirming the division so made.

In *personal actions*, the judgment, (if for plaintiff) is for debt (or damages) and costs. The judgment for defendant in all actions is for his costs. In all these cases, there is but one kind of execution in use in this province. This is grounded on the provincial statute of 1758, 32 G. 2 c. 15, 1 P. L. 21, 22, 23, which act has been extracted from, and particularized in the 2d vol. p. 254 to 259. The form of this writ recites the judgment briefly—and it directs the sheriff "that of the goods, chattles, lands or tene-"ments," of the losing party within his county, he should "cause to be paid and satisfied unto" the gainer of the judgment the amount of his claim, or for want of such lands or goods "to the acceptance of the" holder of the judgment, "to take the body" of the losing party and imprison him in the jail of the county until payment of the judgment and expences "or that he be discharged" by "the creditor, or otherwise by order of law." It is tested and on some day of the term in which the judgment is given, made returnable at some return day of the ensuing term, except executions on the judgments given by the supreme court on circuit, which are "made returnable in 60 days from the issuing thereof," by provincial act of 1799, 39 G. 3, c. 5, s. 3, 1 P. L. 406. On executions issued from the supreme court, the attorney is directed by the provincial act of 1787, 28, G. 3 c. 15, s. 5, 1 P. L. 264, to file the judgment roll before he takes out the execution and to *endorse "upon the execution, the real debt due."* He is also thereby directed, on taking out execution in any court to file a copy of the taxed bill of costs in the clerk's office. (In practice the original taxed bill and not the copy is filed) —(The old form of bailable process in our courts was by a writ, directing the sheriff to attach goods or lands and for want of them to take the defendant. This seems to correspond with the form of execution.)

If the party who recovers a judgment should direct the sheriff under this writ of execution to take the debtor, he cannot after the debtor is taken, proceed by the same or another execution, for the same debt, against the goods or lands of the prisoner;—but if he cause goods to be taken and they should prove insufficient to discharge the amount, he may take the real estate or the body of the debtor. If he has taken the real estate and that proves insufficient, he may take out an *alias* execution and imprison the debtor under it, for the balance. The rents only are taken, if sufficient to discharge the debt, &c. within two years. It is usual in practice, to state on the back of the execution not only the amount due on it, but also the manner in which the credito wishes it to be levied. If one execution shall be returned unsatisfied, another (called an *alias* execution) can be issued; and if that should not be sufficient a third must be taken out. The third and any subsequent are termed *pluries* executions. If the judgment is totally discharged or released, a *satisfaction piece* should be made out, signed by the attorney and filed as a record in the court where the judgment has been given, and the provincial act of 1758, 32 G. 2, c. 18. Sec. 14, 1 P. L. 27, requires a warrant of attorney from the creditor to enter satisfaction, and an affidavit of one credible witness in writing, of the execution of the warrant before satisfaction can be regularly entered on any judgment. Sec. 15 limits the effect of the execution as a lien on *goods*, to the time when it is delivered to the officer for the purpose of putting it in force. The effect on real estate is from the date of signing judgment* but if a year elapse and the real estate be not taken in execution, the lien ceased by our act of 1822.—See Epitome, 2d vol. p. 254 to 264.

The act of 1832, 2 Wm. 4 c. 51, enables the judgment or attachment to be registered to bind the land and rents.—See Epitome vol. 2. p. 261.

In England there are five kinds of executions in personal actions. 1. The writ of *extent*, which is the execution the king is entitled to there, for debts secured by bond—and the same writ is allowed on a certain kind of security of an antique description, called a statute merchant or staple, in favor of a private creditor. The extent resembles our execution as it goes against the goods, lands and person of the debtor. 2. The writ of *levari facias*.—By this writ which is not much in use, the sheriff levies on the goods and the profits of the land of the defendant. 3. The writ of *elegit*.—Under this writ a creditor can obtain the goods, and one half of the *freehold lands* of the debtor. 4. The writ of *fieri facias*.—This directs the sheriff to take the goods and chattles and make out of them for the creditor the amount due. 5. The writ of *capias ad satisfaciendum* authorizes the arrest and detention of the debtor in prison till the debt is discharged.

The Colonial practice here, has dispensed with this variety of forms, adopting in lieu of them, the one simple form we have described. Our execution may be considered as a combination of the *fieri facias*, and the *capias ad satisfaciendum*. The real estate being put, in general, on the same footing with personal estate, as to its liability to be taken for debt, the variety of rules and distinctions existing in the English law respecting extents, *levari facias*, *elegit*, *&c.* are got rid of, and the proceedings under our execution are regulated by the leading rules of the English law, respecting *fieri facias* and *capias ad satisfaciendum*, with such local enactments as have been found necessary. At common law an execution by *fieri facias* bound the goods of a debtor from its *teste*. This has been remedied in favor of *bona fide* purchasers by the English stat. 29 Car. 2, c. 3. sec. 16, (reenacted by provincial stat. 1758, 32 G. 2. c. 18, s. 15, 1 P. L. 27,) but this statute has been held to protect purchasers only, and not to affect the parties, nor to protect against the *extent* of the crown.—2 Tidd. Pr. 1089. Under

the *fieri facias*, a sheriff can sell every thing that is a chattel belonging to the debtor, except his necessary wearing apparel. It was once even determined that if a defendant had two gowns, the sheriff might sell one of them. Leases for term of years, corn growing which would go to the executor, and fixtures such as a tenant was at liberty to remove, are all liable to this writ in England.—2 Tidd. Pr. 1040.

The provincial statute of 1817, 57 G. 3, c. 25, exempts from attachment and execution "the necessary wearing "apparel or bedding of any person or persons (or of their "children,) against whom such writ shall be issued,—the "tools or implements of his trade, of any mechanic, ne-"cessary for his, and ordinarily used by such mechanic "in his trade, and business;" and "the cow of any per-"son unless he or she shall have more than one, in which "case it shall be lawful to attach or take all over and "above one."—3 P. L. 21. The provincial statute of 1824, 4 and 5 Geo. 4, c. 7. sec. 2, 3, P. L. 182, enacts "that it shall not be lawful to take under and by virtue of "any writ of attachment, execution or other process (ex-"cept for rent) the grain, hay, potatoes, or other article "growing in the ground, before the same shall be sever-"ed from the ground."

If goods have been fraudulently sold, they may be taken under execution notwithstanding such fictitious sale. It is usual when there is doubt or dispute respecting the property of goods taken in execution, to require an affidavit, or some equivalent proof from the claimant. If the creditor insist on taking goods as those of his debtor, where the ownership is dubious, the sheriff usually requires an indemnity from him before he proceeds further. If the goods of parties be taken on an execution against one only, the sheriff should take so much that the debtors share in the property taken, will meet the debt.—2 Tidd. Pr. 1046. The sheriff is bound at his peril not to take the

goods of third persons, and he will be liable as a trespasser if he do otherwise.—ibid. 1047. The sheriff on a *fieri facias*, may enter the house of the debtor when the *outer* door is open, to take his goods. He cannot regularly break an *outer* door of a dwelling house, at the suit of a private person, though if the goods of the defendant be in another person's house the case is different. It is the duty of the sheriff to sell goods taken in execution and he may do so after the return of the writ, and even after he is out of office.—2 Tidd. Pr. 1052. It seems doubtful whether a sheriff is justified in selling goods greatly under their value, although it be to the highest bidders at an auction. The safer course appears to be to retain them,—and return, that they remain on hand for want of buyers.—ibid. 1053.

The statute of 8 Anne, c. 14, s. 1 and 8, re-enacted by provincial act of 1768, 8 G. 3, c. 4. s. 5 and 13. 1 P. L. 137, 138, 139, obliges the creditor on taking goods under execution to pay whatever rent may be due the landlord for the premises, not exceeding one year's rent. The crown is expressly excepted from the operation of this act. Under the equity of this statute the landlord will be entitled to its benefit where goods are taken under a sequestration out of the court of chancery against his tenant. If one year's rent be paid him under one execution, he will not be entitled to another, under a second execution. An outlawry in a civil suit against the tenant will not deprive the landlord of the benefit of this act, and we may conclude that the equity of the act will apply to the attachment of goods under the absent debtor law.—See. 2 Tidd. Pr. 1054. Governors, ambassadors, and their suite, peers, members of the legislative body—(soldiers and sailors for debts under £20.) &c. cannot be taken under execution and imprisoned. An infant (minor) may be taken. So may bail against whom judgment has been obtained. The imprisonment of the debtor under an execution, is in law, a *satisfaction* of the debt, as far as respects the prisoner;

but it will not prevent the plaintiff from taking out execution against other persons liable for the same debt, and if discharged with the consent of the plaintiff, the defendant cannot be again charged in execution, although it had been on such an agreement that he was liberated.—If he dies while prisoner under the execution, the common law views the debt as totally discharged—statute 21, Jac. 1 c. 24, has altered this rule in England, but its provisions have not been re-enacted here.

It was formerly a doubted question whether, if a person taken in execution were set at liberty by privilege of either House of Parliament, the creditor could afterwards take out any new execution. The right so to do was conferred by the English act, 2 Jac. 1 c. 13, sec. 2. In conformity with which the prov. statute of 1818, 58 G. 3 c. 11, 3 P. L. 24, 25, enacts sec. 1, that, the time of privilege of the session being ended, a new execution may be issued as "if no such former execution had been taken "forth or served," that the sheriff, bailiff or other officer, shall not be liable to any action for delivering the privileged person so set at liberty by his privilege. Sec. 2, that the act is not to extend to "diminishing of any punishment, "to be hereafter, by censure in either House of General "Assembly, inflicted upon any person who shall here-"after make, or procure to be made, any such arrest, as "is aforesaid."

When a person is arrested on *mesne process*, the sheriff is not liable to any action for an *escape*, if he lets him remain at large, provided he either takes bail, or has the defendant forthcoming at the return of the writ.—1 Tidd. Pr. 234, 235. But a defendant in custody under an *execution* is by law, to be kept in *close* custody, and if he be found at large the sheriff is liable to an action 3 B. C. 415. Escapes are called *voluntary*, where they take place with the express consent of the keeper; *negligent*, where the prisoner gets away clandestinely. In the case of a *volun-*

tary escape, or the rescue by third parties, of a prisoner in execution, the sheriff will be liable to the creditor. If the sheriff on a fresh pursuit, retake the prisoner, or he return of his own accord before an action for escape is commenced, the sheriff will be excused for a negligent escape.—3 B. C. 415, 2 T. R. 126. Where an escape has taken place the creditor is not obliged to look to the sheriff, but he may take out a new execution.—2 Tidd. Pr. 1071. An irregular execution may be set aside on motion of the defendant's counsel; and the defendant, or goods, &c. taken, discharged by rule. So a third party, whose goods have been taken improperly under an execution, may on motion, have a rule to restore them. But if the ownership be not clear, the court may leave him to his action against the sheriff, and will sometimes retain the money the goods have produced in court, to abide the settlement of the ownership—see 2 Tidd Pr. 1072.

If execution be taken out and directed to be levied on the defendant's person, and the sheriff returns *non est inventus*, i. e. that he is not to be found within the county, the plaintiff may commence an action against the bail. The rule of the supreme court given in this Epitome v. 3, p. 153. authorizes the bail, at any time before (or within four days after) the return day of the summons against them to surrender the defendant, but in this case they must pay the costs of both actions. A practice has been introduced of obtaining a return of *non est inventus* in order to fix the bail with payment of costs, although the defendant is in the county and visible about his business at all times.—Before they are made thus liable, they ought in common fairness have notice, that such a writ is in the sheriff's office. But until some rule or decision shall have made such a notice imperative under these circumstances, it behoves the bail to lose no time after a judgment is entered (whether by confession or otherwise) in getting rid of their responsibility by a regular surrender. It is often

desirable that bail should have an attorney to act for them, who is not otherwise connected with the suit, as their interests do not always coincide with those of their principal.

Insolvent debtors.

The provincial acts on this subject in force, are the 3 and 4, G. 3, c. 5, act of 1763, 1 P. L. 90—93. 57 G. 3 c. 1, act of 1817, 3 P. L. 1, and act of 1832, 2 W. 4, c. 58. By the 1st clause of the act of 1763, when a person "charged in execution" [amended by act of 1817, sec. 4, which gives a prisoner for debt the same right when judgment shall have been recovered against him, and no execution issued or charged on him for 30 days after] "for any sum or sums of money, shall be minded to deliver "up" to his creditors all his effects, towards satisfying their demands—such prisoner may petition the court from which the execution issued, and if it be not sitting, two of the judges of that court. [The act of 1817, sec. 1, substitutes two judges of the common pleas to relieve prisoners under supreme court judgments, when there are not two justices of the supreme court within 20 miles of the jail where the petitioner is confined.] The act 1832, c. 58, s. 6, authorizes any two justices of peace of the county to carry the insolvent debtor laws into effect in favor of the prisoner committed "under any execution by any justice or "justices of the peace"—without *fee* or reward. The first clause of the act of 1763, further directs that the petition should shew the cause of imprisonment, and give an account of the prisoner's "whole real or personal estate, "with the dates of the securities wherein any part of it "consists, and the deeds or notes relating thereto, and "the names of the witnessses thereto," to the extent of the prisoner's knowledge.

In order that the prisoner should not spend his substance in jail, and afterwards avail himself of this law,

the act of 1817, s. 2, requires the petition to be exhibited "if before the court, within the first term of the court "which shall be held in the county or district, next after "such person shall be so charged in execution; and if "before the said two justices, within forty days after such "person shall be so charged in execution" unless the petitioner "satisfy the court or the said justices"—that he has "not remained in gaol for the purpose of defraud-"ing" his "creditors." On such petition being presented the court or two justices to whom it is addressed, are required by the 1st clause, act 1763, to make an order or rule (if two judges, they are to make an order for the purpose under their hands and seals.) By the order they are to "cause the said prisoner to be brought up to the said court, "or before them the said two justices," and the creditors at whose suit the prisoner is confined under execution, "to be summoned to appear personally, or by their attor-"ney" at the same time and place for which the prisoner's appearance is directed. Two days notice must be given to the creditor or his attorney or agent, and if the creditor does not live within 10 miles of the place appointed, he is entitled to an additional days notice for every 20 miles he lives from the place of meeting (act of 1817, sec. 3.) If the creditors refuse or neglect to attend,—the 1st clause act 1763, requires an affidavit of service of the rule or order on them, on which the court or justices may proceed without them.

The court (or the two judges) the act goes to say "shall "and may in a summary way, examine into the matter of "such petition, and hear what can or shall be alleged "on either side, for or against the discharge of such "prisoner," it then appoints an oath to be administered to the prisoner in the following form, viz.

"I. A. B. do solemnly swear in the presence of Almighty "God, that the account by me delivered into "in my petition to doth contain a true and full "account of all my real and personal estate, debts, credits,

" and effects whatsoever, which I, or any in trust for me, " have, or at the time of my said petition had, or am, or was, " in any respect entitled to in possession, remainder or rever- " sion (except the wearing apparel and bedding for me or my " family, and the tools or instruments of my trade or calling, " not exceeding ten pounds in the whole) and that I have not " at any time since my imprisonment or before, directly, or " indirectly, sold, leased, assigned or otherwise disposed of, " or made over in trust for myself, or otherwise, other " than as mentioned in such account, any part of my lands, " estate, goods, stock, money, debts, or other real or per- " sonal estate, whereby to have or expect any benefit or pro- " fit to myself, or to defraud any of my creditors, to whom I " am indebted. So help me God."

This oath is written out and signed by the prisoner.—Act. of 1763, 2nd clause. The examination having been made, and the oath taken either " in open court or before " the said two justices, *if the creditors are satisfied** with the " truth thereof," the court or justices may immediately direct an assignment to be made by the prisoner " to " the said creditors, or to one or more of them, in trust " for the rest of the said creditors," of " the lands, goods " and effects, contained in such account," (or sufficient part thereof to pay off the executions and the sheriff's and gaolers fees,) " by a short endorsement on the back of the " said petition, signed by the prisoner." This shall vest " the estate, interest and property," in the " lands, goods, " debts and effects so assigned," in the assignees, who may take possession, or sue in their own names, in the same manner as assignees under the bankrupt laws, and no release made by the prisoner or his representatives after the assignment shall be a bar to any such suit. Immediately on executing such assignment the court or two justices are to make the order for the prisoner's discharge absolute. The order is to be a sufficient warrant to the sheriff or gaoler to liberate the prisoner " if detained for " the causes mentioned in such petition and no other."

* Or if no good cause be shewn on affidavit against it—Act 1832.

He is to be discharged at once "without fee." The assignee is to divide the assigned effects in proportion among the creditors whose executions or judgments were concerned (the sheriff and gaoler coming in for their quota with the rest as creditors by sec. 9.)

Sec. 3. makes the proceeding before the two justices valid, as if done in court, and directs them to take the same steps and to return their proceedings signed by them to be a record of the court. [The act of 1817, sec. 1, contains the like direction as to the two judges of common pleas.]

Sec. 7. Provides that, though the person of the debtor, so discharged, shall never after be arrested for the same debt; yet the judgment shall remain in force, and execution may be taken out thereon against his lands, tenements, or hereditaments, goods and chattels, except wearing apparel, bedding and tools.

Sec. 8. Inflicts on a false oath under this act, "all the pains and forfeitures" of wilful perjury. The perjured debtor may be taken (by process *de novo* or execution) for the former debt, and "shall never afterwards have the "benefit" of the act. Sec 11, makes a quaker's solemn affirmation as valid as an oath under the act, and liable to the same sanction as to punishment for its violation.

Sec. 10. Directs that the provost marshal or other officer, &c. who shall offend against the act, shall "forfeit "and pay to the party thereby grieved the sum of £50, to "be recovered with *treble* costs of suit by action of debt, "bill, plaint or information, in any of the courts of law "within this province, wherein no essoign, protection, or "wager of law or more than one imparlance shall be allowed."

Sec. 12. Originally limited the benefit of the act to debtors who did not owe above £100, but this was after extended to £500, and finally the act of 1817, sec. 5, enacts that it should be extended to all persons imprisoned

for debt although beyond £500. But this is provided not to extend in favor of persons imprisoned "for debts con- "tracted with merchants residing in the United Kingdom "of Great Britain and Ireland."

The act of 1817, sec. 6, directs that any two judges of the supreme court, may examine on oath any person imprisoned for debt at the suit of the crown, and by all lawful ways and means, ascertain the party's insolvency or solvency, and if they find him unable, report the inability with an inventory of his property, to the governor, who if he think proper, may, with the advice of the council, by warrant under his hand and seal, order the attorney-general to consent on behalf of the king to the prisoner's discharge. The act of 1832. 2, Wm. 4, c. 58, enacts.—

Sec. 1. Where the prisoner "shall in all respects com- "ply with the directions of the acts"—"such person "shall forthwith be discharged"—"unless good and suf- "ficient cause for the further detention of such prisoner "shall be shewn by affidavit to the court or justices" applied to. Sec. 2. If it appears to the court or justices that the debt "was fraudulently contracted"—or if from other circumstances as to the debt or the delay of payment they judge proper,—"it shall be lawful for the said "justices or court to remand the prisoner for such longer "period or periods as the said justices or court shall con- "sider proper under all the circumstances of the case; "and also from time to time, to make such further order "or orders as the said justices or court may judge equit- "able and proper." Sec. 3. Gave prisoners then in jail sixty days to apply in, and provides—that the act is not to deprive creditors of any right secured by former acts as to the person or property of the debtor, except of the right of remanding on bread at the creditor's option. Sec. 4. The court and justices where an assignment is to be made under these acts, are empowered "to order all such "deeds and instruments of assignment to be executed" as

they deem necessary. Sec. 5. The court or justices may refuse to discharge any prisoner who "shall decline or re- "fuse to comply with such terms and conditions" as they deem reasonable, towards paying the debt or costs in whole or part. It seems doubtful whether this act has not indirectly repealed the former exception in favor of British creditors.

The model on which our act was first formed in 1763, appears to have been the British statute of 32 G. 2. c. 28, commonly called "the Lords' act," see. 1 Tidd's Pr. 378. It bears a close analogy to the *cessio bonorum*, in the Roman and Scotch laws, &c. and appears in many respects to operate well in practice. Some improvement may perhaps yet be made on it. A poor prisoner is often in debt to a poor creditor, and heavy costs are incurred before this act interposes between them. Would it not be better that any person arrested might make application, admitting the debt to be just, without the delay and expense of a judgment?

Gaol limits and prisoners.

The provincial act of 1791, 31 G. 3, c. 4, s. 2, 1 P. L. 284, 285, authorizes the judges "of the *supreme court* in "their sessions *in the different counties* in this province" "from time to time" to "make and publish such *rules and* "*orders* for fixing and ascertaining the *extent and limits of* "*gaol yards, boundaries and privileges of prisoners*, and for "directing and controling the *conduct of sheriffs, gaolers*, "and other officers, *having the charge* or custody of *prison-* "*ers*, and for the safe keeping and protection of prisoners, "as the said justices may judge proper and necessary."

The act of 1796, 36 G. 3 c. 16, 1 P. L. 382, authorizes the grand jury in each county to include in their presentments, the sum necessary for the support of a jailor, and "for providing *fuel and other necessaries* for poor prisoners "who may be at any time confined in the several county

" gaols." This act was temporary at first, but has been made perpetual and general by act of 1807, 48 G. 3, c. 19, 2 P. L. 21. The temporary act of 1801, 41 G. 3 c. 18, s. 12, [which is annually continued, see act of 1832, 2 Wm. 4, c. 2, sec. 23,] authorizes the Governor to draw by warrant on the treasury for the expence of maintaining prisoners committed to the county gaol of Halifax, and not by law chargeable on the county, and also for the expence of bringing them there.

Rule of the Supreme Court, Halifax, ss. Hilary Term, 1816.

RULES FOR HALIFAX JAIL.

" *Ordered,* That the prison doors shall be locked at sun-
" setting throughout the year, and no visitors be admitted
" after that time, nor before 8 o'clock in the morning, except
" for the relief of the sick, or other emergency, and then
" for such time only as the sheriff or jailor may deem re-
" quisite."

" That no visitor shall be admitted within the cells or the
" debtor's room, except for the relief or necessary attendance
" of the sick, and then for such time only as to the sheriff
" or jailor may appear to be necessary."

" That debtors shall be permitted to send for, or have
" brought to them at seasonable and regulated hours any vic-
" tuals or clothing; but in respect to liquor, that no prisoner
" shall be allowed to send for, receive or drink more than a
" gill of rum of spirits, or a pint of wine in any one day or 24
" hours."

" That debtors who are turbulent and refuse to submit to
" the rules of the prison, who are quarrelsome, drunken, re-
" fractory or abusive, may be confined in the cells; and if
" they shall attempt to escape, or conspire with ony one to do
" so, may be secured in the most effectual manner by the sheriff
" or jailor, and the case be immediately reported to any two
" or more justices of the peace, who shall thereupon visit
" the jail and enquire into the situation of such refractory
" prisoner, and grant relief, or confirm the proceeding of the
" sheriff and jailor as shall appear to them to be right and
proper."

" That sailors charged with deserting the vessels they be-
" long to, or apprentices who shall be committed on the com-
" plaint of their masters, must be provided by the complainants
" with necessary food to be furnished to the prisoner daily,
" before the hour of 12 o'clock, or they will be discharged

"there being no county or other allowance for such prisoners."
"By the Court, 23d Jan. 1816."
(Signed) "WILL. THOMSON,
Cler. Cor. & Proth."

The act of 1791, has been generally construed by our judges as not giving them authority to give prisoners any freedom, but merely to define the bounds of the prison-yards within the walls of which, prisoners for debt, who can give satisfactory security to the sheriff, are generally allowed to walk. Much must depend in all prisons upon the disposition and habits of the sheriff, jailor, &c. The rules above extracted, if literally executed would debor debtors, and other prisoners whose trials are to come on, from any free or private communication with their family, friends, or legal advisers. Such could not have been the intention of the court in making the rules. Much must be left discretionary with the jailor, whose duty it is to afford to prisoners every reasonable advantage within his power, consistent with their safe keeping, for which he is responsible. Happily our jails (except that at Halifax,) have rarely more than an occasional prisoner or two. If the change of circumstances should render them more crowded, many rules will become necessary, to secure order, and to lessen the discretionary power held at present by the keepers, by affording them a certain standard to refer to. The sale of intoxicating liquors, if carried on in a jail, is most pernicious. I believe this practice does not now exist in this province, but it should be prevented. The due separation of prisoners is a matter of great importance, yet it always presents difficulties that the prudence of magistrates should endeavor to obviate.

An act of Upper Canada, 1792, 32 G. 3 c. 8, sec. 15, U. C. laws, p. 12, imposes a fine of £20 on gaolers selling spirituous liquors, or strong waters, or allowing them to be brought in or used at all in prison, except where prescribed by a medical man; and makes a second offence punishable by forfeiture of office.

BOOK III.

PART 2.—CHAPTER 2.

SUMMARY SUITS, CERTIORARI, WRITS OF ERROR, APPEALS, SCIRE FACIAS, &c.

SUMMARY JURISDICTION.

Supreme court and common pleas.

The supreme court, and the courts of common pleas are empowered to try all actions for the recovery of any debt between £5 and £20, which shall be brought in either, "in a summary way, by witnesses, to examine the "merits of such causes, and to make up judgment accord- "ingly. Provided, that when either of the parties shall "desire it, the court shall order a jury to try the same." Provincial act of 1822, 3 G. 4, c. 30, sec. 6. 3 P. L. 135. The request for a jury should be made before the trial by the court has begun. The court will of it's own authority order a jury, if in hearing the evidence they find it doubtful. The act of 1832, 2 W. 4. c. 53, raises the summary jurisdiction to £50. This act is passed for one year. When a summary cause is sent to a jury, it is no longer treated in a summary way, but all the regular pleadings, &c.

must be used. If a party desire a jury, it will be in the discretion of the court, whether (if he is successful in the cause,) he shall be reimbursed the additional costs incurred by his so changing the mode of trial. Besides these causes appeals may be brought (under the 1st. clause of the same act) from judgments of magistrates amounting to 20s. or above, to the supreme court or the common pleas, I suppose, though no express mention of either is made, the appeal being given to both in the expired act of 1807, 2 P. L. 18, see also expired act of 1792, 1 P. L. 305, 306. The supreme court at Halifax also, has an appellate jurisdiction over the commissioners' court in causes from 20s. to £10, and the original jurisdiction of both the supreme court and common pleas is taken away by the same act in all cases within the scope of that court—(see *local laws* title 'Halifax.) Appeals are to be prosecuted at the first term of the court above.

Justices of Peace.

Debts not exceeding £3* may be sued for by summons "*to appear before any one justice of the peace*, of the county "or district where the debtor shall reside."—"No person "shall be arrested in any case for a debt due by him "under 20s."† If the debt amount to 20s. or more but does not exceed £3 on affidavit of the debt with the further affidavit of "the party applying that he verily be- "lieves that unless a writ of capias be allowed the debt "will be lost," a capias may issue instead of the sum- "mons. Debts above £3 not exceeding £5, (where the whole dealing or cause of action does not exceed that sum) may be sued for by summons to "appear before any "*two justices* of the peace of the county or district where "the debtor shall dwell." Under the act respecting bail,—

* See 1 P. L. 251.

† Where the whole dealing, or cause of action does not exceed that sum.

1 P. L. 211, a capias may also be used in commencing these suits between 3 and £5.—See 1 P. L. 251. 3 Epit. 126 Prov. act 1822, 3 G. 4 c. 30. s. 1, 2, 3, P. L. 135, 6.—In all causes thus brought either before *one* or *two* justices I. The summons or capias must be served on the "defend-"ant at least 3 days previous to the day on which such "writ shall be made returnable"—ibid. sec. 3. II. The "justice (or justices) to allow the defendant to produce "his account against the plaintiff or any receipt or "other discharges for payment made either in whole or "part, and the said *justice or justices* shall examine and "*inquire into the merits of both accounts*, and of such dis-"charges, and by such other proof as to him or them shall "seem requisite, *or upon confession* of the debtor to *ascer-"tain the debt* due, and to *decree the payment* thereof, and "to *award costs* as he shall find* whether for the plaintiff "or defendant, "without appeal unless the debt or cause "of action shall amount to 20s. or upwards."—ibid. sec. 1. III. If the debtor who has been "duly summoned to "appear,"—"without just cause to be allowed of by the "justice or justices" fails to perform the "decree or judg-"ment,"—the justice or justices are to issue an execution "against the goods, chattles or body" of the debtor for the judgment and costs.—ibid. sec. 2. IV. The execution is to be returnable in 20 days from the time it issues.—ibid. sec. 2. V. The forms of the summons, capias and execution are by sec. 4. to be those prescribed by an expired act of 1807, 2 P. L. 19.—

The expression *decree*, and the just cause to be allowed for failing to perform the decree, will be better understood by reference to an expired act of 1774, 1 P. L. 191. which conferred a power on justices of decreeing payment by instalments. That power is not directly given

*This entitles the party who succeeds to have costs,—"as "he shall find" meaning as he shall decree the plaintiff to recover or to lose his suit.

by the act at present in force, but yet the language would seem to give it by implication. VI. The amending act of 1825, 6 G. 4 c. 10, 3 P. L. 210, directs that no action shall be tried in a summary way "which may involve the title to land. *Formerly* the parties could (by an expired of 1792, 1. P. L. 305,) be examined under oath in these small suits, and an *equitable* decision given, but they now stand on common law rules. The two acts which regulate summary trials are *temporary* laws, they are continued for a year at a time.—See act of 1832, 2 W. 4. c. 27, which continues them for a year. The *earliest act* on this subject, is that of 1759, of which the title only is printed.—1 P L. 56. The changes of law on this subject have been very frequent, and the present acts may be better understood by the student's referring to such of the expired summary acts as are printed, viz. 1st vol. P. L. 116, 128, 170, 181, 191, 194, 251, 281, 304, 450, 473, 2 P. L. 17. VII. Witnesses residing 5 miles or upwards from the place where a trial is to be held may be summoned by any justice of the county. The form of summons is given, and non attendance or contempt of court is made punishable as in case of a subpœna. They are to be paid for attendance. Act of 1784, 25 G. 3 c. 2, 1 P. L. 239, 240. This was intended to facilitate the obtaining evidence in other courts of a higher jurisdiction; but there appears no reason why it should not apply to the justices' own jurisdiction.

On appeals from the judgments of justices of peace in civil cases, or the commissioners' court, the course in the supreme court and common pleas is to hear the evidence, and try the cause as if it had not been tried below. This enables either party to bring not only the same witnesses that he did before but also any others. In summary suits commenced in the superior courts, the plaintiff must state in his writ the substance of his demand, the defendant pleading orally to it the usual plea of general issue, and filing

his set off, (if he has one to make.) Any special plea must be pleaded in writing.* No declaration is used. It is a matter of doubt whether special bail need to be entered on a summary capias. Some think the bail bond to the sheriff sufficient; but the cautious practiser will file bail regularly. The two last days of each term are set down for the trial of summary causes in the supreme court at Halifax, and they should be entered by the plaintiff's attorney, at the prothonotary's office, during the preceding week. The court will not allow a plaintiff to continue a summary cause from term to term at his pleasure, if the defendant be ready for trial, unless there be good grounds for doing so, but will strike the cause off the list. In a cause of Temple et al vs. Allan et al, at Windsor, Sept. Term 1832, a summary cause which had been continued by consent from from the preceding term of June. (It was a cause under Mr. Roach's act, the sum being above £20.) The plaintiff moved for a jury which was granted, but the defendant being in attendance with witnesses from Halifax and urging an immediate trial, the court required the plaintiff to go to trial during the same term, and on his failing to do so, struck it out of the docket. Mr. Justice Wilkins, and Mr. Justice Wiswall were present. The former observed, that continuances in summary causes were of indulgence and on cause shewn. As it is the object of the summary jurisdiction to combine cheapness with despatch, there appears much propriety in the judge's remark.

Appellate jurisdiction of the supreme court.

The courts of king's bench and common pleas in England, exercise a power of removing causes from inferior courts, in the nature of an appeal. This is transferred to the supreme court here. A *certiorari* lies for this purpose,

* In an expired act, it is directed that the writ should contain the declaration.

by which writ issued from the supreme court, a civil action may, *before judgment*, be removed from any of the courts of common pleas or other *civil* court of an inferior kind into the supreme court. If the jurisdiction of the supreme court over the subject be expressly taken away by an act, this writ cannot issue. This writ may however, be issued in any case where any inferior court is proceeding in a matter over which it has not jurisdiction, or deviates in it's acts from the rules of the common law. *After judgment* has been given, *certiorari* does not in general lie; but under the provincial act of 1799, it has been recently ruled in the supreme court, that the entry of judgment shall be no obstacle to the application for a new trial in the supreme court, if it be made within the year.

Where the inferior courts deviate from the rules of law, a *certiorari* may in general issue after judgment as well as before. This writ is directed to the judges of the inferior court, and it commands them to certify the record with all things touching the same. It should be *tested* in in term time and *returnable* on a return day in term. If a record in a civil suit be filed in the court above, upon a *certiorari*, it cannot at any time be sent back. (See 1 Tidd. Pr. 398 to 412.) When this writ is delivered to the judge of the court below, it immediately suspends his authority. If he attempts to proceed with the cause, every thing he does in it after the receipt of this writ is void, and he may be attached for a contempt of the court above.—ibid. 404.

In *criminal* cases this writ is granted to a defendant, only on grounds shewn to the court above by affidavit; but on the application of the crown it is granted of course. It lies on all criminal questions under penal statutes unless expressly taken away by enactment.—3 Dowl. & Ryl. 35, 275, 301, 306. An *appeal* on the contrary does not lie unless expressly given by the act. The general scope of the authority exercised by the supreme court under this writ is, to keep other common law courts

within the legitimate boundaries of their jurisdiction, and the rules of common law proceeding. It is not intended to impose on the court, above the duty of entering into the the merits and reasons of decisions below, as in case of a regular appeal. The power of granting new trials by the provincial act of 1799, in jury causes, gives to the *certiorari*, in such cases most of the effects of an appeal; but in other cases the general rule will prevail. That act was passed to remedy a deficiency in the power of inferior courts who cannot grant new trials. 2 Tidd's Pr. 836. A doubt exists whether the *certiorari* operates to prevent the issuing of an execution or to suspend it's effect.

The Provincial act of 1774, 14 & 15, G. 3 c. 8, 1 P. L. 189, enacts "That the supreme court for this province, "shall and may, upon application, issue writs of *certiorari* "for removing orders of sessions of the peace, under such "regulations, restrictions and powers, as writs of *certiorari* "are issued by H. M. court of king's bench in Great "Britain, and conformable to the course and practice of "the common law, and the several statutes for that pur- "pose made and provided. The provincial act of 1791, "31 G. 3 c. 9, 1 P. L. 287, directs, sec. 1, that "no "cause commenced in any of the inferior courts of com- "mon pleas, or other inferior courts in this province, shall "be removed by any writ or writs of *habeas corpus cum* "*causa*, or *certiorari*," without sufficient security first given in the supreme court or before a superior court judge by the applicant "to abide, fulfil and perform "the final judgment of the said supreme court in the cause "or causes so removed." Sec. 2. Before the writ issues the judge who takes the surety is to endorse on the back of the writ "the amount for which surety is taken with the "names of the surety or sureties." He is also to endorse his allowance of the writ with his signature and "the day "and date it was allowed."

The provincial act of 1799, 39 G. 3 c. 5, 1 P. L. 406. Sec. 2. authorizes the supreme court "in causes brought "up from the inferior courts by *habeas corpus*, *certiorari*, "writ of false judgment, or error in cases *where a trial by* "*jury has been had below, to grant a new trial* of the fact *be*-"*fore the said supreme court*, on such terms and conditions "as the said court shall judge best calculated to afford "substantial justice to the parties. Provided such new "*trial* shall be *moved* for *within one year* after the trial be-"low, and it shall be made *appear* to the said supreme "court, that *a new trial ought to be granted, and the party* "praying the same shall *put in special bail* in the said su-"preme court, to abide the final judgment which may be "given in the said cause."

Sec. 4, authorizes any one judge of the supreme court, "either in term time, or otherwise," to allow writs of *certiorari*, *habeas corpus*, *cum causa*, writs of false judgment, or writs of error, "to remove causes from the court of com-"mon pleas to H. M. supreme courts, before trial or judg-"ment given therein, at the instance of the defendant," or judgment, at the instance of either party. The applicant is first to file "special bail" in the supreme court and, after trial with sureties "the judge shall approve of." The writs to issue from and be signed and sealed by the prothonotary "or his deputy in any part of the province," being so first allowed.

Scire facias.

This writ is considered as an *action*, and a release of all actions will bar it. It may be brought by the crown to repeal a grant or patent, where the king has granted any thing which he could not legally give, or has been induced by fraud to make a grant. The crown may also have a *scire facias*, against an officer who holds his place by patent and has done something to forfeit it. If the grant of the crown be made of something the crown has already grant-

ed, the first patentee may have this writ to repeal the second patent. Previous to it's issuing for a subject to repeal a crown grant, the fiat of the attorney general is to be obtained for suing it out, by a petition to the government. 2 Tidd. Pr. 1142, 3. *Scire facias* also lies on a recognizance, or a judgment. Where recognizance of bail is forfeited, the plaintiff may proceed against the bail in the action, by action of *debt*, or by *scire facias*, ibid. 1149. The *sci-fa* must issue from the court, where the action was depending, and it calls on the bail to show cause why execution should not issue against them, the principal having neither paid the debt adjudged to be due by him, nor been rendered to prison to satisfy the plaintiff. If the debtor die before the return of the execution issued against his person, his bail will be thereby free, and may plead the fact in their discharge to the *sci fa*. *Scire facias* lies as we have seen, between the original parties to a suit, to revive a judgment where execution has not issued for a year. It must issue out of the same court where the judgment was given, unless the record be removed elsewhere. ibid 1156. If above seven years' standing there must be a *rule* for it, if above fifteen years, a rule to shew cause must be previously obtained before it can issue. On a *general* judgment obtained and discharge of the defendant under an insolvent act, no special execution can issue against him without a previous *sci. fa*. This writ also lies against an executor after a *devastavit* returned by the sheriff. On a *change* of parties to a fuit, as where a single woman obtains judgment, and afterwards marries before execution, there must be a *sci-fa*, for husband and wife, in order to take out execution. ibid. 1166. So when judgment is entered and either party dies after verdict, within two terms under the statute. (3 Epit. 160.) there must be a *scire facias* to revive it before execution.

On the death of a sole plaintiff or defendant after final judgment and before execution, a *sci fa* may be had by or

against his personal representatives. ibid. 1171. On this writ, as it is considered a new action, a declaration is used, and the defendant may plead in abatement or bar as in other suits. It is a rule, however, (where it is brought on a judgment) that the defendant shall not plead any matter of which he might have availed himself in the original action. ibid. 1184. A *sci. fa.* is also given by our act respecting co-partners, against a partner returning to the province, after judgment given in his absence against the rest of the joint contractors. (3 Epit. 148.) *Scire facias* is also issued for the plaintiff in a writ of error to urge the defendant to plead to it.

The name of the writ is from the direction it contains to the sheriff, to *make known (scire facere)* to any party what he is required to answer or perform. It was first given by the statute Westm. 2, 13 Ed. 1, st. 1, c. 45, anno. 1285. before which, if no execution on a judgment in a personal action was taken out within a reasonable time (fixed at a year and a day) the only course was to sue upon the judgment as a presumption arose that it had been satisfied.—2 Inst. 470.

Writs of error.

In England a writ of error issues out of the chancery.—It is a kind of commission to the judges of the same or a higher court, to enquire into the errors alleged to exist in the proceedings in some judgment of a court of record. (A writ of false judgment lies to reverse an erroneous decision of a court not of record :) This writ is granted of course except in cases of treason or felony.

Court of errors.

The Governor and council are a court of error, before whom judgments amounting to £300 or upwards may be reviewed, (and also where a tax or annual charge is con-

tested though of less amount.) Writs of error have been issued by the Governor as the head of this court and proceedings had there; but the instances are few, and only resorted to I presume for delay, as the same professional judges sat in the council by whom the judgments to be reviewed had been given. The *certiorari* and other modes of review and appeal render a recourse to a writ of error, rarely, if ever necessary in our practice. However, as it is a common law proceeding of much nicety, something should be stated of the mode of proceeding under it.

No person can bring a writ of error unless he is a *party* or *privy* to the judgment, or prejudiced by it. It lies for some error or defect in substance, not aided, cured or amendable at common law or by the statutes of amendment or jeofails. Error in process, or clerical errors may be tried upon a writ of error directed to the judges of the same court, where the judgment was given, who may thus review it, but if the error be in the judgment itself, it must be tried in a higher court. A writ or error cannot be brought upon an interlocutory, but only upon a final judgment.—2 Tidd. Pr. 1195. It must be brought within 20 years at furthest.—English stat. 10 & 11 W. 3 c. 14, except the party be under disability. It is, like a *scire facias* considered as a new action, requiring a new warrant of attorney. There must always be 15 days between it's *teste* and return. If sued out before judgment is signed, it is in force during the whole term in which it is returnable. Before execution is executed, the writ of error supersedes it from the time of it's allowance in the court to which it is sent.—2 Tidd. Pr. 1199, 1200. If it be brought against good faith, or manifestly for delay the court will not view it as a *supersedeas*, but proceed as if it had not issued. *Bail* must be given by those who obtain this writ, to secure the due speed in following it up, and the payment of the judgment with costs and charges for delay. This was established by the English courts and regulated there by statute

as to judgments for small debts.—ibid. 1203, 1204. After bail is put in, *notice* of it must be given to the opposite party, who may object within 20 days after.—ibid. 1213. Next the plaintiff in error must cause a *transcript of the record, certified* by the court below, to be sent to the court above. At this stage, motion can be made to amend the writ of error, if required; or to quash it if erroneous. It may abate by death of the plaintiff in error, but not by that of the defendant.—ibid. 1219. The death of the judge before his return on the writ is made, will render it unavailing. If part only of the record be certified, the plaintiff in error may allege diminution.

The *assignment* of errors is a kind of declaration on the writ of error. To compel it, the defendant may have a *scire facias quare executionem non*, that is a writ calling on the plaintiff in error, to shew cause why execution should not issue on the original judgment. The plaintiff on the other hand, when he has assigned errors, must take out a *scire facias to hear errors*, against the defendant, to bring him, as it is technically called, into court.

Errors in fact, are matters of fact not in the record, but which if true, render it erroneous. Such as that the defendant in the original action being an infant, appeared by attorney. But one error in fact can be assigned. The question of fact if disputed, will then be tried by a jury as in other suits. *Errors* in law. Of these several may be assigned. Nothing can be assigned for error which contradicts the record, or which was for the advantage of the party assigning it. 2 Tidd. Pr. 1226. If want of any writ declaration, &c. or error therein be assigned, a *certiorari*, must issue to ascertain the fact, of which no *alias* or second writ is allowed. The defendant in error may in pleading deny the errors alleged, or plead a release of errors, &c. or he may *demur* to the assignment of errors, or plead the statute of limitation, 10 & 11 W. 3, c. 14, before named. The mode of making up the issues, &c. is analogous to the course pursued in ordinary cases.

The *judgment* in error, is *to affirm*, or to *recall* or *reverse* the former judgment, or that the plaintiff is *barred* of his writ, or to award a *venire facias de novo*, that is, that the parties go again before the jury and court below. When a judgment is affirmed, *interest* is generally to be allowed from the date of the judgment to the time of affirmance, besides costs. ibid. 1239. When judgment is reversed, the party affected by the judgment is to be restored to all he has lost by it, and a writ of *restitution* is to be awarded him for that purpose. ibid. 1245.

Summary jurisdiction of justices of the peace in trespasses and replevins.

The consolidating act of trespasses, 1822, 3 G. 4 c. 32, 1 P. L. 136—141, has been noticed 1. Epit. 152—158. The 1st. clause of it establishes what shall be esteemed a lawful fence and directs in case of trespass committed on land properly enclosed that the damage so done by "horses "sheep, hogs and neat cattle" is to be appraised "by "three credible persons living in the neighbourhood." sworn first by a justice of the peace of the county "truly "to value the same." If the owner of the animals, after due notice, refuse to pay the appraised damages, (the fence viewer having adjudged the fence to be legal) the injured party may sue for the amount before *one or more justices* of the peace, or before the common pleas, if the damage be beyond £5. The suit if from 3 to £5, must of course be before two justices. He will be entitled to judgment, on proof of the trespass, as a matter of course, if he has proceeded regularly according to the act, as it is not the duty of the magistrates to control the decision of the fence viewer, or that of the appraisers, unless they have acted with gross injustice or corruption. The 2nd clause also gives a similar action against a person failing to make good his share of the expense of a fence between him

and his neighbor." Sec. 1, Epit. 155. The court in all these cases is only to carry into effect the decision of the fence viewer, &c. except as before stated. The 5th clause gives a fine of 20s. for rescuing impounded cattle, &c. recoverable with damages to the owner for the trespass, *one* justice may adjudge this. For breaking pound, or abstracting animals from it, £5 penalty, which *two* justices may adjudge. The 7th section gives power to *two* justices to impose fines under the regulations of session respecting cattle, &c. going at large. The 8th sec. authorizes *one* justice to adjudge swine or goats taken up for going at large in any township or settlement, to be forfeited, on the oath of one credible witness.

The 12th and 13th sections authorize *one or more justices* in actions of damage for trespasses by "horses, neat "cattle, sheep, goats, or swine," where the damages are not alleged to exceed £3, to summon the parties and "proceed thereon as in cases of debt, to determine the "amount of the damages and cost, and give judgment ac-"cordingly." A form of writ of replevin is given to be issued by them in such cases. The time in the writ not to exceed seven days for the applicant to prosecute. They are "to hear the merits of the case be-"tween the parties." Fees the same as in suits for debt before them. The damages adjudged must not exceed £3. The 14th sec. empowers *one justice* to fine not above 20s. for *cutting sods off a public common.* On non-payment 8 days imprisonment in the county jail may be adjudged. 19th Section. Trespassing by a sportsman or other person in cultivated grounds, 5s. to 10s. fine, *one justice* may on due proof impose it. *Cutting down and carrying away trees*, from private property, is subjected to a fine of 5s. to 40s. for each tree, (half to the owner, half for the poor of the place.) Any *one justice* may adjudge this fine. Sec. 20, sec. 21, authorizes any *one justice*, to impose 40s. fine for every tree "planted for ornament, or left growing on

"the sides of any of the public squares, streets, or public "highways," cut down or injured, to be sued for in the king's name.* Sec. 22. Injury done to railings, walls, or fences, on the side or sides "of any public square, bridge, or causeway," is subjectedto a penalty of 5s. to 40s. recoverable on due proof made before one justice. Sec. 24th. The 18, 19, 20, 21, & 22 sections are not to preclude the private action of the injured person. Sec. 23d, imposed certain limited imprisonment in case fines under the act were not paid, but the act of 1824, 4 & 5 G. 4, c. 8, sec. 2, 3 P. L. 182. altered this by giving the same execution for such fines as is granted for debts recovered before justices of peace. All prosecutions under this act for penalties are limited to be brought within a year, by the act of 1824, sec. 3. 3 P.L. 182.

* The act authorizes the removal of such trees, where found detrimental to a square, highway or street, by an overseer of highways, under an order from the general sessions.

BOOK III.

PART 2.—CHAPTER 3.

FORCIBLE ENTRY, &c.—ARBITRATION—CO-PARTNERS.

The Provincial act of 1758, 32 G. 2, c. 3, 1 P. L. 6, directs the proceedings where possession of lands is forcibly taken or wrongfully detained. The first clause enacts "that upon complaint on oath, made to any "justice of the peace—of any *wrongful and forcible entry* "made into any *houses, lands, tenements or other possessions*" in the "town or place—where such justice resides, or of "any *wrongful detainer or witholding with force after possession demanded* of any houses, lands, tenements or other "possessions, every such justice shall by warrant under his "hand and seal, directed to the constables of such town, "cause such offender or offenders to be arrested and detained in custody"—until they "find sufficient securities" for "their personal appearance at the next general sessions of the peace, there to answer such complaint, and "for want of such security, to be committed to prison."

Sec. 2. empowers the sessions to enquire "by the "oath of the party grieved, and other credible proof," as to such entry or detainer. If the jury who are to be

returned and sworn at the session, find in favor of the complaint, the justices are to direct a warrant to be issued under the hand of the clerk of the court, directed to the sheriff or deputy, to "cause the same houses, lands, tene- "ments or other possessions, within 14 days after such "trial had, to be reseized, and thereof the party to be "again put into possession"—who was put out or kept out, "wherein no appeal shall be allowed to such offender "or offenders." It also authorizes the party grieved to recover, by action of trespass, treble damages and costs of suit against the offender.

Sec. 3. "*Provided always*, that this act *shall not ex-* "*tend* or be construed to extend unto any person or per- "sons, that have had the occupation, or have been in "quiet possession of any lands, tenements or possessions, "by the space of *three whole years* together next before, "and his, her, or their estate or estates therein not end- "ed or determined." This act contains the substance of English acts.—5 R. 2, stat. 1 c. 8. 15 R. 2 c. 2, 8. H. 6. c. 9. 31 El. c. 11, 21, Jac. 1. c. 15. The act of 1761, 1 G. 3, c. 2, 1 P. L. 66, in amendment of the foregoing act, enacts that it is not "to bar the right of any minor, *feme* "*covert*, or person *non compos mentis*, imprisoned or absent "from the province"—who may sue for and recover lands and tenements "to which they are entitled, within 5 "years after such impediment shall be removed."

Persons forcibly entering into houses or lands and keeping possession of them, may be indicted under these statutes or at common law. See R. v. Blake, 3 Bur. 1731. Detaining possession by force, where it is unlawfully taken is equally subject to the operation of these acts. The prov. act of 1779, 19 G. 3 c. 10, 1 P. L. 216, 217, gives an additional and speedy remedy against tenants obstinately holding over after their term is expired, (in amendment of the act of 1758, of forcible entry and detainer)—See 2 Epitome 107, 108.

In practice under this last act, if the tenant give security the landlord must file a declaration in ejectment, and a regular action is made of it, with the usual imparlance.—The landlord has to prove at the trial that the party defending became his tenant, and that his term had ended, either by notice to quit or otherwise, before the proceedings were commenced against him under the act The prov. act of 1763, 3 & 4 G. c. 8, s. 2, 1 P. L. 95. enacts that when any persons "in possession or improvement of land taken in execution shall either refuse to become tenants to the creditor at such rent as the latter shall think reasonable, or shall fail to pay it when due, shall be deemed "wrongful detainers" and may be prosecuted accordingly. —See 2 Epitome, p. 254 to 259.

Arbitration.

Civil disputes may, by the consent of the parties, be left to the judgment of any one or more persons they may choose. Usually two are chosen, one by each disputant, and they are called *arbitrators* and their decision is termed an *award.* In case of the arbitrators differing in opinion, power is generally given them to elect a third person, called an umpire, whose opinion is to turn the scale, if he agree with either arbitrator in the view he has taken of the controversy. All questions respecting personal property, rent, breaches of contract, disputes between partners, and even the adjustment of the terms of a marriage separation may be submitted to arbitration. Property in land cannot be altered by an award, but if ordered to be conveyed, the party refusing to comply will be liable to be sued for breach of the submission. In *criminal* cases cases the party injured cannot refer the subject to arbitration, except where he has a remedy by action, as in assault, libel, nusance, &c. Suits may be referredto arbitration at any stage whether in the common law or equity

courts, and an attorney in the courts of law is considered as authorized to agree to a reference on the part of his client. If he does so without his principal's consent the submission will not be set aside, the client being left to his action against the attorney.

The rule is not the same in chancery, the solicitor there not being invested with equal authority.—See Caldwell on arbitrations, 1—14. The interests of a married woman may be referred to arbitrators by her husband, or those of an infant by his guardian; but the wife or infant will not be bound by the submission; yet the husband or guardian will, and he who refers the interests of another to arbitration, will in general be personally bound for the performance of the award.—Caldw. on arb. 11, 12. Executors or administrators may refer questions arising from their situation.—ibid. 14. The submission may be verbal, by written argument, by bond, by indenture or deed poll. or by rule or order of a court. This last method, which at common law required a suit to be depending between the parties who agreed to refer it, may now be adopted in any case. The provincial act of 1768, 8 G. 3 c. 1, 1 P. L. 133, 134. (taken from English act 9 & 10. W. 3 c. 15.) enabling the parties in controversies, &c. "for which there is no other remedy but by personal "action, or suit in equity,"—"to agree that their sub-"mission"—"should be made a rule of H. M. supreme "court, or of any of H. M. inferior courts of common "pleas within this province, which the parties shall "choose, and to insert such their agreement in their sub-"mission, or the condition of the bond or promise, &c." in order to make it have the effect intended,—the act goes on to direct the reading and filing in court of an affidavit of one or more of the witnesses to the submission, on which it is to be "entered of record in "such court" and a *rule* to be be granted ordering "that the parties shall submit to, and finally be conclu-

" ded by the arbitration or umpirage which shall be made " concerning them by the arbitrators or umpire, pursuant " to such submission." Parties disobeying this rule are subject to the penalties and process of disobeying a rule of court, as in a cause in which they are suitors. The process not to be stopped or delayed in execution by order or process of any other court of law or equity, unless it " be " made appear on oath to such court, that the arbitrators " or umpire misbehaved themselves, and that such award, " arbitration or umpirage was procured by corruption or " other undue means."

The 2d. clause directs " That any arbitration or um- " pirage procurred by corruption or undue means" shall be void. Complaint must be made in the court where the submission was made a rule, " before the last day of " the next term after such arbitration or umpirage made " and published to the parties." This act does not affect causes already commenced, nor is it held to be necessary that the submission should be made a rule of court under it before it is acted on—it may be done even after the award is made, and in vacation.—Caldw. on Arb. 19. A cause pending in one court may be referred by rule in another.—ibid. 20. A reference is not effective as a stay of proceedings in a cause, unless it be so expressed. In interpreting a submission the intention of the parties is chiefly regarded, and a liberal construction made.—ibid. 24. Where a mistake has evidently been made, the words will not be strictly adhered to, but will be construed according to the obvious meaning of the parties. A submission is revocable in its nature before the award is made.—ibid. 29. The *revocation* must correspond in form and solemnity with the submission. If the agreement be verbal, so may the revocation. If by deed so must the revocation, and in both cases notice should be given to the arbitrators. Any act which make it impossible for the arbitrators to proceed, is tantamount to a revocation. Marriage of a

feme sole (who had agreed to a reference) before the award is delivered is a revocation of the submission. The party who revokes an agreement to refer *after* the arbitrators have been named, is liable to damages for breach of his agreement, and the award may be made so as to lay a ground for damages. If a party to a rule of reference revoke it, he is subject to punishment for a contempt. In chancery the revocation of such a *rule* would be held ineffectual and the arbitrator might proceed *exparte*.—ibid. 30—34. The *death of either party* revokes a submission, but this may be obviated by a special clause in the rule of reference or agreement.—ibid. 38—58. The *arbitrator's declining to proceed* also puts an end to a submission, and so does *the death of an arbitrator*. Arbitrators may name the umpire before they enter into the investigation, and it is most judicious for them so to do.—ibid. 45, 46. If the umpire declines the office they may name another—ib. 49. An arbitrator is bound to look to, and preserve the rights of both parties, by which ever he may have been named. If a cause is referred at the trial, the witnesses may be sworn before they leave the court, or before a judge. By agreement they are sworn before a justice of the peace. Arbitrators are bound to notify the parties of the time and place of their meeting, and an award would be set aside, if due and reasonable notice had not been given. But if one party fails to attend after proper notice, the arbitration may proceed *ex-parte*. If a party attend it will imply that he waves any objection to the arbitrators or umpire.—ib. 52. Arbitrators may by agreement examine the parties with or without oath and where empowered to examine parties may examine one in support of his own case. If they examine witnesses not sworn and no objection be made at the time, it would not be ground for setting aside their award, as they have much greater latitude than a formal court, though the *same rules of law, justice and evidence* must be substantially followed by them. The par-

ties may extend the time for making the award, by agreement, or they may give power in the submission to the arbitrators to extend it. The court will not investigate the legal principles upon which an award is made, unless where they appear on the face of it.—ibid. 65. A mere question of law may be referred, and the decision will be binding.—Ching v. Ching. 6 Ves. 282. If an award is clear upon the face of it, an arbitrator will not be allowed to explain his intentions by affidavit.—Caldw. on Arb. 77.

The court will sometimes, but very rarely, send a cause back to the arbitrators to be reheard.—ibid. 78. Arbitrators cannot reserve to themselves by their award, a power of deciding at some future period on any part of the case. —ibid. 78, 79. Nor can they delegate or transfer their authority or any part of it, it being a personal confidence. —ibid. 81. In referring a cause, the costs of suit are incidentally submitted to the award It is usual however, to insert a proviso, that the costs of suit shall abide the event of the award so that the party who recovers will have his costs from the other. The costs of the reference should always be attended to in drawing up the submission. *Partiality* in giving to one party advantages over the other, *wilful neglect and inattention* to the suggestions of any party, on a material point, *refusal to grant reasonable delay* or time for explanation. *Excessive damages from which undue practices may be inferred; receiving money from one party,* even for expenses, *before* making the *award; purchasing the claims* under reference—are all grounds for an application to set aside an award.—ibid. 94 to 98. In cases of flagrant misconduct, an action, bill in equity or even indictment will lie against an arbitrator; but in general awards are looked on with indulgence, and a court is reluctant to hear imputations against arbitrators. *An arbitrator may be made a witness* afterwards, to prove facts admitted before him on a reference.—ibid. 100. Arbitrators are not bound to state their reasons in the award, nor to discover them after-

wards.—ibid. 102. The *award* should be *consonant* with the submission, not extending to persons or things beyond it. Every thing referred should be decided, but unless expressly brought to the notice of the arbitrators, it will not affect their award to have left some part undecided.—ibid. 111. An award should be *certain* or capable of being reduced to certainty, *possible* to be performed, *not contrary to law, reasonable, and consistent with itself*, and *final*. In referring a pending cause, sometimes "All matters in dispute in the cause be- "tweeen the parties" are referred, and, sometimes "all "matters in dispute between the parties to the cause."— An award may be valid in one part and void in another, ibid 130. It is a general maxim never to raise a presumption to overturn an award, but to draw every reasonable inference that will tend to support it, ibid. 132. An award takes effect from the time it is delivered. If a particular difference did not exist at the time of the submission, or was not brought under the arbitrator's notice, although the reference be of all disputes, yet it will not affect such unadjudged point. It is not always necessary to perform an award with literal strictness, a virtual performance being often sufficient, ibid 151.

An action lies to compel the performance of an award, and if it be under rule of court it may be enforced by attachment, but the court has a discretion in granting or refusing the attachment for contempt. If an action pending be referred, the rule generally authorizes the successful party to enter up a judgment. In order to proceed by attachment, there must be a personal notice of the award, and a demand of the money, by the party or one authorized by power of attorney, ibid. 163. (See as to the practice Tidds Pr. 890. (8th ed.) A bill in equity will lie to compel the specific performance of an award, to convey an estate or the like, but where a sum of money only is awarded the proper remedy is by action of law. Caldw. on Arb. 178.

If the arbitrators alter an award after they have notified the parties that it is complete and ready for them, or if they decide without having before them sufficient documents or information, or if the award be objectionable on the face of it, as where the arbitrators, intending to be guided by the law have by their own award shewn that they mistook it; in any of these cases there will be ground to resist the performance of it. A bill in equity may be used to set aside an award, if corruption in the arbitrators can be shewn, excess of authority, or if the award appear contrary to the rules of equity, on the face of it. ibid. 192. Arbitrators cannot compel the attendance of witnesses before them, nor can they themselves swear them. Judge Christian very properly recommends that they should be authorized by act to do both, 3, B. C. 17.

Copartners.

The Prov. act of 1829, (temporary, for 5 years, sec. 15) 10, G. 4, c. 28, affords a mode of adjusting disputes in small copartnerships without the intervention of a Court of Equity. Sec. 1, directs that "in any case wherein *two* "copartners only shall be concerned, and where the *whole* "*amount* of the copartnership *dealings* shall *not exceed* the "sum of £500," either partner may file a *petition* in the deputy prothonotary's office of the supreme court in any county "setting forth the facts respecting the said copart- "nership dealings, and praying the aid of the said Su- "preme Court." On this a *summons* is to issue in the usual manner "whereby the copartner complained of, is called on to appear at the next term of the Supreme Court in the county "to answer the said complaint of his said "copartner."

Sec. 2. Directs a *copy of the petition* to be served with the summons, or "within a convenient time before the term where it is returnable.

Sec. 3. *On the return* of the writ "*if it shall be made to* "*appear* to the satisfaction of the said court" that there were but two copartners, and that the dealings did not exceed £500, *a rule of Court* is to be granted, directing each of them *to select* a commissioner or arbitrator.

Sec. 4. If the parties "shall not within the time for that "purpose to be limited by the said Supreme Court, select "two such persons," the Court is to appoint "two fit and proper persons" for the purpose.

Sec. 5. *The two* commissioners are *to select a third* to act with them. Sec. 6, before proceeding further the *three commissioners* are to make and subscribe the following *affidavit* before any judge of the supreme court or common pleas, to be filed in the cause.

"We A. B. and C do hereby solemnly swear, honestly "and fairly to settle the copartnership accounts and deal- "ings of C. D. and E. F. to the best of our knowledge and "ability."

"Sworn at ———, "before me this —— "day of ——, 18—. } A. B. C.

Sec. 7. Empowers the commissioners to order the parties to produce "all their books, papers and accounts "touching such copartnership dealing," and to fix such times and places as they think proper, for investigating the accounts and examining the parties and witnesses. If either party fail to attend after due notice, they are to proceed *ex parte.*

Sec. 8. Witnesses to be examined by the commisssioners under oath, and also the parties in the same manner. Oath to be administered by a judge of the supreme court or common pleas.

The commissioners "to make an award or *decision* in "favor of such party as they or *any two of them*,—find to "be *justly entitled* to the same, and for such sum as may "appear to them, or any two of them to be justly due."—This award is to be filed.

Sec. 9. In the *next term after the filing the award* "*if no* "*sufficient objection*" be made to the court, *judgment* shall be entered on the award "with or without costs, as the "said commissioners or arbitrators, or any two of them, "shall adjudge and direct."

Sec. 10. *Execution* to be issued as in the usual course. The commissioners or any two of them may direct costs to be taxed by the court as in other cases. The taxation to include what the court shall allow for the commissioners' services. The commissioners or any two of them may award which party shall pay the costs of arbitration and in what manner, and the court shall enforce payment by attachment or otherwise.

Sec. 11. Authorizes the issuing *subpœnas* for witnesses to go before the commissioners, in the same forms and under the same penalties as in ordinary cases.

Sec. 12. Quakers to *affirm*, where this act requires oath of others.

Sec. 13. Perjury in oaths taken [or affirmations] under this act to subject the offender to imprisonment for a term not exceeding seven years in the bridewell, there to be kept at hard labor, and also to the payment of all charges of prosecution.

Sec. 14. Neither party to file any bill or commence any proceedings in equity. Judgment of supreme court, under this act made *final* to all intents and purposes.

BOOK IV.

CHAPTER I.

EQUITY JURISDICTION.

Court of Chancery.

The judges of this court are the chancellor and the master of the rolls. Besides these, there are certain officers called masters in chancery, who perform a variety of judicial duties. The office of chancellor is held by the Governor, Lieutenant-Governor or other person administering the government for the time being, under the royal commission and instructions. [Vol. 1, pages 91, 94.] He exercises within this province, all the powers and jurisdiction belonging to the lord high chancellor of England, at common law; and also possesses under his instructions the specially delegated powers of the lord chancellor, with respect to the custody of idiots, lunatics, &c. The office being held in conjunction with that of governor, no distinct salary has been appointed for it, but there are certain fees established for the chancellor, the masters in chancery, registrar, counsellors and solicitors of the court, by act of 1820, 1821, 1 & 2. G. 4, c. 40, 3 P. L. 119, 120. which will be particularized in another place.

In England the chancellor sits alone as the chief judge of the court, he is styled the lord high chancellor of Great Britain. He is invested with his office by the delivery to him (by his majesty) of the great seal and by taking his oath; which proceeding is recorded in the court. He is a privy counsellor *ex officio*. He is removable at the pleasure of the crown. The redelivery or resumption of the great seal determines his office. Sometimes, on a vacancy, the powers of lord high chancellor are exercised by commissioners, by English statute, 1 W. & M. c. 21. In his absence or illness, the duties may be performed by one judge and two masters under a commission. The chancellor is free to call to his assistance any of the judges; and as in this province the government has been usually held by a military man, some of the judges of the supreme court are in most cases called in. The chancellor is also at common law, a conservator of the peace, and may award precepts and take recognizances of the peace.

The master of the rolls is, in England, appointed by the crown by patent, to hold his office for life. "He administers justice by himself in a separate court, called "the Rolls. He has the power of hearing and determining originally the same matters as the lord chancellor, "excepting cases in lunacy and bankruptcy."—1 Newland's Chancery Pr. 34. The master of the rolls or any other judge who pronounces a decree in this court, must sign it, and the chancellor's signature also be added to every order and decree before it can be enrolled.—1 Newland Ch. Pr. 4, 378. In 1826, a master of the rolls having been appointed by his Majesty, the provincial act of 7 G. 4, c. 11. 3 P. L. 258, established (sec. 1.) an annual salary for him of £600 currency. Sec. 2, directed that he should not receive any fees or emoluments beyond his salary.

The masters in chancery are, in England, appointed by the chancellor and hold their offices for life. The governor being chancellor appoints them in this province. It

is their duty to execute the orders of the court, upon references made to them. The questions referred to them are often of the greatest importance to the parties, such as the investigation and settlement of accounts, inquiries and decisions on the claims of contending parties, &c. Indeed a very great proportion of the judicial business in this court is managed by the masters, on whose reports important transactions of money and property are often settled.—See 1 Newland's Ch. Pr. 6 to 10. The masters have no salary appointed in this province, receiving only fees for such services as they perform.

The register (or registrar) attends the court when sitting, takes minutes of the directions given, arranges them, and draws the decrees and orders. He also furnishes parties with copies of proceeding in the court. He files and takes charge of the papers and records. In Nova Scotia, he takes charge of monies paid into the court. He receives no salary but is paid by fees. He receives the chancellor's fees, and accounts to him for them without any charge for so doing, by the act, 1820, 1821, 1 and 2 G. 4, c. 40, s. 2, 3 P. L. 120.

There are in England a great variety of other officers connected with the court of chancery, but the foregoing (with the counsel and solicitors, who correspond with the barristers and attornies of the common law courts) are the only officers of the provincial court of chancery. The sheriffs execute certain writs issuing from this court. The act of the province, 1820, 1821, 1 & 2 G. 4, c. 40, sec. 5, 3 P. L. 120, directs "that no master or other officer of the said court, shall hold more than one office in "the said court."

The provincial chancery is not held at stated times, but when a cause is ready for hearing or other matters require the chancellor's personal presence, a day is appointed at the request of the party in the cause who wishes to expedite the proceedings. The master of the rolls holds his court every monday regularly.

The chancellor has in England a jurisdiction to proceed according to the common law rules and forms in certain cases. Such are *scire facias* to repeal the king's patent, petitions of right.—(See 4 Inst. 79, 8 Co. 404,) but this jurisdiction is said to be nearly obsolete in England.—1 Maddock's Ch. 5,) and has not been in any way introduced in this province that I am aware of. The original writs by which cases are commenced in England in other courts are issued from the court of chancery, but in this province each court issues it's own.—See 1 Maddock's Ch. 5 to 22, 3 B. C. 48.

Equity and justice being synonimous terms, one would at first suppose that the Court of Chancery, being called a court of Equity, was authorized to distribute justice more accurately or impartially than the tribunals which proceed according to common law. This is however, not a correct notion, See 3 B. C. 429 to 437. The chancellors of England many centuries ago were ecclesiastics, well skilled in the civil and canon law, and conceiving the rules of proceeding and principles of decision, in use in those early days in the common law courts, to be so narrow and strict, as to preclude parties from obtaining justice, they undertook to redress the evil by passing decrees much conformable to the civil law, and justified this course as being necessary for the ends of justice, and agreeable to equity and conscience. In those days there was much clashing of contending jurisdictions, and the strife between the chancery and the common law courts, was kept alive down to the time of Lord Coke, 1616—see 3 B. C. 50 to 58. The clergy were formerly interested in extending the chancellor's equity jurisdiction, in order to give effect to trusts made for the use of the church. The English is perhaps the only system of jurisprudence, in which certain rules of decision prevail in one court that are disregarded in the trial of causes in others. It is true that the Roman law had its equity principles as well as

our own. These under certain circumstances mitigated the strict letter of the law, and adjusted the rights of parties according to principles of justice, without adhering to the literal terms of contracts, &c. and in matters connected with trust estates a particular judge was appointed by Augustus under the title of *Praetor Fidei Commissarius*, i. e. judge of trust estates.—Inst. l. 2, t. 23, s. 1. But the judges were authorized to administer the rules of equity as well as those of law, in the other Roman courts, in such causes as came regularly before them. The appointment of different courts to try and decide different classes of causes, is both reasonable and obvious, when the quantity of business justifies it; but it is an anomaly for which I do not remember to have met with any argument, to give different rules of interpretation and different principles to guide different courts. This anomaly exists in the chancery system, and it produces much practical evil. A person, for instance, having a just right to enforce, or a just defence to set up, in whichever court he begins, whether the chancery or supreme court, may find out that he has mistaken his court, and must begin his proceedings again, with the loss of the costs of a suit, and of time misspent in litigation. This is but one way in which the inconvenience of the system is felt.

The questions arising out of trust estates, those between co-proprietors, and partners, and those concerning the settlement of intestate and insolvent estates, questions of marriage and divorce, and of escheat,—if combined would form a jurisdiction sufficiently extensive for a tribunal to supersede the chancery. I have classified those upon this principle, that they all embrace causes in which the rights and claims of several parties connected with each other in interest are involved, and as they are wholly, or in part entangled with trusts and confidences express or implied. All other jurisdiction might be exercised by the supreme court, common pleas or justices of

peace. Very much of the business which is forced into the court of chancery by the strictness of common law forms, might be expeditiously and well managed in the ordinary courts, were they authorized to refer an account to a proper officer to adjust it, to examine either party under oath, &c. The expences and delay of foreclosing mortgages, might be almost entirely got rid of, as there can be nothing more necessary in such cases than a notice of sale, and the attendance of a judicial person at the sale to see that it is made fairly, unless there be some disputed fact between the giver and the holder of the mortgage. The rules of equity should be considered as forming part of the same code with the rules of law, and both be equally adopted and administered in every court. Any one who will deliberately read through the long, unmeaning, but expensive forms of bills and answers in chancery, and the absurd and unnecessary processes of contempt, as they are called, must be blinded by a reverence for antiquity, if he does not think them unreasonable. Those who are (as clients) made acquainted with the dilatory and unsatisfactory progress of any business which goes into chancery, will feel convinced that there is something wrong in a system productive of such results. I have touched upon changes of an extensive nature, because I have reason to think that some alterations of importance are wished for, by gentlemen whose long professional experience and high station in the courts, and at the bar of this province, render them the most competent judges of the extent of the evils arising from the present system. The Court of Chancery in England has become a national grievance from its expense and delay, and some of the colonies, and many of the United States have no court of Chancery, being disposed rather to submit to many of the strict rules of the common law in ordinary cases, and in important questions to resort to legislative acts.

BOOK IV.

CHAPTER II.

SUBJECTS OF EQUITY JURISDICTION.

1. *Loss of documents.*—Where the instrument on which a *title* is founded, is lost, a court of equity will supply the defect.—Stokoe v. Robinson, 3 Ves. & Bea. 54. So where a *bond* is lost a remedy is given in equity, but not on a lost *note*, as the common law remedy was sufficient. (At common law in modern times, a bond being lost, it's production is dispensed with.)—1 Maddock's Ch. 25. On the same principle, where there has been a long and uninterrupted possession, although the title may be defective in point of form, equity will supply the defects by presuming a grant, &c.—ibid. 28.

2. *Confusion of boundaries, by tenants.*—Where a tenant has confounded the property of the landlord with his own, by changing fences or marks, a suit in equity lies against him to adjust the lines, and a commission may be issued if necessary to ascertain them. ibidem. 29, 30, 31.

3. *Penalties and forfeitures in contracts.*—In all cases where a condition has been broken, or a penalty or forfeiture incurred under the terms of any agreement or deed,

equity will relieve the party from its effects, if there can be a compensation made to the other. If, for instance, a *bond* be given for paying a sum of money by a certain day under a penalty, equity will relieve* on payment of principal, interest, and expences, and so in the case of a *mortgage*, where the money secured not being paid at the time appointed, the estate of the mortgagee has become absolute at law, equity will decree the mortgage to be released on payment of principal, interest, and expenses, and in our provincial practice, the land is usually sold under the direction of the court, and after the creditor receives his due, the overplus belongs to the mortgagor. The equitable relief against penalties for the breach of conditions, does not extend to cases where the thing covenanted to be performed cannot be done afterwards, or a compensation made for it.

If the court cannot put the other party in as good a condition as he would be in, if the agreement had been performed, relief will not be given against penalties. 3. *Covenants.*—As to covenants at law, it is required that they should be strictly and literally performed; but in *equity*, it is sufficient if they be really and substantially performed, according to the true intention of parties, and if accidents of an unavoidable kind, fraud or surprize prevent the strict performance, (without wilful neglect or misconduct of the party bound) a court of equity will relieve on compensation being made.—1 Maddock's, Ch. 34, 35. Eaton v. Lyon, 3 Ves. 692-3. Rolfe vs. Harris, 2 Price 200. Relief is extended to *tenants* against conditions of *reentry* for non-payment of *rent*, &c. but wherever there is a *wilful breach* of covenant, equity will not relieve. 1 Maddock's Ch. 37.–If tenant covenants to repair, except in case

* By the prov. act of 1768, 8 G. 3, c. 10, 1 P. L. 144, 145, taken in part from the English act, 4 & 5 Ann, c. 16, s. 12 & 13. the courts of common law are fully authorized to relieve against the penalties in bonds and agreements.

of *fire*, he cannot be relieved in equity from paying the rent, though the premises are destroyed by fire. ibid. 38. *Liquidated damages* are not considered in the light of penalties, and are not relieved against. ibid. 39. *Conditions precedent* must in general be performed, as equity will never *vest* an estate, where by reason of a condition precedent it will not vest in law. ibid. 41. 4. *Defects in conveyances.* Where a deed is made on *good* consideration, or made in favor of a wife or child, equity will supply a defect in the execution, and a defective instrument will not only be made good against the party, but also against his assignees or representatives. It is a general principle in construing deeds, that where the owner of an estate has expressed a clear intention to dispose of it, and he mistakes the mode of doing so, the informality will be overlooked. ibid. 49—52. As to *powers*, where the intention to execute them is clear, equity will supply the defective execution. ib. 55.—5. *Marriage Settlement.* If articles be executed before marriage, and a settlement made, which purports to carry the articles into effect, but does not, equity will, even after a length of time, rectify the errors in the settlement, so as to give effect to the articles entered into before the marriage. ibid. 61, 63.

6. *Joint bonds.*—A court of equity will sometimes treat these as joint and several, where circumstances shew it to be proper, and in some cases will treat a *partnership debt* as that of each partner severally, but this is done where the original contract was several, and the security made joint through mistake. ibid. 72, 73, 74.

7. *Mistake.*—Agreements relating to real or personal estate will in general be set aside in equity, if founded in mistake, but if a cause be compromised—a deed made to establish the peace of a family, or the rights of a purchaser for valuable consideration may be affected, this relief has been refused. ibid. 74, 75. Long acquiescence in an error, where both parties were unaware of it, will cure

such an error. ibid. 76. A *judgment* will be relieved against, if the party afterwards find a receipt which would have met the demand, or if the party admit in his answer, facts that shew he ought not to have recovered at law. ibid. 77, 78. Mistakes in awards have been rectified, and even extrinsic evidence allowed to explain them, Knox v. Symmonds, 1 Ves. jun. 370. So mistakes in settled accounts, and in legacies and wills, are often relieved in equity. 1 Maddock's, Ch. 80.

8. *Accounts.*—Where there are mutual demands, a series of debts and of credits, between a *tradesman and customer*, a bill in equity may be filed for an account. So if there be complicated accounts between *landlord and tenant*, and the landlord seeks to enforce his legal rights, the tenant may file a bill for an account. So *mines* and *timber* are made the subject of account in equity. A *factor* is liable to account in equity to his principal. ibid 85—88. So an account of rents and profits of an *equitable* estate is given in equity which is analogous to the suit at law for *mesne* profits. ib. 90. *Partners* are liable to account to each other in equity, as a court of law cannot give relief except on a settled and acknowledged balance between them, and societies and joint stock companies are subject to this rule. Equity will dissolve a partnership when the conduct of partners renders the purposes of their association nugatory. 2 Ves, & Bea. 299. Lunacy of a partner has been thought a ground of dissolution in some cases. 1 Cox, 107, 2 Ves. & Bea. 303, and death of a partner dissolves a partnership for a term of years. 3 Madd. Rep. 251. In equity a stated account is allowed to carry *interest*, and such an account is not permitted to be unravelled, except in case of fraud. Although an account may have been settled, yet a party is often allowed in equity to surcharge and falsify. In which case, if either shew an omission of a credit to which he is entitled, it will be allowed him, and this is termed a surcharge. If he can shew any particular

charge to be wrong, he may do so, and this is called falsifying. The burthen of proof in such cases rests on the party making the objections, but if an account beropened generally for fraud, each party must establish the items in his own favor by evidence.—1 Maddock's Ch. 102, 103.

9. *Setting aside purchases.*—Equity will not permit a trustee to purchase from himself the trust estate or any part of it, lest he might take undue advantage of the parties whose interests he is appointed to protect. This principle was recognized here recently in the case of King v. Lawson, by the Chancellor's decree. The rule extends to all persons holding any situation respecting property, in which confidence is reposed in them. Thus the *solicitor of a trustee*, the *committee*, or the *keeper* of a lunatic,—an *executor*, the *governor of a charity*—are all excluded from buying the estate under their supervision. So a mortgagee cannot buy the fee simple from the mortgagor, though he may buy the mortgaged premises on sale before the master, under a decree. Although property be sold publicly at auction, yet the rule excluding trustees and persons similarly circumstanced from purchasing is applied in equity. —1 Maddock's Ch. 110, 111. If however, a trustee purchase from *cestui que trust*, or equitable owner, and he can shew that no fraud, concealment or advantage was made use of, the sale will be supported. Trustees empowered to sell for an infant's benefit, may file a bill for carrying the trust into effect, and on a sale under direction of the court become purchasers, by giving the highest price. It does not appear that an auctioneer can buy property which he is entrusted to sell.—ibid. 113.

An *attorney* is excluded from purchasing any thing involved in a litigation, wherein he is professionally employed. If employed as agent to purchase for another, he is not at liberty to buy for himself. In all these cases the property is again to be sold, at the risk of him who purchased improperly. Remissness and acquiescence will

weaken the claim to be relieved against such sales.—1 Madd. Ch. 114. An attorney cannot support a purchase of the property in his management from his client, unless he can shew that he paid for it the full amount, that could have been obtained from any other person.—ibid. 115. Purchases from *expectant heirs* are viewed with suspicion in equity, and the buyer is in such cases obliged to shew that the sale was fair, otherwise it is liable to be set aside. Although inadequacy of consideration, between persons on an equal footing, does not vitiate a sale unless it be so great as to be evidence of fraud, yet in the case of expectant heirs, any substantial inadequacy vacates the sale, and the purchaser will be treated as a mortgagee entitled to his principal, interest, and expences only. In most of those cases the parents and friends of the heir are imposed on by the secrecy of the purchase.—ibid. 117—120. Where a reversionary interest is sold by *auction*, the rule is different, and the purchaser is not bound to shew that he has given the full value.—ibid. 120. A *guardian* is not suffered to take a deed of gift from his ward at the time of settling with him, nor is he at liberty to purchase an incumbrance on the ward's estate for his own benefit.—ibid. 123, 125.

10. *Waste.*—A suit in equity may be brought and an injunction obtained to stay waste, and this may be even on a threat to commit waste; but unless some act be done or threat made, the mere apprehension of the party is not sufficient ground to proceed on. This equity jurisdiction has in practice superseded the common law remedies to prevent waste. The injunction may be obtained by the person having the next immediate vested estate of inheritance. Those who have contingent and executory estates are also entitled to an injunction, to restrain a tenant by curtesy, in dower, guardian, or jointress tenant for life, or against a trustee possessed of the legal estate to restrain waste in pulling down buildings, digging mines or

felling timber.—ibid. 138, 141. A tenant for life may be restrained from destroying trees planted for ornament.—ibid. 143. Injunctions of this nature are not granted against tenant in tail.—ibid. 146. Injunctions may be obtained between tenants in common, against malicious destruction. On a suit in equity of this kind, if waste has been committed before the injunction, the court will decree an account, and satisfaction for what has passed.—ibid. 148, 149.

11. *Sale of books.*—Where the copyright of an author is invaded, the courts of equity grant injunctions against those who publish, to restrain them from proceeding. 12. *Nusances.* Injunctions are granted to restrain nusances. ibid. 155. 13. *To stay proceedings at law.* Injunctions are often granted against a person who is availing himself of his legal claims contrary to the principles of equity, and they may be obtained at different stages of the cause, and if a discovery be required in order to aid a defence at law, an injunction may be obtained to stay the trial. An injunction to stay execution is never granted, except under particular circumstances—the party applying being considered to have forfeited his claim to redress, by his remissness in not applying for it in an earlier stage of the cause. ibid. 130, 157. 14. *Tenants.* An injunction may be obtained against tenants, to restrain them from breaking the covenants in their leases. 15. *Negociable paper.*—Injunctions are in some cases granted in equity to restrain a party from negociating bills or securities improperly. ibid. 154, 160, as where they have been obtained by fraud, or in case of partners acting against equity. 16. *Possession of property or money.*—Parties attempting to obtain possession of assets irregularly, or about to receive money contrary to equity, may in some cases be restrained by injunction. ibid. 160, 161. 17. *Ships.* Where shares are not ascertained a party may obtain an injunction, to prevent a ship from sailing till it is done. If the shares are ascertained

the remedy of part owner is in the admiralty court. ibid. 163, 164.

18. *Perpetual injunctions.*—Where the rights of a party are liable to be controverted by various persons, at different times, and by different actions, he may proceed by what is called a bill of peace in equity, to obtain a perpetual injunction to fix his rights, and end litigation, So, where the same question has been repeatedly tried in ejectment, equity will enjoin against further strife. ibid. 166, 173.

19.—*Bill of interpleader.*—Where a party has opposite claims made on him for the same money or property, and he does not know which is correct, he may apply to a court of equity for directions, for his own security. Thus a tenant called on at the same time to pay rent to the mortgagor and mortgagee, may seek this remedy. If this suit be properly brought, the party bringing it will be entitled to be paid his costs—ibid. 181.

20. *Perpetuating testimony.*—When the testimony of witnesses is in danger of being lost, before the matter to which it relates can be made the subject of judicial proceedings, —a court of equity will interpose in favor of a possessor or of a claimant out of possession, to secure their evidence to be used afterwards in a trial at law. In these cases the applicant is to pay the costs produced by his own bill.—ibid. 195.

21. *Discovery.*—A bill may be filed to compel a person to answer on oath, in order that his admissions may be used in a trial at law, although no other relief be prayed for in the bill. Any person in possession of property may file a bill of discovery, against those who claim the estate from him in ejectment. ibid. 206. No person is bound in answering any bill, to make a discovery that may subject him to prosecution for felony, or otherwise to criminate himself, or subject himself to a penalty or forfeiture.

id. 214. A discovery bill if abated cannot be revived.—ibid. 218.

22. *Security.*—Legatees, annuitants, mortgagees, &c. are allowed in equity to require that personal property in the hands of executors, on which they have a claim or demand certain in it's nature, but payable at a future time, should be secured for their benefit. On the same principle, if an executor be insolvent, a court of equity will appoint a receiver to take charge of the funds of the estate, and restrain persons from paying money to the insolvent executor.* When suits are pending in a court of equity, where the property of infants is concerned, the affairs of a partnership in dispute, or an executor appears to be wasting the effects of the estate, the court appoints a receiver. The same course is adopted in some other instances, but the court interposes with great caution in appointing a receiver of the rents and profits of land against the legal title. —1 Maddock's, Ch. 218, 225, 1 Newland, Ch. Pr. 206, 207.

23. *Delivery of deeds or chattels.*—On similar grounds, deeds that are void, or any deeds or instruments that are unjustly detained, or which may be made use of unjustly to cause vexation or mischief to a party, will in equity be decreed to be delivered up or properly secured. So a bill in equity will lie for the delivering up of specific chattels, such e. g. as heir looms—articles esteemed for their antiquity or workmanship; as in *trover*, the value only is recoverable, and in *detinue*, the judgment is for the chattel or the value.—1 Maddock's Ch. 229, 232.

24. *Contribution.*—A surety may in equity compel his co-surety to contribute, towards payment of a debt for which they were jointly bound.—ibid. 234. If several

* A bill will lie for an account of personal estate and a receiver, pending a litigation in another court for probate, and a bill will lie to prevent a tenant from committing waste, while the title of land is in litigation. 1 Maddock's Ch. 253.

sureties are bound by different instruments, but for the same principal and the same engagement, they must contribute. Deering, v. E. of Winchilsea, 2 Bos. & Pull. 270. When in an action *ex delicto*, entire damages are given at law against several wrongdoers, a court of equity will not interfere to enforce contribution amongst them. 18 Ves. 116, 117. Contribution may be enforced in equity among partners of a ship pledged abroad by the master for expenses. 1 Ves. 443. and in cases of general average for goods thrown overboard, contribution may be enforced either at law or in equity. 1 Maddock's Ch. 237, Abbott 373. So where a rent charge is granted on an estate, which is afterwards sold in different lots, the grantee of rent may be restrained in equity from levying the whole on one of the purchasers, in order that all may be obliged to contribute. So contribution may be enforced in equity between tenant for life and the reversioner, as to incumbrances, the interest of which the tenant for life is bound to pay out of the rents and profits, while the principal is to be borne by the whole estate. Saville vs. Saville. 2 Atk 463. Tenant for life is to pay off, out of the rents, interest accrued pr[illegible] as well as subsequent to the commencement of his estate. 5 Ves. 106, 7. If he pays off an incumbrance, he is not presumed to have intended to exonerate the estate, although he takes no assignment from the creditor. Tenant in tail, unless he be an infant, is not bound to keep down interest on a mortgage. Bedington v. Bedington. 1 Ball & Bea. 140, 143. Chaplin v. Chaplin, 3 P. Wms. 235, Amesbury v. Browne, 1 Ves. 478, 480.

25. *Dower.*—As impediments may arise to a widow's recovery of dower at common law, owing to the legal estate being in a mortgagee or trustee, or other causes, equity allows her by bill to seek her dower, and in England this practice has almost superseded writs of dower. 1 Maddock, ch. 242. As no costs are there given by law upon a writ of dower, so it is not usual to allow them in

chancery, but as our statute of 1787, 28 G 3, c. 15, s. 2, 1 P. L. 262, gives costs in all actions, costs would seem due on a bill for dower, as equity always follows the law. 26. *Partition.*—A bill in equity for partition is esteemed more convenient than a suit at law, in some respects. If, however, the parties are not competent to execute conveyances, the partition cannot be effectually made in equity. 1 Maddock, ch. 245, 250. 27. *Marshalling securities.*—If a party has two funds by which his debt is secured, a person interested in one of them only, has a right in equity to compel the former to resort to the other fund, if that is necessary for satisfying both. See the subject fully elucidated. Aldrich v. Cooper and others. 8 Ves. 388, 395.

28. *Fraud.*—Courts of equity do not exercise a criminal jurisdiction in cases of fraud, but give redress in civil transactions, where artifice, deception or imposition have been practised. In cases of fraud the party committing is not alone liable, for relief will be granted against his representatives.—Garth v. Cotton, 3 Atk. 758. Length of time is no bar to relief in these cases, unless it can be used to shew acquiescence.—1 Maddock's Ch. 255, 257. In all cases of fraud not penal, a court of equity has a concurrent jurisdiction with the courts of law.—ibid. 258. Fraud in obtaining a will is an exception, the courts of law only having authority as to devises of real estate, and the spiritual courts (for which our court of probates is substituted in this province,) having exclusive power as to wills of personal estate.—ibidem. 258. Every question respecting the execution and validity of a will, under which any legal or equitable estate in land is claimed, is properly and only triable at law.—Bates v. Graves. 2 Ves. jun. 288.

It is the rule in equity as well as in law, that fraud is never to be presumed. If the principal in a fraud be released, the parties who would have been secondarily liable cannot be proceeded against in equity. If a deed be impeached, it cannot be supported in equity by proof of

a consideration wholly different from that alleged in it.—A deed cannot be set aside *in part* for fraud,—if obtained by fraud, it will be wholly set aside, though innocent persons are interested in it. Solemn instruments are not to be set aside on slight grounds. Instruments, obtained from parties ignorant of their rights, have been set aside, even although no imposition was practised, but if the party obtaining them avails himself of their ignorance, there will be ample ground for relief in equity. If a party upon a treaty for any contract makes an untrue representation, whether knowingly or not, by means of which the other party is misled in the terms of the contract, it is equivalent to fraud, and relief will be granted in equity. Suppressing the truth is regarded in the same way. For instance, if one build on another's land in a mistake, the owner of the ground seeing the erection and not putting the party on his guard, is considered in equity as committing a fraud and relief will be granted. In many other cases a person standing by, and by silence contributing to a fraud, is compellable in equity to remedy the mischief his fraudulent concealment has occasioned, as in the case of concealment of incumbrances, entails, mortgages, &c. —1 Maddock's Ch. 261 to 265. Letters patent obtained by fraud may be set aside in equity, at the suit of the attorney-general.—Atty.-general v. Vernon. 1 Vernon 277, 370. Gross inadequacy of price, such as shocks the conscience, is sufficient to invalidate a conveyance on the ground of fraud.—Coles v. Trecothick. 9 Ves. 246. The rule as to purchases from expectant heirs has been already mentioned. Wherever a person taking advantage of the necessities of another practises extortion, equity will relieve.—Thornhill v. Evans. 2 Atk. 330.

Deeds made by parties fully apprized of their rights in order to put an end to a suit, will not be set aside for inadequacy of consideration, nor will marriage settlements though very unequal and in favor of the wife, because the

parties cannot be placed *in statu quo*. Voluntary conveyances are often set aside in equity under the stat. 27 Eliz. c. 4, in favor of purchasers for valuable consideration, and although the purchaser had notice. This rule frequently defeats the intention of family settlements made after marriage, if not grounded on articles entered into before marriage. A voluntary settlement in favor of a child is good against subsequent creditors. 1 Maddock's Ch. 271, 273. A settlement made on the intended wife before marriage will be valid against creditors, although the husband was in debt at the time and she knew his circumstances and brought him no portion. Brown v. Jones. 1 Atk. 190. A voluntary settlement is in all cases binding on the party who makes it, unless it include a power of revocation.—1 Maddock's Ch. 280.

Weakness of mind alone is not a ground for setting aside a deed, but if any the least fraud be practised on a weak person, equity will relieve.—ibidem 283. Underhand agreements injurious to third parties, may be set aside for fraud.—ibid. 284, to 295. In the case of a single woman, a settlement made by her secretly in trust for herself will not be binding on the husband.—Draper's case, 2 Freeman, 29, 30, Pitt v. Hunt, 1 Vern, 18. Bonds from women obliging them to marry, or not to marry, have been set aside in equity.—See 2 Vern. 102, 215. Awards fraudulently obtained may be set aside in equity.—Maddock's Ch. 295, to 298. So may insurances and releases.—ibid. So equity will relieve against a verdict, a judgment, or a decree in equity, an order in lunacy, a probate, or a judicial sale, if obtained by fraud. ibid. 300, 301. A contract or instrument made by a man who is intoxicated, will in some cases be relieved against in equity, especially if the other party contributed to make him drunk, but the English law hardly gave any redress in such cases, until very recently, although the principle has been fully adopted in the civil and the Scotch law.—ibid. 301 to 304, Bull, N. P.

172. Ersk. Inst. 447. Pothier, P. 1, Ch. 1, s. 1, art. 4. A deed obtained by undue influence will be set aside in equity, as where a parent abuses his authority over his child, or any person having another under his authority, employs threats or ill treatment for the purpose.—1 Maddox Ch. 309. If in a sale at auction, a person is employed not merely to prevent a sale at an under value, but to take advantage of the eagerness of bidders to screw up the price, the sale will be considered fraudulent.—Smith v. Clarke, 12 Ves. 483. If a person having notice of an unregistered conveyance, obtains a registered one, equity will relieve. Forbes v. Denniston, 2 Bro. P. C. 425. Bushell v. Bushell, 1 Sch. & Lef. 100, 1 Maddock's Ch. 328.

29. *Infants.*—The authority of the king as *pater patriae*, father of his country, extends to the care, not the guardianship of infants, and this is delegated to the court of chancery, but it does not exercise any control over them unless they are *wards* of *court*, which they become on a bill being filed on their behalf. 1 Maddock's, Ch. 332. Chancery has removed a child from the control of a father in constant habits of drunkenness and blasphemy—(in a recent case, on account of the father's irreligious and immoral principles and conversation), in case of gross ill-treatment, &c. ibid. 332. The court has also interfered, to prevent the father from taking his child out of the jurisdiction of chancery. ibid. 333. The court in England exercises a large control over the management of the education, property, and even the marriage of it's infant wards, superintending the guardians, and acting as guardian in many respects. ib. 333 to 356.

Infant trustees or mortgagees, are by the English act 7 Ann, c. 19, empowered to convey under direction of the court of Chancery the estates they hold in trust or mortgage. This act has been construed to apply to lands in Ireland, and in the East and West Indies. Evelyn v. Forster, 8 Ves. 96. Ex parte Anderson, 5 Ves. 242, 2 Bro. C.

C. 325. As the Colonies are not mentioned in the act, it may be a question whether a colonial court of Chancery could exercise this authority.

30. *Specific performance of agreements.*—If a contract has been entered into by competent parties, and is unobjectionable in its nature and circumstances, equity will decree a specific performance of it.—Hall v. Warren, 9 Ves. 608. There are instances were equity will relieve, although no action for damages could be sustained at law. As where a vendor dies before the deeds are executed, the heir is bound in equity to convey, though an action at law will not lie against him. In a contract for the purchase of land—from the time of the contract, the vendor is considered in equity only as a trustee for the purchaser, and in like manner the purchase money is considered in equity to be held in trust by the vendee for the vendor. The estate is looked on as the real property of the purchaser, and as vendible, chargeable, and devisable by him.—1 Maddock's Ch. 364. A contract to sell land operates in equity as a revocation of a will of the same estate.—19 Ves. 178. Money articled or directed to be laid out in land is considered in equity as land, and has all the incidents of real estate, except dower.—1 Maddock's Ch. 365. After the time appointed by an agreement for payment of the purchase money, the risk and the benefit of the real estate belong to the purchaser.—ibid. 367. The death of either party will not affect such a contract, and the heir of the purchaser may insist on it's completion. The general rule of equity, is that what is contracted to be done for a valuable consideration is, considered as done.—ibid. 370. In enforcing such agreements, equity will adhere to the statute of frauds, and to other *legal* rules as to the forms of contracts, competency of parties, and certainty of intent. ibid. 372. Therefore, verbal bargains respecting the sale of lands not reduced to writing, cannot be the subject of this jurisdiction, unless where they have been partly performed.—ibid. 377, 381.

Articles of separation between husband and wife are not enforced in equity, unless where trustees or other third parties intervene.—ibid. 387. The wife is not held to be bound by them, and they are put an end to by a reconciliation.—ibid. 388.

Partition made by agreement of parties competent and carried into effect, will be established in equity although no formal instruments have been executed.—ibid. 389. Covenants which run with the land may be enforced in equity against or for successive owners.—If one agree to sell land which he has not, but after acquires, he will be bound to fulfil his contract.—ibid. The specific performance of an award, directing any thing to be done respecting lands, may be enforced in equity,—but not so as regards money.—ibid. 401. Contracts respecting chattles or moveables will not in general be specifically enforced in equity, the action at law for damages being esteemed a sufficient remedy, but there have been cases of extensive contracts where damages would be an inadequate relief, in which equity has decreed performance *in specie*.—ibid. 403. A person claiming the aid of a court of equity must, it is said, come with clean hands,—free from unfairness, imposition, or undue advantage taken on his part, and claiming only that which in honesty and honor he is entitled to.—ibid. 405. Agreements are more readily enforced in family arrangements than between strangers.—ibid. 409. The *insolvency* of a party is considered in equity an objection to the agreement for a lease being carried into effect.—ibid. 421. The purchaser of a fee simple under an agreement, is entitled in equity to have usual covenants in his deed, and to have a clear *legal* title, commencing, by the rule in England, sixty years before the time of purchase.—ibid. 427, 430. If a purchaser delay payment beyond the time fixed for it, he is chargeable with interest, and generally he is liable to interest from the time of taking possession. This inter-

est is rated at 4 per cent. in England.—ibid. 441, 442. A purchaser under a decree in Chancery is bound to see that all proper parties to be bound are before the court.—ibid. 444.

31. *Trusts.*—Every *cestui que trust* is entitled to the aid of a court of equity, to avail himself of the benefit of the trust. Between him and his trustee (except a trustee by implication only,) the statute of limitations does not apply.—ibid. 446. The *cestui que trust* has in general the same power over the estate that the *legal* owner would have, and it has similar liabilities except as to dower. He may alien it.—ibid. 453. A judgment against the trustee will not in equity charge the estate, nor can the widow of a trustee claim dower in it.—ibid. 456. If a legal and equitable estate unite in one person, the equitable estate merges in the legal.—ibid. 457. If a legacy be left to a married woman 'for her separate use,' or 'for her maintenance,' or 'her receipt to be a sufficient discharge to the executors' the husband will be a trustee only, for her benefit.—ibid. 471. A married woman may bind her separate property by note, bond, or conveyance, or devise it by will as if she were single, and equity will carry such acts into effect.—ibid. 474. But she will not be *personally* responsible. Chancery will not aid a husband in getting possession of his wife's fortune, without first making a suitable provision for her.—ibid. 482. see 3 Atk. 400, and also for the children.—13 Ves. 6. 1 Maddock's Ch. 487.

32. *Mortgages.*—A mortgage is, in form, an absolute conveyance of a property with a condition or proviso, that it shall be annulled, if the mortgagor pay to the mortgagee a certain sum by an appointed day. If the money be not paid according to the condition, the interest of the mortgagee becomes absolute at law, in the premises. Equity however, considers the mortgage as a pledge only for the money lent. It will relieve against the legal forfeiture, on satisfaction being made for the principal, interest and ex-

penses. It treats the estate of the mortgagee of lands merely as a chattel interest, and views him as a trustee for the mortgagor. Patch on Mortgages 6. 1 Maddock's Ch. 512. After the condition is forfeited, the estate of the mortgagor is termed his equity of redemption, and this is considered as an estate in the land and may be devised, sold and treated in the same manner, and has the same incidents as other estates,—subject to the lien of the mortgagee,—except as respects dower. Where a woman marries a man entitled to an equity of redemption, upon a mortgage in fee previously made, she will not have a right to dower in the equitable estate of her husband.—See Co. Lit. 208. a. note 1. Patch on Mortgages 182, 183. A practice has been introduced in England, of constituting a trust for sale in the mortgage, so as to obviate the necessity of resorting to chancery for a foreclosure. The land is conveyed to the trustee, and the usual powers and covenants of a deed of trust for sale are added.—See 1 Maddock's Ch. 514, 515. Equity carefully protects the right of redemption, and will not consider as binding any agreement in a mortgage to make the estate absolute in the mortgagee, lest advantage should be taken of the necessities of borrowers. Where an absolute deed is made, and the person to whom it is made agrees by a separate writing under hand and seal (called in this province a back bond,) to reconvey on repayment within a specified time, it is considered in equity* as a redeemable mortgage. So where there is an absolute conveyance, a demand and payment of interest money will be evidence to shew it to be a

* The right to redeem in such a case can only continue, while the land is in the hands of the mortgagee or a party purchasing from him with notice of the existence of such a back bond. Therefore if the absolute deed be registered and the backbond is unrecorded, an innocent purchaser buying from the mortgagee who is apparently the owner, must be protected by our statutes of registry. At the same time the mortgagee and his representatives would be responsible under their agreement.

mortgage.—ibid. 516, 517. In what is called a Welch mortgage, there is a perpetual power of redemption contained. If the mortgagee go into possession and hold the property twenty years, it will be a bar to its being redeemed, but this will not be the effect if the mortgagor or his heir was imprisoned, *non compos*, an infant, feme covert, or out of the country, nor where the mortgagee has admitted that he held the property as a pledge and kept accounts or gives receipts for the interest, &c.—ibid. 519, 521. All persons claiming under the mortgagor are entitled to redeem. An equity of redemption is subject to crown debts, but it cannot be taken under a private execution, though the holder of the execution will be entitled to redeem. ibid. 522, 523. It has been decided that a mortgagee is not bound to take possession of the premises, as that would subject him to an account, and he may file a bill of foreclosure without taking possession. A pawnee of stock, may sell without a bill of foreclosure. ibid. 529. In this province on bill of foreclosure, a reference is made to a master to report the sum due on the mortgage, which having been ascertained, the defendant is ordered to pay into court with the costs by a day appointed. If he fail to do so, the estate is ordered to be sold at public auction by a master, for cash, to discharge the sum due and the costs. If the mortgagor is permitted to remain in possession, he is not liable to account for rents and profits to the mortgagee. If the mortgagee in possession, hold over after payment of what is due him, he will be chargeable for what he receives and for interest on it. A mortgagee who takes possession is only bound to make such repairs as are necessary, ibid. 533. If guilty of gross mismanagement of the estate, he is responsible for it; nor is he permitted to make any profit of the mortgaged property beyond his principal and interest, nor can he make charges for his personal exertions as receiver, &c. ibid. 534. Compound interest will not be allowed a mortgagee, even t ho h pro-

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vided for in the mortgage. ibid. 535. But where a mortgage is assigned, the assignee will be entitled to interest on the whole amount due at the time of the assignment. If the sum due be tendered, the mortgagee loses interest from the time of tender. A mortgagee in possession is liable to account, for what rents and profits he has received or might have received without his own wilful default. ibid. 536, 537. A mere deposit of the title deeds of an estate, as a security for an advance of money, gives an equitable lien as a mortgage and will cover subsequent advances. ibid. 537.

33. *Trust deeds for the benefit of creditors.*—Deeds and agreements for compounding debts, or for discharging them, will be enforced in equity if obtained fairly. A conveyance of land for payment of debts will be considered fraudulent, if the debtor retain the deed in his possession. In England an assignment of all the property of a trader, for the benefit of all his creditors, is rendered void under the bankrupt laws. In this province there is no obstacle to making such a transfer valid, if its terms are fair and just. ibid. 542. A trust deed has been considered valid in equity where the creditors have acted under it, although it contained a clause to make it void if they do not sign it within a certain time, and they had not executed it. ibid. 543. Where estates are conveyed or devised in trust to sell them, and apply the proceeds for any particular* purpose, a purchaser having notice of the trust is bound to attend to the application of the purchase money, unless a clause be inserted in the will or trust deed dispensing with it, and making the receipts of the trustees sufficient discharges. ibid. 545, 443, 609.

34. *Assignments of debts and securities.*—At common law a *chose in action* cannot be assigned except to the king, but

* But if lands are devised generally for the payment of debts, the purchaser is not bound to see the application of the price.

in equity it may be assigned for a consideration, even by *parol* and no particular words are necessary to make an assignment of a chose in action, by deed, valid in equity. Thus a bond, decree, judgment, policy of insurance, debt, &c. may be assigned. ibid. 545, 546. The assignee is entitled to all the remedies of the seller, but he takes it subject to all exceptions that might have been made against it while the hands of the assignor. (Bills of exchange and promissory notes, indorsed before they become due, vary from this rule, as the indorsee who has given value for them, will not be affected by any want of consideration between the previous parties, if he had no notice of it.) It is therefore judicious in taking the assignment of a mortgage, that the mortgagor should be joined as a party, as he thus will be precluded from disputing the amount declared in the assignment to be then due. ibid. 547.

35. *Express trusts created by will.*—In all cases where real estate is expressly devised in trust, or where real estate devised is in the hands of trustees, the jurisdiction of the equity courts is exclusive, and generally the chancellor has nothing to do with legal estates. The general rules by which wills are interpreted, are the same in courts of law and equity, the intention of the testator being the guide. ibid. 550, 554. Where a trust is created, but the directions for setlling the estate are incomplete, it is considered in a court of equity an *executory trust*, and the court will direct the estate to be settled and conveyed according to the apparent views of the testator, and the same rule applies to trusts created by deed as to those under a will. The law respecting executed and executory trusts contains much subtilty and confusion of ideas, and as the sentiments of Mr. Fearne, and the decisions of LordHardwicke, and Lord Mansfield, are at variance on this subject, I should be fairly excused from entering upon its details, if the plan of this work admitted of it, which it does not.—See 1 Maddocks 557, 577. Fearne on contingent remainders.

36. *Administration of assets.*—Executors and administrators, if not expressly made trustees for paying debts and legacies, and for performance of the other duties of their office, are considered in a court of equity as trustees for those purposes by implication, and the court will accordingly enforce the execution of those implied trusts. It has been even held that chancery may decree an account of an intestate's personal estate, after an account had been taken and distribution decreed in the spiritual court.—1 Maddock's Ch. 577, 580. 2 Vern. 47. By analogy it may be supposed, that a settlement in the court of probate would not bar the jurisdiction of the chancellor in this province. The personal estate is considered in equity to be first liable to discharge debts.—1 Maddock's Ch. 588. Thus on a mortgage containing a covenant for payment* although the land is security, the personal estate is first liable. ibid. 591, 592. Our provincial statutes only authorize the sale of the lands, by order of the governor and Council to pay debts and legacies, where the personal property is not sufficient. The heir at law must be made party to a suit in chancery, to carry into execution the trusts of a will directing the sale of real estate.—ibid. 604. Simple contract creditors are not entitled to interest, where lands are devised for paying debts. ibid. 611. Generally on a bond, the penalty is a limit, although the principal and interest should exceed it. ibid. 613. Interest will be allowed, on a written agreement to pay by instalments or on any note payable on a certain day, &c. ibid. 614. An executor or administrator is considered in equity, as a trustee for the parties entitled to legacies or distribution, as well as for the payment of debts.—2 Maddocks 2. Toller on executors 480. Equity considers a condition binding

* But this rule does not apply where an estate already mortgaged has descended to or was purchased by the intestate In those cases as the debt was not originally his own, his personal estate will not be first liable.—ibid. 592, 594.

a child, legatee of personal property, not to marry without consent, as a declaration *in terrorem*, and not to be enforced; but in the case of real estate such a condition is held binding.—2 Maddock's Ch. 28, 29. But even then it must not amount to a prohibition of ever marrying—Yet an annuity granted to a widow, during widowhood, will be good, so will a condition not to marry an individual named, or not to marry under 21, or any other reasonable age. ibid. 33.

37. *Devises and legacies to charitable purposes.*—A wide discretion is exercised over these trusts by the chancery. ibid. 60, &c. The statutes of mortmain not extending to the colonies, lands may be legally devised for charitable uses, as well as money may be bequeathed. Chancery exercises a power of inspection over charitable foundations, and where a charity is founded by the crown, the chancellor, (not the court of chancery) acts as visitor. ibid. 73. Corporations for charitable purposes are considered as trustees, and if they make conveyances in abuse of their trust, such instruments though good in law, are bad in equity. ibid. 75.

38. *Resulting trusts.*—There are three classes of these, first, where an estate is purchased in the name of one, but the money or consideration is given by another. In this case the nominal purchaser is considered in equity, as trustee for him who advanced the purchase money; secondly, in the case of a will where an estate is devised in trust, but the trust is declared only for part, the residue is a resulting trust in favor of the heirs at law; thirdly, in cases of actual fraud, a resulting trust may exist in favor of the party justly entitled to the property. The statute of frauds has prevented any other kinds of resulting trusts from being adopted. ibid. 112, &c.

39. *Implied trusts.*—Equity regards all persons coming into possession of trust property with notice of the trust, as trustees by implication, and holds them responsible,

with respect to that special property, to the execution of the trust. (There is an exception in the case of a *disseisor*, abator, or intruder.) ibid. 125. On this principle where a married woman obtains administration, and the goods are wasted during the coverture, and the husband dies, his assets are chargeable in equity for the waste. ibid. 126.

40. *General liabilities of trustees in equity.*—A court of equity will fix on persons who are in the situation of trustees, the consequences of a breach of trust, and extend the responsibility to their representatives, whether the latter derive any benefit from the wrong done or not, and an account in such a case will not be confined to six years, as (by analogy with the statute of limitations) it is in ordinary cases of account in equity. ibid. 131. The jurisdiction of the equity courts is exclusive as to breaches of trust, no action at law being allowed. If an executor keeps the trust money in his hands for his own use unnecessarily, he is made in England to pay 4 per cent interest on it, as for a breach of trust. ibid. 135. Neither is an executor justifiable in keeping money of the estate dead in his hands, especially if empowered to lay it out at interest. ibid. 137. If an executor wastes the estate, his executor is not liable to a suit at law, but he may be made to answer in equity. ibid. 139. A trustee joining in a receipt with a co-trustee who receives money, will be liable at law, but equity considers him alone responsible who receives the money. ibid. 141.* Trustees are not held accountable in equity for losses which happen from necessary acts, nor where they employ others, either from necessity or according to common usage. Thus if a trustee employ a banker to receive rents, and the banker fails, or is robbed, the trustee is not answerable, unless perhaps where he mixed them with his own money in one account with the banker,—*a fortiori*, a trustee is not liable in case

* But an executor joining in such a receipt will be liable.—ibid. 143.

of the testator's banker failing. If a trustee however, employ an *attorney*, he must take on himself the risk of such a confidence. ibid. 142. Executors are not justifiable in lending money on personal security, or in leaving it so, if it can be called in. ibid. 146. If a trustee or an executor buy an incumbrance or compound debts, he will be allowed no more than he really paid. ibid. 140, 151, 153. It is a rule in chancery, that if an executor, without applying to the court, does in the management of the estate what the court would have approved, he will not be forced to undo it, merely because he acted without having made such an application. ibid. 152. Trustees and executors are not allowed in equity (in England) any compensation for their personal exertions; though whatever they expend fairly will be allowed them. Allowances agreed upon for commission, &c. will be admitted. ibid. 157, 160. The practice in India is to allow executors a commission—and it is in fact generally charged by trustees and executors here, and admitted without dispute. On proper grounds a bill may be brought in chancery to remove a trustee. In case of death, &c. the court will appoint trustees. ibid. 162.

BOOK IV.

CHAPTER III.

CHANCERY PRACTICE.

1. *Bill.*—A suit in equity is commenced by filing a bill of complaint. This is in some respects, like the declaration at common law, as it sets forth the grounds of the complainant's case, in the form of a petition addressed to the chancellor. It contains much formal matter rendered necessary by usage and practice, but which might well be dispensed with. It requires the signature of a counsel as well as that of the solicitor. If criminal, impertinent, or scandalous matter be contained in it, the defendant may have it expunged.—1 Newl. Ch. Pr. 51, &c. 2 Maddock's Ch. 164 to 172. If there be an adequate remedy for the complainant at common law, or in any other court of ordinary jurisdiction, as in the admiralty, a demurrer will lie to the bill.—2 Maddock's Ch. 171.

2. *Parties.*—If on the face of the bill it appears there are not sufficient parties to it, a demurrer will lie. ibid. 173, but the bill in this case may be amended. If a feme covert (married woman) sue her husband in chancery, in respect of her separate property, it must be by some other person, who is able and willing to be responsible for costs,

called her *next friend*, (prochein ami) and her consent is necessary. But the consent of an infant (who must also sue by his *next friend)* is not required. In general the trustee and *cestui que trust* should be joined in suing in equity. Persons interested, stated in the bill to be out of the jurisdiction of the court, and proved to be so, need not be made parties, ibid. 176, 177. In a bill for *relief* all persons materially interested in the subject of the suit, should be made parties, ibid. 179. But if they are very numerous a few will be allowed to sue for the rest, but not to defend, except under a corporate privilege. One of several creditors or legatees may however sue for the interest of all, ibid. 180, 181. Persons who may become entitled in remainder or reversion in case of the failure of an existing vested estate of inheritance, need not be made parties, ibid. 183. Persons who *may* be examined as witnesses and against whom no relief is prayed, should not be made parties, and they may demur. It is the rule that no one need be made a party, against whom the plaintiff cannot obtain a decree.

If the wife be sued, the husband must be made defendant too, and she must join him in suing for a sum due her on a bond, &c. ibid. 184, 185. A foreign monarch has been made a party to a suit in the English Chancery. ibid 184. So the committee of an idiot or lunatic must be joined with him. In the English practice on bills of foreclosure, all incumbrancers previous to filing the bill must be made parties.—ibid. 188, 190, but our practice does not require a mortgagee to call into court any, who hold incumbrances executed the subsequent to the making and registering of his own mortgage. One joint tenant cannot be made defendant without the other.—Finch 82. If the crown is interested, the attorney-general should be made a party to the suit.—2 Maddock's Ch. 195. A decree protects the rights of those who are not parties to the suit, as it gives

relief on the terms that such persons are not to be prejudiced.—ibid. 196.

3. *Subpœna.*—On filing a bill, a writ of subpœna is to be sealed and signed by the registrar. This in its nature is similar to the writ of summons in the supreme court. It is in our practice made returnable in 14 days, and is dated on the day in which it is actually issued. Being directed to the defendant, it may be served by any person who can read and swear to the service. 4. *Appearance.*—On receiving the subpœna, it is not necessary for the defendant to leave his home, but he is to cause a written appearance to be entered for him by his solicitor at the return day of the writ.

5. *Process of contempt.*—If the defendant neglects to appear, it is considered as a contempt of the court, and on affidavit of service of the subpœna, an *attachment* against his person will be granted. If he is not arrested under this, then an attachment with *proclamations* issues. Next a *commission of rebellion.* Then a *sergeant at arms* may be moved for, and if he is not taken under any of these processes, a *sequestration* may be obtained on motion, by which the defendants' personal estate, and the rents and profits of his real estate may be seized. In the case of a corporation being defendant, a *distringas* is issued, instead of the attachments, &c. Under the *distringas* their goods and chattles, rents and profits may be distrained, till they obey the directions of the court. In the case of a peer being in contempt, the sequestration issues at once, without the other process, as he is privileged from arrest.—2 Maddock's Ch. 202, 205. There can be little doubt that much benefit would arise from granting the sequestration in the first instance, to enforce appearance and obedience to the orders of the court, leaving the right to a party, upon shewing special grounds, to obtain process against the person also. At present a plaintiff is much delayed and expences unnecessarily incurred, as it is not usual to

have the defendant actually taken under those writs. We have however, recently an instance of a person named Allan, who refusing to obey an order of the court, was taken under a commission of rebellion and was a long time in jail. A sequestration does not affect the land. It binds the personalty and rents from the time of awarding the commission.—ibid. 206. Sequestrators cannot sell the goods unless after a decree, as before that they are only holding to enforce appearance, &c. but if *perishable articles*, on notice and motion they will be ordered to be sold. Sequestrators may break locks.—ibid. 207. Their allowance is to be settled by a master.—ibid. 208. Process of contempt lies for neglecting to answer, or answering insufficiently.—ibid. 258.

6. *Gazette notice to appear.*—If the court is satisfied by affidavit, that the defendant is not within the province to be served with a *subpœna*, an order is made, that notice should be published in the Royal Gazette at Halifax, calling on him to appear and defend the suit. This notice is usually published for two months. If he fail to appear, the bill is then taken *pro confesso* (i. e. considered as confessed.)—[In England a similar course is followed in case of a defendant absconding to avoid the service of process, under the statute 5 G. 2 c. 25.]

7. *Motions.*—These are made in court, and, if special, require a previous notice in writing for 2 days to the opposite solicitor. Motions of course, that is, such as cannot be opposed, require no notice, but they must be made in court. The affidavit on which a motion is grounded, should in general be filed some time before, to enable the other party to obtain a copy of it. Motions are usually made in the rolls court.

8. *Injunction.*—In urgent cases an injunction will be granted on petition and affidavit, before the bill is filed. Injunctions may be granted upon special application on affidavits, after the bill is filed, or they may be granted on

the defendants answer, or on an order for time to answer, or an attachment for want of an answer. If the injunction be to restrain an act, and the defendant disobey it, a motion may be made that he stand committed. This motion requires a personal notice to the defendant,—a person may be arrested on a *sunday* on an order for commitment. —2 Maddock's Ch. 216 to 225.

9. *Ne exeat regno*.—Where a person, against whom there is a *certain* equitable money demand, intends to leave the province, and the creditor has not a legal remedy, and cannot therefore hold him to bail at common law, he may obtain a writ of *ne exeatregno* on bill and affidavit. If a bill has been before filed, he may on affidavit move to amend the bill and pray a *ne exeat* without notice of motion. The writ is directed to the sheriff. The defendant is to give bail on it to the amount sworn to, not to leave the province without the leave of the court, or else he is committed to prison. The application should be prompt. The plaintiff must swear positively to the equitable debt, and also that the defendant is going away, or has declared that he will do so. ibid. 226 to 229.

10. *Receiver*.—The power of appointing a receiver is discretionary with the court. If prayed for by the bill, it may be done, before or after answer. After decree it may be done though not prayed for in the bill. In the case of lunatics or idiots it may be done without a bill filed. In case of an infant's estate it may be done, after bill filed though not prayed for. A motion for a receiver must always be on notice. A solicitor in the cause, or a *prochein ami*, cannot be receiver. The receiver must give security by recognizance with two sureties, but if all parties interested consent the sureties will be dispensed with. He can only be discharged on special application by petition. He cannot bring or defend an ejectment without moving the court for leave. It is his duty to let the estate to the best advantage, but he must apply to the court, and he

cannot turn out tenants without an application to the master. His lease, unless agreed to or ratified by the court will not be valid. He may distrain on the tenants. He is not to repair extensively without applying to the court. ibid. 232, 246.

11. *Amending bill.*—This may be done by motion before or after appearance or answer, but it puts an end to all process for for contempt. ibid. 316. 12. If the defendant after appearance (or while in custody for contempt) will not answer, the bill will be taken *pro confesso.*

13. *Examining witnesses de bene esse.*—The English Chancery practice on this subject, corresponds nearly with the regulations of the provincial statute authorizing the examination of witnesses who are aged, infirm, unable to travel, or about to quit the province. See 3 Epit. 182.

14. *Time to answer.*—In a town cause 8 days after appearance, is allowed to put in the answer, in a country cause, the time is 30 days. On motion or petition further time is granted, in a town cause, first a months time, second motion, three weeks, third, a fortnight; in a country cause—six weeks, a month, and a fortnight; being 12 weeks in a country cause, and 9 in a town cause.

15. *Security for costs,*—A plaintiff settled abroad is bound to give this security, in the same manner as in common law proceedings. ibid. 270.

16. *Demurrer.*—This must be signed by counsel, but is not sworn to. It is like the demurrer at common law,—admits the facts charged in the bill, but denies that they afford ground for relief. ibid. 282. It must enter specially into the causes of objection. ibid. 283.

17. *Plea.*—The pleadings in equity are not as precise as at common law. A plea must be put in before answer, unless the bill be amended. It may be to the whole bill or to part. A demurrer is proper, when the objection to the bill is apparent on the face of it, but a plea or answer must be used if the objection is not so apparent. The

defence where a plea is proper, is such as reduces the cause to a particular point to bar the complainant, and which if decided for the defendant will save further proceeding. A plea may be to the jurisdiction,—to the person, or in bar. A plea to the person, is in the nature of a plea of abatement at law; such as that plaintiff is not heir, executor, &c. in which character he sues. ibid. 295 to 305. Pleas in bar to relief may be, an act of parliament, such as the statute of limitations—a record, as a former decree or a judgment—other matters may be pleaded in bar, as a release, compromise, settled accounts, &c. Some of those pleas require to be under oath.—See 2 Maddock's, 305 to 330.

18. *Answer.*—If there be no demurrer or plea, or the defendant demur or plead only to part of the allegations in the bill, an answer must be put in to the whole bill, or to the part not met by demurrer or plea. The answer must be signed by counsel, except taken before commissioners. The answer, whether taken before a master or commissioners, must be signed by the defendant and sworn to, unless by consent, when it may be without oath. A corporation answers without oath, under it's seal. An infant answers by his guardian, and a lunatic by his committee. A wife sued with her husband, must answer, though *her* answer will not be evidence against either. A defendant may demur to one part of a bill, plead to another part, disclaim as to another, and answer as to another. ibid. 331—333. A defendant may *disclaim* all right or title to the matter in demand. In such case the bill will be in general dismissed against him. ibid. 336.

If a party has a right to relief, the defendant is bound to answer every allegation, the truth of which it is necessary for the complainant to establish to entitle him to relief. Thus on a bill for an account the defendant is bound to give the best account he can. ibid. 337. If an answer is insufficient, *exceptions* may be taken to it. It may be re-

ferred to a master for impertinence, i. e. irrelevancy, or for insufficiency. ibid. 343, 344. Exceptions must be signed by counsel.

19. *Replication and rejoinder.*—A replication is the plaintiff's answer or reply to the defendant's plea or answer. If the answer admit the allegations of the bill, or so much of them as to render the examination of witnesses unnecessary, a replication is not required. ibid. 349. Rejoinders are disused, but the plaintiff after replication must serve the defendant with a *subpœna to rejoin*, unless he appear *gratis*. This puts the cause at issue and they may then proceed to examine witnesses. If there be a plea and answer, the replication must be to both. Special replications are disused. ibid. 349, 350.

20. *Concurrent remedies.*—When a party is suing in equity, he is not allowed to sue at law for the same thing, and the chancery will, after the defendant has answered, oblige the complainant to make his election, and abandon one or the other suit,—yet if he should fail at law he may file a new bill in equity. The case of a mortgagee is an exception, he being permitted to pursue his concurrent remedies at the same time. ibid. 358 to 360.

21. *Dissolving injunction.*—On an injunction obtained upon affidavit till answer or further order, the defendant, before answer, may move to dissolve it upon an affidavit in reply. Otherwise, the defendant may put in his answer, and then obtain an order *nisi* of course to dissolve the injunction, to be made absolute unless cause to the contrary be shewn by a day appointed. It may be shewn for cause against dissolving the injunction. 1. That a reference of the answer for impertinence is pending. 2. That sufficient merits are admitted by the answer to continue the injunction. 3. That the complainant has filed, or will immediately undertake to file exceptions to the answer. If the master on the exceptions report the answer sufficient, the injunction is dissolved with-

out further motion. The report in such case must be made in four days.—ibid. 362 to 365.

22. *Amendment.*—As equity pleadings are not considered with the strictness used at common law,—if facts be substantially stated, errors in form are not to be taken advantage of. If the plaintiff after plea or answer, think fit, he may obtain leave on motion, to amend his bill so as to adapt it better to the case. ibid. 368. This generally speaking should be done before the cause is set down for hearing. ibid. 373.—After it is set down a supplemental bill is necessary, if new charges are introduced or material facts are to be put at issue. A mere clerical error may be amended, even after the cause is brought on to be heard. The amending of an answer is much in the discretion of the court. Amendments are also allowed of demurrers and of pleas, where there has been a clear mistake. ibid. 373 to 384.

23. *Dismissal of bill.*—The plaintiff may at any stage of the cause before decree, apply to dismiss his bill on payment of costs. ibid. 389. The defendant before issue joined, may move to dismiss a bill (in England) if no step or proceedings take place in the cause for *three* terms. Our court of chancery not keeping fixed terms, it will perhaps be discretionary with the court, how long a delay they will permit. After issue joined, the defendant has it in his own power to expedite the cause.—ibid. 384.

24. *Production of deeds,* &c.—If the complainant establish his interest in any documents, which the defendant admits to be in his custody,—on motion, the court will direct them to be produced and shewn to the complainant. ibid. 390.

25. *Payment of money into court.*—This will be ordered, if it appear by the answer, the affidavit of defendant, or the master's report, that money is due. If an executor admits that he has a balance in his hands after payment of debts, or if he be not solvent, he will be ordered to pay

in the amount. ibid. 399. If money be not paid in, pursuant to such an order, a motion, after notice, may be made for its being paid in, within a limited time, usually a week or ten days. If the order be not complied with, a writ of execution issues on it.

26. *Compromise.*—If a suit be ended by compromise, the bill and answer will by consent, on motion, be ordered to be taken off the file. ibid. 405.

27. *Witnesses.*—When the cause is at issue, the plaintiff may sue out a commission to examine witnesses. If the plaintiff do not move for it, or is negligent in conducting it, or the defendant finds it inconvenient to join in the commission, from the distance of his witnesses abode from the plaintiffs, &c. the defendant may move for a commission. The commissioners are named by the parties. If witnesses reside abroad, a commission will be granted as in the common law courts. 1 Newland 255 to 266. 2 Maddock's Ch. 405 to 411. [If witnesses reside within 20 miles of London, no commission is necessary, but their evidence is taken by an examiner.] Witnesses are examined on written interrogatories and cross-interrogatories and the evidence is reduced to writing and signed by the witness. The commissioners, clerks, and witnesses are all sworn. A *subpœna ad testificandum*, will issue, if the witness does not attend voluntarily. If the depositions be objected to, they may be referred to a master. If he reports that the questions were leading or impertinent, the depositions will be suppressed.—1 Newland's Ch. Pr. 276. A plaintiff (under certain restrictions) may examine a defendant, but by doing so he bars himself from obtaining any decree against him, on the matters as to which he has examined him. ibid. 280.* The defendant cannot however, examine the plaintiff without his consent. Deeds, &c. may be proved *viva voce* at a

* See also Maddock's Ch. v. 2, 407.

hearing, upon an order, which is granted of course, and notice. ibid. 285.* Witnesses cannot be examined to discredit others examined, until articles of exception are put in, and leave granted by the court.—ibid. 291. *Publication* passes either by rule or consent. When this is granted, the parties may have access to, and obtain copies of the evidence, which before this is not to be disclosed. Whenever either party wishes to expedite the cause by closing the examination of witnesses, he may do so by rule to shew cause why publication should not pass.—ibid. 294.

28. *Cross bills.*—Where the person made defendant at first in the suit, brings a bill against the original complainant, concerning the subject of the first bill, or respecting the facts alleged in his answer to it, such second bill is termed a *cross bill.* It is generally used to obtain discovery of facts that rest in the knowledge of the complainant in the original bill, to assist the defence in the first cause. A cross-bill may be filed before or after answer put in to the original bill or before decree, but the first bill must be answered before an answer to the cross bill can be insisted on, unless the first bill be amended after the cross bill is filed.—2 Maddock's Ch. 429. If publication has passed in the original cause, no examination will be allowed under the cross bill. ibid. 429, 431. The same pleas, answers or demurrer, may be used to a cross bill as to an original, except pleas to the jurisdiction,—demurrers for want of equity,—or pleas to the person, except where a cross bill is brought in the name only of one incapable to sue. ibid. 434.

29. *Rules of evidence.*—These are in general the same as the courts of law. In questions of *fraud* or *trust*, however, courts of equity do not adhere to as strict rules as the courts of law, but enter more freely into the merits of a cause or the real intention of a trust. In equity, a de-

* See 2 Maddock's Ch. 427.

fendant, made so only for form sake, may be examined as a witness, and so may a trustee who is merely nominal, the rule differing in these cases from the common law practice. Many other differences may be traced in the mode of proof. No one however, is allowed to be a witness who is liable to costs in the cause.—ibid. 436, 449.

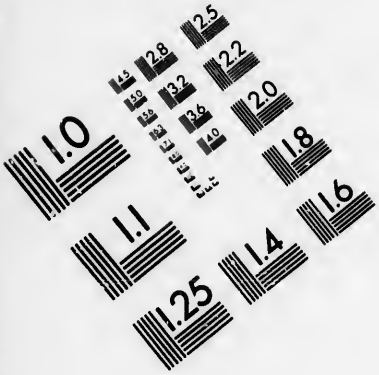
30. *Setting causes down for hearing.*—The complainant may set down his cause for hearing on bill and answer, if he think the admissions in the answer sufficient, or on publication of evidence having passed, the cause may be set down.—1 Newland's Ch. Pr. 302. If the plaintiff delay to do so, the defendant may apply to do it. ibid. 303. The cause being set down on the list for hearing, a writ of *subpœna* to hear judgment is to be served on the defendant, in a town cause ten days, in a country cause fourteen days before the day of trial.—1 Newland's Ch. Pr. 306.

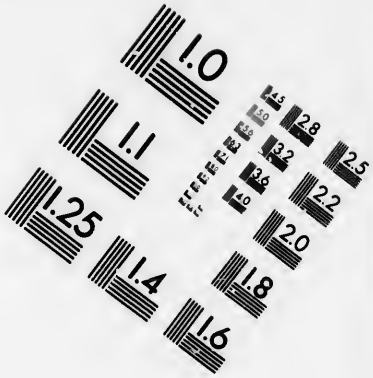
31. *Trial.*—The trial (usually called the hearing) is thus conducted. The pleadings being stated to the court, and the plaintiff's case explained and enforced by his leading counsel, the depositions (if any) of his witnesses and such parts of the answer as he may rely on are read. The junior counsel for plaintiff are then heard. Then the defendant's side is supported in the same manner, and the leading counsel of the plaintiff closes. After this the court passes its decree. (This is the regular course in England, but our practice can hardly be said to be settled, as to hearings of defended causes in Chancery, as they have not been frequent.) The time for making an objection for want of proper parties, is after the pleadings have been opened at the hearing and before the merits are disclosed, though it may be allowed in a later stage, ibid. 308, 309. If the defendant does not appear, a decree *nisi* will be granted on affidavit of service of the *subpœna* to hear the cause, which decree will be made absolute eventually, unless cause be shewn. ibid. 311, 312. Cross suits

and causes connected with each other, are generally heard together. By consent of both sides, matters are sometimes heard in England by the Lord Chancellor in his private room. ibid. 315.

32. *Decree.*—This is the judgment of the court pronounced after hearing the cause. Minutes of it are taken down by the register, who afterwards draws them out more fully, and makes up the decree to be signed and enrolled. ibid. 316. The decree is not perfect and complete until it is enrolled. Until that is done, the chancellor may rehear, alter, change, or reverse it. To prevent undue haste in entering a decree, and save the necessity of appealing, either party may file a *caveat* without assigning any reason for it, on which the enrolment is suspended for 28 days.—2 Maddock's Ch. 464. If error appears in the body of the decree, or the enrolment has been gained by surprise, or irregularly made, the court will open the decree, and vacate the enrolment. ibid. 465.

33.—*Reference to master after interlocutory decree.*—The first decree is often interlocutory, and a necessity then exists for investigation of facts, or settling of legal points, before a final decision can be given so as to afford the relief the parties are entitled to in equity. When it is requisite to ascertain the truth in material points on which the parties are at variance,—or where the information is necessary to the court, and is not clearly brought before it by testimony or admission,—it is usual to refer the enquiry to one of the masters of the court,—particularly where it would be extremely difficult or inconvenient for the court when sitting, to make the enquiry. Thus it is usual to refer to a master the taking of accounts, the investigation of a title, the conducting a sale of real estate, the search after heirs, creditors, &c. The master is often empowered by the interlocutory order, to examine the parties in the cause, especially where an account is referred. He is also sometimes ordered to examine witnesses, and in both cases it





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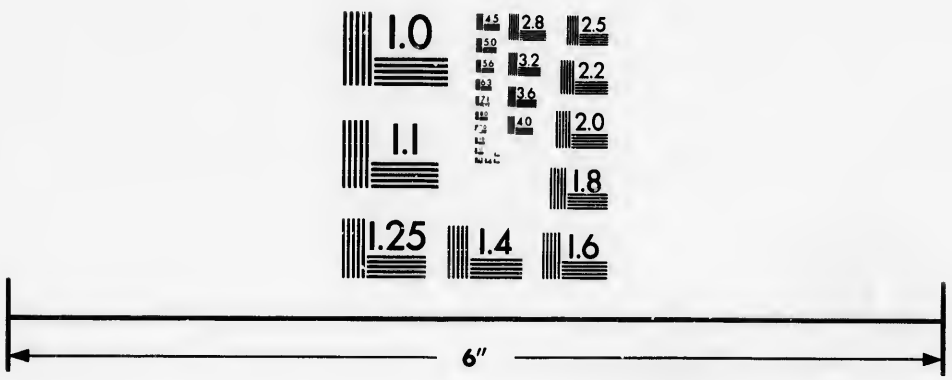

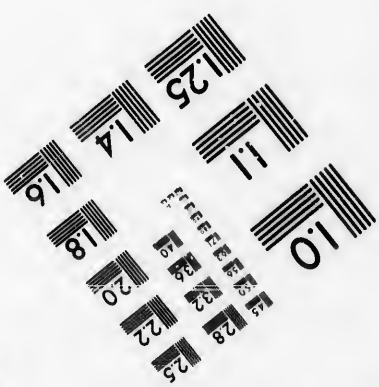

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is done under interrogatories. The master may receive affidavits as evidence, if not objected to at the time. 1 Newl. Ch. Pr. 322—332.

34. *Sales before a master.*—The advertisement should be prepared by the solicitor of the complainant, and the draft of it approved and signed by the master. At the sale the highest bidder is to sign a memorandum of his bidding. The usage here is to require a deposit of 10 per cent. at the time of sale, and the residue in cash on delivery of the deed, which the master prepares and executes to the purchaser. In sales under foreclosure, no conveyance from the mortgagor is directed or deemed necessary in our practice. In the English practice, a person offering a considerable advance, and giving a deposit of 20 per cent. will be entitled to open the biddings, and have a resale, provided he did not attend, and bid at the first sale of the lot. ibid. 338.

35. *The master's report.*—When the matters referred to him by the decree have been investigated by the master, he makes a written report on them to the court. Sometimes for the accommodation of parties, the court will grant an order permitting the master to make a separate report on part of the matters referred, without waiting for the close of his enquiries under the reference. The master, gives access to the parties to the draft of his report, and if they have objections to it, he hears them before making it up. Those objections a party may bring before the court as exceptions to the report, if the master overrule them, but where he has neglected to object before the master, he will be too late afterwards to except. Conciseness is required in framing reports. The report is to be signed and filed without delay with the register, and an order of the court applied for to confirm it. ibid. 342. By consent this order may be absolute in the first instance. *Exceptions* must be specific, and reduced to writing. They are filed with the register. They are to be set down for hear-

ing, and each one argued and decided separately. ibid. 348.

36. *Reference to courts of law.*—First, to settle a mere legal question, the chancellor sometimes refers it to a master, who prepares a special case to be sent to a court of law, and there argued by counsel and judges. The judges return their opinion in the shape of a certificate to the chancellor, without stating their reasons. The chancellor is not bound to adopt this opinion, but may send the case to another court of law, ibid. 355. Secondly, to ascertain a fact, he may either direct a party to bring his action at law, or send to the court of law an issue, the verdict on which is likely to determine the fact. This is done by means of a fictitious suit, in the shape of an action, to recover a wager laid on the existence of the alleged fact.

37. *Further directions.*—After the master's report, the verdict or certificate—the cause is to be again heard, in order that a second or final decree may be made in it. This is done on petition to the court, who order the cause to be set down to be heard for further directions. After service of the order the cause is set down, and the court at the hearing make a final decree, or otherwise give such further order as appears right.

38. *Delay to permit an action at law.*—The court will in some cases, where it is of opinion against the complainant, still retain his bill for a certain time, in order that he may if he chooses establish points in his favor by an action at law, ibid. 358.

39. *Rehearing.*—Either the chancellor or the master of the rolls may rehear the cause, and alter or change the decree he has already made, if it has not been enrolled. If the decree has been pronounced by the master of the rolls, the chancellor on petition may rehear it by way of appeal. ibid. 362. In neither case, however, is there any

stay of proceedings under the order or decree, unless it be so specially directed by the court.

40. *Bill of review.*—This may be brought after enrolment of a decree, either on error of law apparent in the decree itself, or upon the discovery of new matter. ibid. 368. It does not of itself stay any of the proceedings under the decree, and only lies for him against whom there is a decree, 2, Maddock's ch. 541.

41. *Appeal to the king in council.*—In England, the appeal from the chancery is to the house of lords, which is in effect to the ld. chancellor himself. The appeal, in the colonies, is from the colonial courts in all causes above £500, to the king in council. The appeal having been allowed by the chancellor and security given by the appellant to prosecute, it must be entered there with the clerk of the privy council within one year. The papers of the cause are transcribed and the transcript certified by the chancellor under the great seal, and transmitted to the office of the privy council. The forms pursued there, are similar to those used in English and Scotch appeals to the house of lords. The appellant prepares his statement of facts and legal inferences, and the respondent does the same. These are mutually exchanged and corrected, and are then printed for the use of the court and the parties. The cause is referred to a committee of privy council, in which some eminent judge usually presides, and the parties or their advocates having been heard, the committee reports its opinion to his majesty in council, where it is usually confirmed, and a decree or order of council is made in conformity with this report. This may either affirm the decree in chancery, or reverse or alter the whole or any part of the proceedings,—sometimes the cause is sent back to the colony to be again more carefully tried. The same appeal lies from the common law courts of the colony. In general we have every reason to admire the justice and impartiality administered on these appeals, but

the cost, expense and delay attending them are such as to overbalance any benefit they may confer. The rules which govern the admission of, and proceeding in these appeals are chiefly borrowed from the civil law. A court of appeal composed of the most eminent judicial persons in the B. N. A. provinces, and meeting once yearly, would settle our appeals with dispatch and at little expence, and give the fullest satisfaction I should think to all suitors concerned.

42. *Execution of decrees.*—To enforce a decree there is a writ of *execution*, the purport of which is to order the party to obey it. If he fail to obey it, recourse is had to the same processes of contempt already described. If he be in custody and refuse to perform the decree, sequestration may issue, ibid. 385. Under a sequestration for not paying money decreed to be paid, the goods, rents, &c. may be ordered by the court to be applied to satisfy the sum, ibid. 386.

43. *Costs.*—These, in an equity court, are in the discretion of the chancellor. *He who fails* is *prima facie* liable to costs. An *infant* is not *personally* liable for costs, unless after coming of age he choose to proceed in the suit. *Trustees and executors* (not being in fault) are entitled to be paid their costs, whether they are suing or defending while they merely seek the direction of the court, but fraud or negligence* may render them liable to costs. ibid. 396. A legatee who recovers will have his costs allowed out of the estate, if an ambiguity in the will render his suit necessary. A mortgagee who acts *bona fide* and fairly will be allowed his costs, whether under a bill to foreclose, or a bill to redeem, ibid. 397. In a bill to perpetuate testimony, the defendant is allowed his costs, if he only cross examines the the witnesses. In a bill for a dis-

*Wherever interest is decreed against executors, they must also pay costs. Executors of an insolvent are not to have costs. 2 Maddock's Ch. 553, 556.

covery only, the defendant will be allowed his costs. In a bill for partition, the English rule allots the expense of executing the commission according to the share of each proprietor, ibid. 399. An interpleading party, who acts correctly, is allowed his costs out of the property in dispute. A solicitor has a lien on all deeds and papers of his client, to secure him the payment of his costs, ibid. 426, and he has a similar lien for costs on any sum decreed to be paid to his client, ibid. 428.

44. *Supplemental bill.*—If by deed or operation of law, the property in the subject of litigation is changed, a supplemental bill may be filed either for or against the person, newly interested. So it may be done to add parties, to seek a further discovery, or put new facts in issue. 2 Maddock's Ch. 519, 520.

45.—*Bill of revivor.*—If any material party dies during a suit, it will abate, and must be revived, against or for the representatives of the deceased, by a bill of revivor. This bill should be confined to a statement of the circumstances which shew the right to revive, and if it contain more may be demurred to. ibid. 526, 534.

46. *Lunatics*—This jurisdiction belongs to the chancellor only, and he cannot delegate it, ibid. 725. A commission of lunacy may be obtained on petition to the chancellor, supported by affidavits. It is directed to 5 persons, two of whom to be barristers. It should be executed immediately after it is obtained. The commission issues a warrant to the sheriff who summons 24 jurors and it also grants subpœnas for witnesses. The inquisition is signed by the commissioners, and the jurors who have been sworn, who must be 12 at least, and it must be returned into chancery within a month after it has been issued. 2 Maddock's Ch. Pr. 728, 729. An analogous commission issues, where a party is, from *any cause*, incapable of managing his own affairs, ibid. 731. The form of the return is that the party is of '*unsound mind.*' On a

return to this effect the chancellor appoints committees of his person and estate. It is usual to refer it to a master, to approve of proper persons. Relations are mostly preferred. The same person is often made committee of both the estate and the person. A master in chancery is excluded from such a situation, ibid. 739, 740. The security given by the committee is discretionary with the chancellor. Generally a bond with two sureties, approved of by the attorney general, at double the amount of the outstanding estate, is considered requisite. The court acts for the lunatic in providing suitable maintenance for his family, if the estate be considerable, as he would have probably done if in his senses, ibid. 743. The comfort of the lunatic is the chief object of the court, the interests of his heirs are to be held secondary, ibid. 746.

BOOK IV.

CHAPTER IV.

COURTS OF ESCHEAT—DIVORCE—AND ADMIRALTY.

Court of escheats and forfeitures.

The only *escheats* known in our provincial law, are for want of heirs, and the escheat consequent upon attainder in cases of treason or felony. The *forfeiture* of land to the crown takes place in general, on account of the non performance of the conditions of improvement and settlement, under which lands are held. I shall not dwell here on the abstruse subjects of escheat and forfeiture, but refer the diligent student to Coke on Littleton, 13, a—b. 77, b. 92, b. 243, a. 2. Inst. 36, 64, 2 B. C. c. 15. Co. Lit. 392. 3, Inst. 19, 211, and to C. J. Belcher's notes and references, 1. P. L. 61, the perusal of which will enable him to obtain an accurate idea of the English law on this head, and he will find a clear statement of the nature of inquests of office in 3 B. C. 258, and 4, B. C. 301. The commissioner of escheats and forfeitures, appointed by the executive, is the presiding officer or judge of this court. He proceeds with a jury summoned for the purpose, to enquire into the facts and circumstances, where any lands are alleged to have escheated or to have become forfeited to the crown.

Those inquests have I believe been usually held at Halifax, with a jury summoned from that place, although the lands under investigation lay in other parts of the province. The first act of the province on this subject is a local act of 1760, 1, P. L. 60, 61, respecting lands within the peninsula of Halifax, mentions the jury of 12 men under oath, and directs the inquisition to be returned into the office of the register of the court of chancery (see local laws.) The second and latest act is that of 1811, 51, G. 3, c. 6, 2, P. L. 68, the title of which is "an act to regulate the proceedings of the Court of Escheats." This act is general,—its first section directs, that before any such inquest take place "public notice thereof shall be "given in the Royal Gazette, a copy of which notice shall "be fixed at the church door, and also at the door of the "court house of the county or district where the lands lie; "and if any known tenant or person be living on the lands "or tenements to be enquired of, a copy of such notice "shall also be delivered to him, at least three months be-"fore such inquest shall be made.

Sec. 2. Directs "one part of every inquisition" to be returned into Chancery "and if any person will traverse the "same, such inquisition shall, on petition to the Chancel-"lor, be certified into H. M. Supreme Court, and may be "there traversed in the same manner that inquisitions are "traversed in the High Court of Chancery, or Court of "Exchequer in England." Traversing means opposing the return or verdict given in the court of escheat; but as the parties interested usually receive ample notice before the inquiry takes place, and have a full opportunity of being heard before the court of escheat, this mode of traversing can rarely become necessary. The 3d sec. imposes a forfeiture of £100 on any tenant or occupier wilfully neglecting to give information of such notice to the landlord, (or to his attorney or agent, if he reside abroad;) to be recovered by the injured party in any court of record in this province.

The 4th sec. enacts that no lands returned as escheated shall be regranted within one year from the day of such inquest, except to the original owners, their heirs or assigns. The expence attending these inquests has been generally borne by persons who wished to obtain grants of the lands to be escheated. The improvement of the province has been retarded by the existence of large grants of wilderness land of good quality, which the owners are unwilling or unable to cultivate or to sell;—and owing to their living out of the province in some instances; and in others to their hope of obtaining high prices at a future day; they keep extensive tracts unoccupied. Thus deriving benefit by the labor of others, without expending capital or industry of any kind; and never having given any value to the crown or the public for their estates, they can have little claim to favor. The conditions in these patents respecting improvement and settlement, might be enforced in such cases with the strictest justice, and an active enquiry and rigorous pursuit of the public rights, where the proprietors have not invested an adequate amount on the lands, would be both beneficial and popular in this colony, and the remark will also apply to the adjoining island of Prince Edward.

Court of marriage and divorce.

This court consists of the governor and council. They possess all the authority exercised in the mother country by the ecclesiastical courts in matrimonial causes, and even greater powers under the provincial statutes. A total divorce may be granted, not only in cases where the English law would give it, but also in cases of adultery and of cruelty. There are five species of causes, known in the ecclesiastical law, respecting marriage.

1. *Jactitation of marriage.*—This affords a remedy to any man who feels aggrieved or inconvenienced by a woman's claiming, without foundation, to be his wife,—and in like

manner protects a woman from the unfounded claims of a pretended husband, the court having authority to enjoin silence on a party who sets up false claims or rumors of this kind.

2. *Suits to compel the solemnization and celebration of marriage.*—Those causes cannot be brought in England since the stat. 26 G. 2, c. 33, but as that does not extend here, it is possible our court would enforce a contract of marriage in this way.

3. *Suits for restitution of conjugal rights.* 4. *Divorce suits.* 5. *Suits for alimony.*—3 B. C. 93. 94. The practice of this court is similar to that of the English ecclesiastical courts in matrimonial causes. The prosecuting party is called the *promovent*, and the defendant is called the *impugnant*. The promovent constitutes a proctor by signing a written proxy. The proctor petitions for a citation which is issued by the register of the court, (the secretary of council) nearly in the form of a subpœna in chancery. This is served on the opposite party, and affidavit of the service made. At the same time the promovent files a written libel, containing as many distinct allegations as appear requisite to put the causes of complaint forward clearly. The impugnant then appears by constituting a proctor in the same way, and files a written *answer* to the several allegations in the libel. The court then at the request of either party, appoints a proper person to examine the witnesses, and the proof on both sides is committed to writing. Advocates are heard by the court on each side, and its interlocutory and final decrees follow, as in the court of admiralty or chancery, to both of which it's forms and practice have a resemblance. The advocates and proctors correspond with the barristers and attornies in common law courts.

There is a strong objection against this court in the want of regular terms, or stated sittings, and it has happened that no court could be assembled for many months

together, because it required the presence in town of a majority of the members of the council, as well as that of his excellency the governor. He forms an integral part of the tribunal, and in his absence it cannot act. There are several ways in which this might be remedied. A single judge might be appointed to decide these cases, and if that were thought expensive, the situation might be held in conjunction with the mastership of the rolls, or by any one of the other judges, and an appeal given from the decree to the governor and council. Or a certain number of the council, say 3 or 5, might be empowered by an act to be a quorum, and proceed in business before this court, although the governor and the rest of the council might be absent, or find it inconvenient to attend. The same method would improve the court of errors.

Prov. act of 1758, 32 G 2, c. 17, 1 P. L. 24, 25, sec. 4, "*And be it further enacted*, That if any person being married, do marry again, the former husband or wife being "alive, such offence shall be felony."

5. "*Provided nevertheless*, that the foregoing clause of "this act, shall not extend to any person whose former "marriage has been declared void, or who has obtained a "divorce by any sentence had before the governor and "council (c); nor shall any attainder for this offence work "any corruption of blood, loss of dower, or disinherison "of heirs."

6. "*And be it further enacted*, That all matters relating "to prohibited marriages and divorce, shall be heard and "determined by the governor or commander in chief "for the time being, and his majesty's council of this "province."

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c "The divorce must mean *a mensa et thoro*, since a divorce *a vinculo matrimonii*, required no aid from a *proviso*, "1 Hales Hist. P. C. pa. 694, Kel. 27, Thomas Middleton's "Case." "Qu. whether it excepts divorces *causa saevitiae* "Cro. Car, 463. Porter's case." (C. J. Belcher's notes.)

7. "*And be it further enacted*, That no marriage shall be "declared null and void, except for the cause of impo- "tence, or of kindred within the degrees prohibited in an "act made in the 32d year of king Henry the 8th, entitled "an act concerning precontracts, and touching degrees "of consanguinity; and that no decree for divorce shall "be granted for any other, than the two foregoing, and "the two following causes, viz: that of adultery, and that "of wilful desertion, and withholding necessary mainte- "nance for 3 years together; in any of which cases every "person suing for a divorce, shall be entitled to a decree "for that purpose, to be obtained from the Governor, or "Commander in Chief for the time being, and his Majes- "ty's Council, who shall have full power and authority to "grant the same."

Provl. Act of 1761. 1 G. 3, c. 7. 1 P. L. 69.

This act recites the 7th clause of the act of 1758, and proceeds thus "which clause has been found to be incon- "sistent with the laws of England, *be it therefore enacted* "*by the Honourable, the Commander in Chief, the Council* "*and Assembly*, that the causes for which marriages shall "be declared null and void, shall be in all causes of im- "potence, of precontract, and kindred, within the de- "grees prohibited in an act made in the 32d year of King "Henry the 8th, entitled, an act concerning precontracts "and touching degrees of consanguinity, of adultery, and "of cruelty, and for none other causes whatsoever."

Sec. 2nd. "*Provided*, that nothing herein contained, "shall be of any force or effect, until His Majesty's plea- "sure shall be further known herein."*

* "The principal ground of amendment by this act seems "to have been, the permission of divorce for wilful desertion, "&c. as not agreeable to the laws of Engiand, for this cause "is now omitted by the act, and all the other causes are, as "in the former act, inserted." Chief Justice Belcher's notes.

Provincial Act of 1816, 56, G. 3, c. 7, 2 P. L. 201.

This act has been disallowed by his Majesty. "*An Act to explain the Acts, &c.*" It recited that doubts had arisen relative to the construction of the Provl. acts on this subject and in *explanation* enacted "That it shall and may "be lawful for the court in which such causes are tried, "on the hearing of any suit of marriage and divorce, for "the cause of adultery or cruelty, to declare and decree "by definitive sentence or otherwise, the marriage be- "tween the parties in such suit, to be absolutely null and "void, from and after the time when such adultery or "cruelty shall be proved before the said Court to have "been committed; or to separate the said parties from "bed and board only, and to allow and order alimony, "and reasonable costs to the wife so separated, as shall "appear to the said court to be fit and proper, according "to the condition of the parties, and the rules and prac- "tice of the Ecclesiastical Courts in England, in such "cases."

2. "*Provided always*, That nothing herein contained "shall be construed, to allow any person or persons, who "may be divorced from bed and board only, to marry again "without incurring the crime of bigamy.," The foregoing acts and the commission and instructions of the Governor with the general usage of this and other colonies, shew that this court is intended to exercise the jurisdiction over marriage and divorce which the ecclesiastical courts do in England, and also that extraordinary judicial power exercised by Parliament in passing private bills of divorce for adultery. It adds also a power of granting a total divorce for cruelty. Thus restoring the laws repecting this contract of marriage to their original and rational principles. The act of 1816 must have been disallowed because it would have given the power of bastardizing children for *acts of cruelty* by their father, committed on their mother

before their birth. The act of 1761, makes the most material alteration and was not disallowed. The acts of 1758 and 1761, are worded and seem intended to make the divorce total in each of the causes provided. In that of adultery if a divorce *a mensa*, and *thoro* were granted, it would operate as a severer punishment on the offender and produce greater inconvenience to the injured party than would result from following the obvious meaning of these statutes by making the separation *a vinculo*. The Provl. Statutes make no direct reference or even allusion to the lesser divorce, and as they have provided a power to grant total divorces in almost all imaginable cases where such or any judicial separation could be endured, it may be a question whether they have not taken *away* the lesser divorce *in toto*.

Alimony.

Where alimony is granted there is (besides the process of the ecclesiastical court (" a writ of common law *de* " *estoveriis habendis*, in order to recover it." 1 B. C. 441.

" Alimony signifies that proportion of the husbands' es-
" tate which, by the sentence of this court, is allowed the
" wife for her maintenance (upon any separation from him)
" *pendente lite*. In every cause where the wife sues the
" husband, or *e contrario*. as soon as it appears to the judge,
" either by the answers of the party principal, or by the
" proofs, that the marriage was solemnized betwixt the
" parties, the wife's proctor prays that the husband
" might be condemned in costs of suit and alimony,
" and then porrects a bill of costs and prays alimony to
" be allowed from the return of the citation, *pendente lite*
" *juxta ratam* of so much per week, &c. leaving a blank
" at the bottom of the bill for the judge to insert the sum
" to be paid *usque finem litis*; the judge then taxes the
" costs, and being certified of the man's abilities (for in

"taxing of alimony *consuetudo et qualitas ejus cui assignatur* "*sunt considerandae*) he taxes so much for alimony weekly, "&c. *nisi aliter per nos decretum fuerit;* and the usual sum is "the third or at least the fourth part of the yearly value of "the estate, though the man may in any part of the suit (to "avoid a further taxation) allege his poverty, or that he is "decayed in his estate. Alimony may be before divorce." Floyer's, Proctor's Practice, 2nd edition, 1746, p. 50 51. Quoted in the margin, &c. 1 chan. ca. 250, &c. 1 Sid. 109, 124. Godolph Abr. 508, &c.

No divorce was known at Rome before the year of the city 520. During 100 years before the revolution no divorce took place in the colony of New York. 2 Kent. com. 82. See Kent 2nd, v. 86, 87, 88. The law varies much in the several American States on this subject. In Evans vs. Evans, 1 Haggard 35, in determining what is *saevitia*, it is stated that it is necessary that there should be a reasonable apprehension of bodily hurt. See 2 Kent 106, 107, where this and other cases are cited.

Robertson v. Robertson—Arches. 1728.—Ill-nature, violent passion, and frequent abuse of his wife, was proved against husband.

The foregoing was cited in argument in Otway v. Otway. Arches. M. T. 1812, a similar suit and referring to it, the court said it was not necessary to prove acts of personal violence to substantiate a charge of *cruelty*. 2 Phil. 95. It is the acknowledged doctrine that danger to the person and health is sufficient. The same doctrine has been established in the more recent case of Hulme v. Hulme. Consistory court of London, M. T. 1823.

"When a series of unkind treatment is accompanied by "words of menace, and when from collateral evidence "there appears a reasonable apprehension that the me-"nace may be carried into effect unless prevented;" these circumstances present a case of a very different nature,

and such as calls for the prompt interference of ecclesiastical jurisdictions. Poynter on M. & D. 213, 214. Harris v. Harris. 2 Phil. 111. If a wife does *without any default of her husband*, of her own accord, depart from him, he shall not be obliged to allow her alimony. Pointer on M. & D. 246.

A husband, regularly speaking, is bound to allow his wife alimony, pending suit, whatever the cause may be, and afterwards in most cases of separation, not occasioned by elopement or adultery. ib. note C. In all suits of divorce, &c. as soon as the court is judicially informed that a fact of marriage has taken place, it is competent to the wife to apply for alimony pending suit. ib. 247. The quantity of alimony to be assigned depends on the discretion of the court. ibid. The husband is to pay the wife's costs, because all her property vests in him by law. See Poynter 258, 261. Very erroneous impressions exist among well meaning and even highly informed persons, as to the sanctity and indissoluble nature of the marriage contract. This subject is most ably and beautifully elucidated by Milton in an essay published among his prose works which is deserving the serious consideration of every jurist and student, both on account of the eloquence and originality of the style, and the close research and learning it displays. Without attempting to weaken the holiness and binding nature of the institution, he shews very clearly that the scripture passages have been wrested from their true sense, and that there is no religious principle adverse to a judicial sentence of total divorce, where the happiness and safety of man and wife require their living entirely apart. This view of the subject is in conformity with the general principles of our colonial law, while it is in some degree opposed to the system followed up in the mother country,—(see 2 Epit. 25.)

Court of Vice-Admiralty.—1. *Instance Court.*

This jurisdiction extends over a variety of maritime causes and contracts. The forms and rules of proceeding

are taken from the civil law. An appeal lies from it to the high court of Admiralty in England, and also to the King in council, 3 B. C. 69. There is one judge, commissary or President, who holds a commission from the governor, during pleasure.

He may delegate his authority to a surrogate, and may hold his court in any convenient place within his jurisdiction. There is also a register, a marshal or serjeant at Mace, (who executes the orders of the court,) and advocates and proctors. All those officers are paid by fees, according to a table sent many years since from the High Court of Admiralty. His majesty is represented in this and the other maritime courts by his advocate and procter, an office hitherto united to that of the attorney general of the province.

Subjects of jurisdiction.

1. *Employment of ships when part owners disagree.* If any part owner be dissatisfied with the ship's being employed in the way the others desire, this court will take security, and permit the majority of the owners to navigate her at their own risk, and the dissentient partner has no share of the profit or loss that may arise in such a case The course is for the party dissatisfied to arrest the vessel and proceed in this court against the other owners. Holt on shipping, 202, 204, but the court has no power in such a case, to compel a sale. 1 Wilson, 103. But where the shares are not ascertained, the only remedy is by application to the court of chancery for an injunction, which must be done as early as possible. Christie v. Craig, 2 Merivale, 137.

2. *Hypothecation, or bottomry bonds.* The master when in a foreign country, or at a distance from the owner's residence, may pledge the ship by hypothecation, or even by his own bonds, in cases of necessity, and this contract

may be enforced by warrant from the court of admiralty for the arrest of the ship, and a suit for the money, on which the court may decree a sale of the vessel to satisfy what is due. The remedy on hypothecation bonds is against the master and ship, but not against the owners, and if bills on them be taken, they will only be good for the principal and common interest. Interest in hypothecation bonds may legally be as high as the parties agree upon, to cover the extra risk. The master, in extreme necessity, may even pledge in this way the ship, freight, and cargo, and sell part, but not all the cargo. The Gratitudine, 3 Rob. 246. The necessity must be for the use of the vessel and voyage. This security does not transfer the property to the lender. Wherever money can be obtained on the personal credit of the master or owners, a bottomry bond will not be considered regular. Holt on Shipping, 242.

3. *Seamens' wages.* All the seamen of a vessel either separately or altogether (except the master), may sue for their wages in this court, and arrest the ship by its process as a security for their demands, or they may cite the master or owners personally to answer them, if their engagement be under the usual articles and not by a sealed instrument or other special undertaking, ibid. 289. The wages of a coasting voyage, or hire for rigging, &c. may be included in such a suit, ibid. 290. The same limitation as to time is enforced as in the common law courts, so that the action must be brought within 6 years. In the usual action in the admiralty for wages, the suit is rested upon the service and not upon the contract of hiring, so that the articles need not be produced in general. By the British statutes, 2 G. 2. c. 36, and 31 G. 3, c. 39. the master or owner is bound to produce the articles when required in court. ibid. 292.

4. *Salvage.* Salvage is a reward for saving a ship or cargo from wreck, or for recapturing them from the ene-

my. When goods are abandoned by the owner, he who finds and secures them may, by common law right, retain possession until he is remunerated for his trouble. Hartfort v. Jones, 1 Ld. Raym. 393. Others v. Day. 8. East. 57. The rule adopted by the admiralty court in cases of salvage, is to give liberally when the property is large, and when it is small, to give according to the danger. The crew and passengers cannot be viewed as salvors; but a passenger making extraordinary exertions to save the ship has been held entitled to remuneration. Newman v. Walters, 3 Bos. & Pul. 612. When a ship has been captured by the enemy, and the crew rescue her, they will be considered as salvors, as the capture had rescinded their contract of hiring, but this does not extend to a capture by mutineers. Governor Raffles, 2 Dodson, 14 The rate of salvage on derelict is in the discretion of the court. Aquila, Lunsden, 1 Rob. 37. The contribution must fall on the ship and cargo, or on either, according to the benefit their owners derive from the service. Holt on Shipping, 523. Mere acts of pilotage are not to be confounded with salvage. 1 Rob. 306. There is an act of the Province concerning ships wrecked or abandoned, and goods stranded or floating, &c. when found in any harbor, or within soundings on the coast, giving a jurisdiction to the justices of peace. This act will be noticed hereafter. There are also local acts respecting pilotage, directing questions as to salvage of anchors, cables, &c. to be adjusted in a summary mode, which will be found under the general head of local laws. The rate of salvage on recapture from the enemy is fixed by act of parliament at 1-8, if made by a king's ship, and 1-6 if by a private vessel. Holt on Shipping, 538. The rate of salvage on wrecks and derelicts is sometimes 2-5. 1-2 and even as high as 2-3 of the value, where the danger has been great. ibid. 525. When the enemy abandon a captured vessel at sea, and she is saved, the rate of salvage will be

regulated by the discretion of the court, and not limited by the statute, as a case of recapture.

6. *Condemnation of ships for unseaworthiness.*—In a case of extreme necessity, when the master can shew he could pursue no other course, he may sell the vessel. In such cases a sentence of the admiralty is required, to shew the state of the ship as too defective to go to sea. The master petitions the court for a survey, a commission of survey follows. The surveyors' report, a decree confirming it—a petition for sale, and a commission of sale, are the subsequent steps necessary. This proceeding is not conclusive evidence of the necessity of the sale to justify the master, but it must be resorted to, as the best proof a master can obtain to protect himself under such circumstances. Holt on shipping, 255, 256.

6. *Sale of cargo in part.*—The master when obliged from necessity to sell part of the cargo, may resort to this court for an order of survey and sale. But this is a power a master should not attempt to exercise over either the vessel or cargo, particularly the latter, without great caution, and obtaining the best advice to assure him that he will be justified by the circumstances, as his authority to do either can only arise from extreme necessity.

7. *Damage.*—If the master through wilful neglect or intention, run down another vessel at sea, he and his vessel may be prosecuted in the admiralty for the damage thereby occasioned.

These are the most usual kinds of actions of a civil nature brought in this court, although its jurisdiction is very large, embracing all causes where the whole matter of contract or damage arises on the high seas. Contracts made on land, or to be performed on land, though partly maritime, belong to the common law courts. Instruments under seal cannot be sued on in the admiralty. 3 B. C. 69, 106. The proceedings in this court are drawn from the civil law chiefly, but the Rhodian laws, and the laws of Oleron, have also a share in their composition.

There is a class of actions in this court, of a penal kind. Some on common law grounds, and others under acts of Parliament or provincial statutes. Articles are exhibited in the nature of criminal charges; as for example, against a master for wearing illegal colors, for not having the name of the vessel on the stern, &c.; or a libel is filed against a vessel or goods, for some breach of the revenue laws or of other statutes connected with navigation. For there are two kinds of action in the civil law, one against the party who has done you an injury, or failed to perform his contract with you, the other against some property to which you lay a claim. "*aut in rem sunt, aut in personam.*" Inst. 4. 6. 1. In the admiralty, suits are often commenced against vessels, and still more frequently against goods supposed to be subject to confiscation, and public notice is given, that the owners may interpose a claim if they think proper. This kind of action has by our revenue statutes been transplanted into the common law courts, which have in several instances a concurrent jurisdiction with the admiralty. The forms used in the admiralty are in many respects more clear and concise than any other. In a case of subtraction of wages, the seaman employs a proctor who who draws a summary petition or libel stating his case, with a schedule annexed, showing the account of wages and payment received, to which the seaman makes oath before the register with whom this petition is filed. The proctor then petitions in writing for a warrant of arrest against the ship.* The register waits on the judge with these papers, and the judge authorizes the register to issue a warrant, by marking the petition "allowed" and adding his signature. Under this warrant the marshal takes possession of the vessel and nails a copy of it to her mast. The proctor (if there be no appearance) petitions the

* This may issue against the ship, against ship and the master, or against master or owner.—See forms in Marriott, 326 to 332.

court, to allow evidence to be taken before the register, and files his interrogatories. After the witnesses have been examined, the proctor petitions the court for publication, (i. e. that copies of the evidence may be taken.) He next petitions for a decree of sale, which is made if the evidence be satisfactory. If there be a defence, security or caution may be given, for the amount sworn to be due in the cause and the costs. Two bondsmen are required, each of whom must swear, that he is worth the sum in the bond after payment of his just debts.† On this bail being entered, the vessel will be released from arrest, and the defendant's proctor may file a defensive allegation on his behalf, and may file interrogatories and cross interrogatories, and examine witnesses. Either party may petition for a court day, as this court has no regular terms or fixed days of sitting, and after hearing advocates on both sides, a decree is made by the judge or his surrogate. If there be no defence, the sale may be prayed at the return of the warrant, which is usually made returnable in a week or 10 days after it issues, and the witnesses may be examined as soon as it has been served, so that there are no causes to make the proceedings dilatory, except the nature of examinations under interrogatories, and the want of regular sittings and terms of the court, both of which tend to delay. Goods seized by the officers of the customs, as forfeited under navigation or revenue acts, are prosecuted by the advocate general, who files a libel on behalf of the crown, against them, on which a proclamation is affixed to the door of the court house, and if no one claim them within a limited time, they are decreed to be condemned as confiscated. The proceeding by information against them in the Supreme Court is conducted in a similar form. The ancient forms in the court of admiralty seem to have been the source from

† The Bond should not be under seal. Marriott's Formulary, 27-1.

which our colonial mode of attaching credits of a debtor in the hands of a third party, is more immediately derived. See Clerke's Praxis Admiralitatis.

2. *Prize Court.* In time of war, the courts of vice admiralty receive commissions to adjudge upon vessels and goods taken from the enemy, or forfeited by neutrals for breach of the laws of nations respecting war. * This prize court proceeds according to civil law forms and rules, and is also governed by the royal proclamations and acts of parliament passed for that purpose. See British statutes 45, G. 3. c. 72, 49, G. 3, c. 123, &c. The construction of

* "In the first place, a commission under the great seal of "the United Kingdom, goes directed to the lords commission- "ers of the Admiralty, authorizing the seizure and detention "of the vessels of any country, saving such exceptions as may "afterwards be declared; and authorizing the same to be "brought to judgment in any of the courts of admiralty, with- "in the dominions, which shall be duly commissioned; and "the lords comrs. of the admiralty are thereby authorized and "enjoined to will and require the high court of admiralty of "England, and also the several courts of admiralty within the "dominions, which shall be duly commissioned, to take cog- "nizance of, and judicially proceed upon, all such ships, ves- "sels and goods as shall be seized and detained, and to ad- "judge and condemn the same, saving such exceptions as "may be at any time after declared. In consequence of this "commission a warrant issues under the seal of the office of "Admiralty, with a copy of such commission usually annexed, "requiring H. M. V. Admiralty Court at Halifax (or what- "ever place it may be,) to take cognizance of, and judicially "proceed upon all ships and goods, that are or shall be taken "within the limits of said court, and to hear and determine the "same, and according to the course of Admiralty and law of "nations to adjudge and condemn the same, saving always "such exceptions as His Majesty may, at any time, be pleas- "to declare." "Thus the court of Admiralty becomes fully "authorized to take cognizance of, and to proceed judicially "upon, all vessels seized *jure belli*, or under any orders H. M. "Government may have deemed it expedient to issue. But "until the court receives authority to act through the regular "and legal channel, it cannot undertake to administer the law "as applicable to prize, and to settle the conflicting interests "of nations."—Judgment of C. Uniacke, Esq. V. A. Court at Halifax, case of the Nabby, 1818.

treaties and of international law, come into constant use in this court. " By the laws of Great Britain all prize be- " longs originally to the king, as a part of the ancient " rights of the crown, and no subject can be entitled to it " but by grant from his Majesty." Sir E. Croke's decision. Treasurer of Greenwich Hospital, against the prize agents of the Bermuda, 8 May, 1811. The distribution of the proceeds of prize vessels and prize goods, is regulated in war time by acts of Parliament.

The chief object of this jurisdiction is the *condemnation* of the *vessels and goods* of a foreign nation with whom a war subsists, and the proper court to try the question is the admiralty court of the state, whose subjects have made the capture. Unless duly adjudged on in a competent court, a prize ship cannot be registered* as a British vessel, and consequently could not be made any use of as a ship by British subjects. Besides this, upon general principles supported by the law of nations and general usage, a vessel taken in war and sold as prize will not be considered the property of the purchaser, unless condemned by a court of competent jurisdiction. See Ld. Stowell's judgment in the case of the Flad Oyen. 1 Rob. 135. Holt on Shipping, 191, and the sentence, &c. should be among the ship's papers as a document of ownership. The same rule is applied in the registry acts to slave ships condemned and sold. If a vessel be purchased from pirates, the original owner will still be entitled to her. Holt. 190. The adjudication of the enemy's courts are considered as binding to establish a change of property ; thus in the case of the Christopher, Slyboom, 2 Rob. 209. where the British vessel was captured and carried into the port of an ally of the enemy,

* See British statute, 6. G. 4. c. 110. s. 5, & 29. By the last of which, a certificate under the hand and seal of the judge of the court, of the condemnation and also a certificate of a survey under direction of the court, are required and the owners oath of the identity of the vessel, before she can obtain a British register.

and while lying there condemned in the enemy's court, the condemnation was decided by Lord Stowell to be valid, and this principle was even extended under particular circumstances to the case of vessels carried into neutral ports. See 3 Rob. 287, 4 Rob. 43, 5 Rob. 285. In the courts of common law, the production of a foreign sentence of condemnation by a competent court, is *prima facie*, and presumptive evidence of the justice of the transaction. See Holt on Shipping, 193, 194.

Contraband goods, are such articles are serviceable for military and naval uses in war, and these if carried to the enemy are subject to capture, although they may be the property of a neutral. Thus "a cargo of ship timber going to an enemy's port of naval equipment. The Endraught, Bonker, 1 Rob. 22. Iron, hemp, &c. if intended for the use of the enemy's men-of-war,—the Ringende, Jacob, Kreplien. 1 Rob. 77, and arms and ammunition of war, carried to the enemy, are both by the law of nations and by very many treaties prohibited as contraband. Contraband goods taken are condemned and sold the same as prize, and if the vessel belongs to the owner of the contraband goods, she will be involved in the same consequences.

Breach of blockade.—When a port belonging to a belligerent power is actually blockaded by the ships of war of its opponent; a neutral vessel, taking in a cargo after the commencement of the blockade and leaving the port, is liable to condemnation if taken, and so will her cargo if it belong to the same owner. The Frederick Molke Boysen. 1 Rob. 72. So a vessel entering a blockaded port after notice given, her will be liable to seizure and condemnation.

Recapture. In case of the property of an ally recaptured from the enemy, the rule of reciprocity is adopted, the vessels or goods being restored, if the law and practice of the ally would restore ours on salvage under the same

circumstances. See the case of the Santa Cruz, 1 Rob. 66. It is the general principle of the law of nations, that the property of an enemy may be taken, even though it be found on board the ship of a friend or neutral, and on the other hand that the goods of a friend are to be respected and restored, though found on board the ship of an enemy. The many questions that arise as to the right of neutrals are decided by these principles, modified by the usages of belligerent powers and the terms of subsisting treaties.

In *prize cases* evidence is sought in the first instance from the papers on board the captured vessel, and from the examination under oath of her master and principal officers, under standing general interrogatories. If the case appears clear, the vessel is either acquitted or condemned, but in cases of a doubtful kind the court exercises a discretion of allowing the claimants to furnish further proof in their defence, which is usually permitted to be done by affidavits, duly certified by a British consul and properly attested before competent magistrates. But the court may order solemn pleadings and regular examinations of witnesses, and will then issue commissions to examine them abroad, but this is rarely resorted to. If a vessel be seized without probable cause, the captor is liable to pay costs and damages, and if there be misbehavior or suspicion on the part of the claimant, the vessel may be restored to him without his costs being paid him, or he be even ordered to pay costs on her restoration, as the court think just. It is the duty of the captor to deliver in on oath to the registry of the court, all papers found on board a captured ship.

A *monition* is issued, and a copy fastened on the mast of the vessel, and within the time limited for its return, the claim (if any is intended) should be put in. The master's duty is to make a protest at once and send it to his owners or their correspondent, and to have a proctor

employed to enter a claim for the vessel. This claim must be supported by an affidavit (as to belief at least) of the ownership, and security for costs given with it. As soon as the claim has been made, publication will be granted, i. e. copies of the papers and evidence may be obtained, and upon the return of the monition the cause may be set down for hearing, on the preparatory examinations and papers of the ship. *An appeal* may be made within 14 days after sentence, and the appeal court registry in England applied to for an *inhibition*, which should be obtained within 9 months. Security must be given before obtaining it, and it is to be served on the judge, registrar, adverse party and his proctor, by shewing them the sealed writ and leaving with them a copy. If the party cannot be found to be served, his proctor may accept service for him ; but if he do not, it is to be served *viis et modis*, by leaving it at his last place of abode, &c. An affidavit of service made before a notary public is returned with the inhibition. Immediately on entering the appeal here in the Vice Admiralty Court, the appellant should send a full copy of the proceedings, to be given to a proctor to act for him in the court of delegates, as the appeal court in prize cases is called. If the court of appeal think it requisite to the justice of the case, it is competent to them to permit further proof to be made before them, instead of remitting the cause for further investigation, to the judge of the Vice Admiralty Court. In this time of profound tranquillity, the prize courts have no active existence in the British dominions, but when called into operation their powers and importance are very great, so that this branch maritime law may be recommended as not undeserving a student's attention, even at the present period. Besides the analogy, between the practice of this and the other courts that adopt civil law forms, is very great and the study of one aids materially to elucidate and illustrate that of the other. The brief and imperfect account

I have been enabled to give of them may be sufficient to shew how interesting and valuable the subject is. The court connected with the admiralty for the trial of piracies and other offences committed at sea, belonging to the subject of criminal law will be noticed in the next book.

BOOK V.

CRIMINAL LAW.

CHAPTER I.

OF CRIMES.

Every moral offence partakes of the nature of a crime. The object of criminal law, however, is generally speaking limited to the investigation and punishment of acts of an atrocious nature, or of such as are esteemed subversive of the security and comfort of the community. In many instances a compensation in damages the injured party may recover in a civil action, is the only retribution the law awards against the wrong doer. To provide for the safety of life and property, by severe enactments against acts of violence and fraud, has been the prevalent method with those who have enacted criminal laws. The learned Commentator states expressly "that the criminal "law is in every country of Europe, more rude and imper- "fect than the civil." 4. B. C. 3. and although since he wrote more liberal, and enlightened principles have obtained a partial footing among statesmen and lawgivers, yet much remains to be done before his remark will cease

to be applicable. Capital punishment is enjoined in so many classes of offence, by the laws of European states, and so little regard is paid to the prevention of crime, or to the relative proportion that should exist between the offence and the punishment, that we may turn with some satisfaction to the laws of the states and provinces of this new world. Here the subjects of capital punishment are few and well known, and the general character of the criminal code is comparatively mild and paternal, while in practice it is conducted with the most humane and benevolent spirit.

Criminal offences may be arranged according to the language of English laws under the three classes of 1. Treasons. 2. Felonies. 3. Misdemeanors.—Felonies comprize all offences which at common law occasioned the forfeiture of lands or goods of the criminal. 4, B. C. 94—97. Misdemeanor is generally used in contradistinction to felony, and comprehends all indictable offences that do not amount to felony, (as perjury, battery, libels, &c.) In most cases of great crimes, that are punishable criminally, the English law considers any damage sustained in consequence by a private individual, as *merged* or swallowed up in the public wrong inflicted. For this reason no action of damage will lie in cases of homicide, theft, &c. but in many kinds of misdemeanor as for example in nusances, assaults and batteries, &c. the party injured is not deprived of his right to bring a civil action, although an indictment be also preferred against the aggressor. The reformation of the offender is one just end of legal punishment, another is to prevent his offending in future by restrictions, where his reformation is either hopeless or not likely to be suddenly effected. Again it is important to prevent the contagion of bad example, by holding up the punishment of one to deter others from similar misconduct. (My plan does not permit me to dilate upon this most interesting topic, and the reader will hold

me excused for being very succinct in the sketch of our criminal laws. I regret it much, but I hope the subject will be more fully handled by some other pen, if I should not find leisure to do it.) It seems essential to the justice of punishment, that the exact degree of guilt should be adjusted. The shades of criminality vary with a thousand circumstances arising from the character and situation of the offending party,—his natural temper,—his habits,—his temptations. Crimes that are most mischievous and those most difficult to guard against, justly arouse the vigilance and call for the active exercise of the criminal laws. The state of society should also be regarded, by those who have any discretion entrusted to them in enforcing criminal justice, and where there is a general mildness and peaceable disposition displayed by the people at large, it seems less expedient to be severe in the extreme, or to make examples.

Of criminal intention.

A bad intention is an essential part of crime. If therefore a person who has done some act forbidden by the laws, can shew that it was involuntary on his part, he frees himself from guilt and its consequences. At the same time, the law does not undertake to punish a mere intention, not carried into effect by any distinct act on the part of the individual, however bad a design he may have entertained. A crime then, comprises both an evil intention and an unlawful act in pursuance of the bad motive. It is on these principles that *infants* are exempted in some respects from legal punishments. Thus in common misdemeanors, especially in cases of omission, they are excused. But in case of a riot, or even for blows inflicted, an infant above 14, is as much amenable to punishment as a grown up person. 4. B. C. 22. In capital offences, if an infant shews a consciousness of doing wrong, or by other circumstances appears possessed of dis-

cernment and discretion deliberately to effect a plan of villainy, the want of years is no safeguard or excuse for him, the legal maxim being, that "malice supplies the want of age," *malitia supplet aetatem.* Under the age of 7, a child will be legally free from any charge of guilt, and from 7 to 14, the strong presumption of law is in his favor; but in England there have been instances of children under 14, capitally punished, and that even in recent times. The commentator says that "in all such cases, the evidence of that malice which "is to supply age, ought to be strong and clear beyond "all doubt and contradiction." 4. B. C. 24. See 4 B. C. 195, 196. 1. Hawk. c. 1.

Idiots and lunatics stand also free from being charged with crime. Their acts arise from a mind originally defective, or accidentally deprived of it's proper faculties, and however injurious in their results, partake not of the character of criminality, not being the consequences of wicked intentions. By a very humane principle of English law, if during any stage of criminal proceedings, the accused becomes insane, the process is suspended, and even after judgment has passed, if the prisoner should lose his senses, the sentence will not be carried into execution. 4. B. C. 24.

Drunkenness leads men into the perpetration of mischief by depriving them of sound judgment, and therefore, in the Roman law, was allowed to palliate if not wholly to excuse a prisoner; but this has not been adopted in English law, and it is sometimes said that far from being an excuse, drunkenness aggravates the offence by adding one crime to another. Perhaps the just principle in such cases, and that which should regulate the punishment of the offence, would lead into an enquiry into all the attendant circumstances. The habits of the prisoner are to be considered; and a difference made, where the intoxication preceding the crime was designed, from habit, or ac-

cidental. The degree of excitement or of stupor produced by it, has also a bearing on the guilt of the party, as it would be carrying things to a great extreme (at least in capital cases) to punish the party with death, for acts done when his reason was wholly inoperative. 4. B. C. 26.

Misfortune or chance.—When a man by mere accident commits some act forbidden, it is not the subject of criminal punishment or judgment, as no intention or design led him to it. But if one who is engaged in a criminal or mischievous act, should by its accidental consequences deprive a man of life, he will not be excused from punishment on the ground that he did not intend to commit a homicide. The act must be one contrary to the moral or natural law, and not merely forbidden by the statutes or positive laws of the country. Even then, there will be some difference in the degree of guilt, as it cannot be thought that there is any circumstance so aggravating in the case of murder, as that deliberate and malicious attempt to destroy a fellow creature, which forms the distinctive characteristic of the crime. 4 B. C. 26. Foster, 259. 1 Hal. P. C. 475. *Ignorance or mistake*, are also excuses, as they shew that no intention to commit a crime existed in the mind of the actor. But if this ignorance or error proceed from wilful negligence on the part of the accused, he will be liable for its consequences. As in a street which is a common thoroughfare, if a mason should throw down stones while repairing a house, without calling out to the passers by, or noticing whether there were persons beneath, and one of those stones (dropped at random,) kill a man, he could not be justly excused on the ground of ignorance or mistake. But if an individual, whose dwelling is attacked at night by armed robbers, who appear to intend murder and theft, should attempt to fire at them, and by a mistake shoot one of his own family, or some other innocent person, in such a case, the

involuntary error arising from self defence, would be an excuse. In all cases of casual homicide, where it is clear that there was no intention to take life, the prisoner should be freed from the charge of murder.

Compulsion.—In all offences below treason and murder, a wife will be excused from punishment, if acting under coercion of her husband, and his being in her company at the time, will be evidence of his having compelled her to commit the offence. 1 Hal. P. C. 47, 4 B. C. 28, 29. A child or servant cannot legally plead in defence the order or compulsion of the parent or master. (If a wife, however, in conjunction with her husband, keep a house of ill-fame, she may suffer jointly with him the degrading punishment appointed by law.) Wherever the wife offends alone, without the presence or coercion of her husband, she is liable to be punished for her own acts. *Fear* of death or personal injury is a legal excuse, where a person is by superior force compelled to a breach of the laws. But this does not excuse in cases of homicide or other breach of the first principles of natural law, but is chiefly applicable to acts in contravention of positive laws of the state. It is allowed under certain limitations as an excuse for persons found among rebel prisoners, provided they can prove that they were induced to join the rebel forces by fear of death, and had no disposition to remain in their ranks of their own accord. Fost. 14, 216, 4 B. C. 30.

Of principals and accessaries.

An accessary is one who is implicated in a crime, not being the chief actor, nor having been present at it's performance. The chief actor is called the principal, and those who are present aiding and abetting him in the commission of the offence, are principals in the second degree.

Accessaries are divided into—*accessaries before* the fact, and *accessaries after* the fact. An accessary *before* the fact, is defined to be one who has procured, advised or directed another to commit a crime, but is absent himself from it's perpetration. An accessary *after* the fact, is one who knows a felony to have been committed, and notwithstanding, receives, relieves, comforts or assists the felon. 4 B. C, 34, 37.

It is only in *petit* treason and felony, that there can be accessaries. In high treason, he who excites another to the act, by advice, command, or any inducement, will be considered as a principal. Foster, 341, 1 Hale 238.—So in manslaughter there can be no accessaries before the fact, because it is a sudden and unpremeditated offence. In *petit* larceny and in all misdemeanors there are no accessaries either before or after the fact. "In treason all are principals, *propter odium delicti* (for ha- "tred to the crime); in trespass, all are principals, be- "cause the law, *quae de minimis non curat* (which does not "regard trifles), does not descend to distinguish the differ- "ent shades of guilt in petty misdemeanors." 4. B. C. 36. Any assistance given to a felon to screen him from trial or punishment, makes the assistant an accessary after the fact. Receivers of stolen goods, knowing them to be stolen, are made punishable (by statute in England, re-enacted here by Prov. Act of 1758, 32, G. 2, c. 13. s. 16, 1 P. L. 17.) as accessaries after the fact. At common law, this offence was only a misdemeanor, and the act subjects the receiver to be tried for misdemeanor and punished by fine and imprisonment; although the principal offender be not previously convicted. See English statutes 3 & 4 W.& M. c. 9—5. Ann. c. 31.—4 B. C. 38, 133, and Judge Christian's note at pages 133, 134. The English law does not allow any one to justify the aiding a felon, in evading the pursuit of justice or escaping from prison, although ever so nearly related to him, a wife only being excused

for sheltering her husband, but a parent, child, brother or sister not having *legally* any such privilege, 4, B. C. 38, 39. It was the ancient rule of law, that the principal must have been tried and convicted before the accessary could be put to his defence, or that they should be both tried together; but the law has been much altered in this respect.

BOOK V.—CHAPTER II.

HIGH TREASON.

The Provl. Act of 1758, 32, G. 2, c. 13. sec. 1.—1 P. L. 15. enacts, "that if any person or persons shall com- "pass or imagine the death of the king,—or shall levy "war against him,—or adhere to his enemies,—or give "them aid or comfort,—or shall forge or counterfeit the "king's money, being gold or silver coin of England or of "Great Britain,—or shall counterfeit the king's great seal "or privy seal, or the seal of this province,—and shall there- "of be duly convicted, the person or persons so offending "are hereby declared and shall be adjudged to be trai- "tors, and shall suffer as in cases of high treason; and "that all treasons declared by the acts of parliament of "England or of Great Britain, shall be deemed and ad- "judged to be treason within this his Majesty's province, "and none other, and that such acts of parliament as di- "rected the proceedings and evidence against, and trials "of such traitors, shall have their full force and effect, and "be observed as the rule in all trials for treason in this "province."

In the ancient common law, much was left to the discretion of the judges in defining treason, and very many acts were punished by that name capitally, that amounted, in justice, to but slight offences. To remedy this evil the statute of 25. Ed. 3. st. 5, c. 2. anno, 1352, was passed, limiting the punishment of treason to certain expressed cases, viz. compassing or imagining the death of the king, queen, or their eldest son and heir,—violating the king's wife, his eldest daughter unmarried, or the wife of his eldest son,—levying war against the king in his realm, or adhering to his enemies,—giving them aid and comfort in the realm, or elsewhere,—counterfeiting the great or privy seal, or the king's money, importing counterfeit money, killing the chancellor, treasurer, judges, &c. being in their places performing their public duties. The statute 1 Mary, Anno. 1553. st. 2, c. 6, makes the accessaries in counterfeiting the king's seal equally liable as the principals to the punishment of treason.* (There were three statutes viz. 5, Eliz. c. 1, 27, Eliz. c. 2 & 3, Jac. 1, c. 4, respecting the pope's supremacy, and the Roman Catholic Clergy, which I do not think were ever in force in these provinces, now substantially repealed by the acts of emancipation. They each inflicted the punishment of high treason. See 4 B. C. 87.———) The acts of 5 Eliz. c. 11, 18. Eliz. c. 1, 8 & 9 W. 3, c. 26. 7. Ann. c. 25, impose the character of high treason, on debasing of coin and even on having in one's possession instruments of coinage. (See 4, B. C. 90,) & 15 and 16, G. 2, c. 26, adds to this the coloring or plating of money. The acts 13 & 14, W. 3, c. 3, 17, G. 2, c. 39. 1 Ann. st. 2, c. 17. 6 Ann. c. 7, created a variety of treasons, making every act or writing in support of the

* This act also makes it high treason to counterfeit foreign coin, or the king's sign manual, privy signet or privy seal, and 1 P. & M. c. 11, adds the importation of counterfeit foreign coin.

exiled Stuarts' claim, or in opposition to the act of settlement; equal to high treason. Treason may be committed not only by a subject, but by any person residing in the king's dominions, as there is a temporary allegiance due from all sojourners, to the government whose protection they enjoy. So treason may be committed against an usurper if he is in possession of the royal authority, but acts done towards the restoration of the lawful king are not legally treasons. On the other hand, if there be a person lawfully entitled to the throne, but who has not obtained possession, no treason can be committed against him, 4 B. C. 77.

Words alone cannot constitute treason, but where any act or consultation takes place, then words may be evidence of the intent. Foster. 202. Writing may amount to an *overt* act of treason. Resisting the king's forces illegally, in a military defence of a castle,—raising an insurrection to pull down all inclosures, or to compel by force of arms and intimidation, the repeal of a law, have been considered acts of levying war against the king. See 4, B. C. 82. Dougl. 570. Sending intelligence to the enemy in war has been viewed as treason. 1 Burr. 650. 6 T. R. 527. *Punishment.* 1. The offender is to be drawn *to the gallows, on a sledge or hurdle. 2. He is to be hanged by the neck and cut down alive. 3. His entrails to be taken out and burned before his face. 4. He is to be beheaded. 5, To be quartered. 6. The remains to be exposed or disposed of at the will of the king. For a female the punishment was, to be burned alive, but altered to hanging by English act, 30, G. 3. c. 48.—In practice the more disgusting parts of this punishment are omitted.—There has never been a trial for high treason in this province, as far as I can learn. The only instance of one in the present B. N.A. provinces, I have heard of, is that of McLean, tried and executed in Lower Canada, about the close of the last century.

* Originally he was to be dragged there.

BOOK V.—CHAPTER III.

OF FELONIES.

Felony is stated by Blackstone to comprize every species of crime, which occasioned at common law the forfeiture of lands and goods. 4 B. C. 94. Treason in strictness may therefore be included under this name, but it is usually distinguished. Not only all capital offences are called felonies, but suicide, excusable homicide, and larceny also. The punishment of death was formerly annexed to almost all felonies in English law. The clergy in early times obtained privileges that tended, though very inadequately, to mitigate these sanguinary punishments. *First*, by the right of sanctuary, any person whose crime or misfortune had rendered him liable to death, by taking refuge in a church or other consecrated place, was protected from the pursuit of criminal justice. *Secondly.* The whole body of the clergy were so far inviolable, that no criminal court in the kingdom could sentence one of their number to death for murders, robberies, &c. though in high treason, they were not allowed this privilege. The benefit of clergy, as it was termed, was at one

time granted to every one who could read. This was the mark whereby a priest was known, the ignorance of the laity being almost universal. As learning became more generally diffused, this rule operated to take away the punishment of death in many cases, and consequently, acts were passed from time to time to except certain offences from the privilege, by declaring that the benefit of clergy should not be allowed to persons convicted of them. The test of reading was finally abandoned, and all that remains important of this privilege, once so extensive, is that capital offences are declared by statute to be felonies *without the benefit of clergy*. In other cases of felony, whether at common law, or otherwise, although death be expressed as the punishment; yet, unless the benefit of clergy be expressly taken away by statutory enactment, no capital punishment can be inflicted.—(Even this distinction has been lately abolished in New Brunswick, by the revised criminal statutes of that province.)

Capital crimes.

Capital offences include in our law, treasons, and what are called felonies without benefit of clergy.

[1. *Murder.*]—The prov. act of 1758, 32 G, 2, c. 13, s. 2. 1 P. L. 15, enacts, "that if any person with *malice pre-*"*pense* shall *kill*, or *procure* any other persons to kill,—

[2. *Lying in wait to kill, &c.*]—"or shall on purpose, and "of *malice forethought*, and by *lying in wait*, unlawfully *cut* "*out or disable the tongue, put out an eye, slit the nose, cut* "*off a nose or lip*, or *cut off or disable any limb or member* "of any person, *with intention to kill or to maim, or disfi-*"*gure* any such person, the persons so offending, their "counsellors, aiders, and *abettors*, *privy to* the offence, "shall be *felons without benefit of clergy*. Provided that

" no attainder of such felony * shall work corruption of " blood, or forfeiture of dower, lands or goods of the of- " fender."

[3. *Stabbing.*] Sec. 3. (1 P. L. 15.) " That every per- " son, who shall *stab or thrust any person who hath not then* " *any weapon drawn, or that hath not then first stricken* the " party who shall so stab or thrust, *so as the persons, so* " *stabbed or thrust, shall thereof die within* the space of *six* " *months*, although it cannot be proved that the same was " done of malice forethought, yet the party so offending " and being thereof convicted, shall be excluded from the " benefit of clergy."

[Sec. 4. 1 P. L. 16. " Provided, that this act shall not " extend to any person, who shall *kill* any person *in his* " *own defence, or by misfortune*, or in *any other manner* than " as aforesaid, nor shall extend to any persons who *in* " *keeping the peace*, shall chance to commit manslaughter, " so as the said manslaughter be not committed wittingly " and of purpose, under pretext and colour of keeping the " peace ; nor shall extend to any person who, in chastis- " ing or correcting his child or servant, shall besides his " purpose, chance to commit manslaughter."]

[4. *Petit treason.*] By Prov. act of 1768, 8. G. 3, c. 3, s. 3. 1 P. L. 136. " That if any *woman* with malice pre- " pense, shall *kill* or procure any other person or persons " to kill *her husband ;* or if any *servant* with malice pre- " pense shall *kill* or procure any other person or persons " to kill his or her *master or mistress ;* the persons so of- " fending, their counsellors, aiders, and abettors, privy to " the offence, shall upon due conviction, be adjudged guil- " ty of *petit treason*, and suffer death without benefit of " clergy accordingly."

* This *proviso* is declared by the explanatory act of 1768, 8 Geo. 3, c. 3, s. 4, 1 P. L. 136, " to extend only to the felony " of maiming, as declared and expressed in the recited clause " in the said act.

[5. *Unnatural crimes.*] Sec. 6. 1 P. L. 16, "that the "detestable sin of buggery committed with mankind or "beast, shall be adjudged felony, and such process there- "in be used as in cases of felony at common law, and the "offender or offenders, being convicted by verdict, con- "fession or outlawry, shall suffer the pains of death, and "loss of their goods, lands and tenements, as felons, and "no person guilty of such offence shall be admitted to his "clergy; and justices of the peace shall have power to "inquire of the said offence as in other felonies."

[6. *Rape, &c.*] Sec. 7. 1 P. L. 16. "That if any per- "son or persons shall, by force, and against the consent "of any woman, or infant above the age of twelve years, "have carnal knowledge of her body, every such offender "or offenders shall, on due conviction of such ravishment, "suffer as a felon without benefit of clergy. *Provided* al- "ways, that if *complaint* shall not be made of a ravishment "*within ten days* afterwards, before one of H. M. justices "of the peace or other magistrate, that then such fact "shall be adjudged to have been committed by and with "the consent of such woman or infant."

Sec. 8. 1 P. L. 16. "that if any person shall unlawfully "have carnal knowledge of any female child under the "age of twelve years, though with her consent, every such "unlawful and carnal knowledge shall be felony, and the "offender being thereof duly convicted, shall suffer as a "felon, without benefit of clergy."

[7. *Burglary.*] Sec. 9. 1 P. L. 16, "that if any person "or persons shall *by night break open and enter any dwelling "house, shop, or warehouse, or any vessel lying so near the "land* that it be adjudged *within the county, with an intent to "commit* any *felony*, whether such felonious intent be exe- cuted or not.

[8. *Robbery, by day.*] Sec. 10. 1 P. L. 17. "or shall *rob "any dwelling house in the day time, any person being "therein,*

[9. *Robbery, and breaking in.*] or *break any dwelling* " *house, shop, or warehouse thereunto belonging*, or therewith " used, in the day time, *and feloniously take* away any *mo-* " *ney* or goods* of the value of *five shillings* therein being, " although no person shall be within such dwelling house, " shop, or warehouse.

[10. *Robbery, and putting in fear.*] " or shall rob any " other, *or feloniously take* away any† goods in any dwell- " ing house, the owner, or any other person, being therein " and put in fear."

[11. *Highway Robbery.*] Sec. 11. 1 P. L. 17. " or if any " per on or persons shall by night or by day, *rob* or *by vio-* " *lence take money,‡ or goods, from any person putting him in* " *in fear*, in any *highways*, or in any *streets* or *lanes* of a town

[12. *Privily stealing from the person.*] Sec. 12, 1 P. L. 17. " Or shall *feloniously take money or*† *goods from the* " *person* of any other, privily without his knowledge."— Sec. 13, 1. P. L. 17. " Each and every of the offenders " aforesaid, their *aiders and abettors*, shall, upon due con- " viction, suffer as felons, without benefit of clergy."

13. *Embezzlement by servants.* Sec. 18, 1 P. L. 17. " that " if any *servant* or servants *shall go away with the cask-* " *ets, jewels, money, goods or chattles, delivered to his*, her " or their *keeping, by his*, her or their *master*, or mistress, " *with intent to steal the same*, and defraud his, her or their " master or mistress thereof, contrary to the trust and con- " fidence in them reposed, or *being in service, without as-* " *sent* or commandment *of his*, her or their *master or mis-* " *tress*, shall *embezzle or convert the same to his or her use*, " *with purpose to steal* the same, *being of the value of forty* " *shillings or above*, every such offender or offenders shall,

* Stealing or taking by robbery " any bills of exchange, " bonds, warrants, bills, or promissory notes for the payment of money, being the property of any other person," are put on the same footing as stealing or robbing goods, by the 14th clause of this act. 1 P. L. 17.

" upon due conviction suffer death as in cases of felony, " without benefit of clergy. Sec. 19, 1 P. L. 17, *Provided* " that any *apprentice or apprentices, within the age of fifteen* " *years*, shall be entitled to the benefit of clergy, for the " first offence."

[14. *Arson.*] Sec. 20. 1 P. L. 17, 18, " That if any " person or persons shall *wilfully and maliciously burn*, or " cause to be burned, any *dwelling house, barn, outhouse or* " *warehouse of another*, or any *public building*, or any *hovel*, " cock, mow, rick, or stack of corn, straw, hay, or wood, " of another, all and every such person or persons so of- " fending, and their aiders, abettors, and counsellors " shall, upon due conviction, suffer as felons, and be ex- " cluded from the benefit of clergy."

[15. *Shooting.*] Sec. 21. 1 P. L. 18. " That whosoever " shall *maliciously shoot* at any person or persons, in any " dwelling house or other place—

[16. *Threatening letters,*] " or shall knowingly send any " letter without any name, or signed with a fictitious name, " demanding from any person or persons, money or other " valuable thing, such offender or offenders, being duly " convicted thereof, shall suffer as felons, without benefit " of clergy."

[17. *Second offence.*] As the act of 1758, 32 G. 2, c. 13, s. 27, 1. P. L. 18, directs, " that every person which " once hath been admitted to the benefit of his clergy, " being afterwards arraigned, shall not be admitted to the " benefit of his clergy." It follows that a second conviction for a clergyable felony, exposes the offender to capital punishment.

[18. *Stealing at fires.*] The act of 1762, 2 G. 3. c. 5, s. 5, 1 P. L. 81, enacts " That if any evil-minded wicked " persons, shall *take advantage of such calamity, to rob,* " *plunder, purloin, embezzle, or convey away, or conceal any* " *goods*, merchandizes, or effects of the distressed inhabi- " tants, whose houses are on fire or endangered thereby,

" and put upon removing their goods; and shall not *re-*
" *store* and give notice to the owner or owners, if known,
" or bring them into such public place as shall be appoint-
" ed and assigned by the *governor and council*, within the
" space of *two days* next after *proclamation* made for that
" purpose, the person or persons so offending, and being
" thereof convicted, shall be deemed felons, and suffer
" death, as in cases of felony, without benefit of clergy."
This act related to fires at Halifax, and is extended to several other towns. See local laws.

[19. *Cutting dykes, &c.*] The act of 1766, 6 & 7 G. 3, c. 1, s. 1, 1 P. L. 122, enacts, " that if any person or
" persons, from and after the publication of this act, shall
" unlawfully and *maliciously break down, or cut down the*
" *bank or banks of any river, or any sea bank or dykes, where-*
' *by any lands shall be overflowed or damaged*, every person
" so offending, being thereof lawfully convicted, shall be
" adjudged guilty of felony, and shall suffer death as in
" cases of felony, without benefit of clergy."

20. [*Wreckers.*] The act of 1801, 41 G. 3. c. 14, sec. 1. 1 P. L. 446, enacts that "if any person or persons whatso-
" ever, shall *plunder, steal, take away or destroy, any wrecked,*
" *stranded, or abandoned, ships or vessels, or any kind of goods,*
" *wares and merchandise* whatsoever, which shall be wrecked,
" lost, stranded or cast on shore, *on the coasts of this Pro-*
" *vince, or of the island of Sable*, or shall *steal or take away,*
" *any kind of shipwrecked or lost goods, wares or merchandise,*
" which shall be found *floating in the rivers, bays or har-*
" *bours of this province, or contiguous to the shores thereof*, ex-
" cept so far as may be necessary to bring the same to shore
" for security,—or *shall plunder, steal or take away, any of the*
" *tackle, apparel, furniture or provision, of any ship or vessel*
" *so found wrecked*, stranded or cast away as aforesaid,
" (whether there be any living creature on board such ship
" or vessel or not,) *or shall beat, wound, or otherwise wilfully*
" *obstruct, any person or persons endeavoring to save his, her,*

" *or their life or lives*, from such ship or vessel,—or shall *put* " *out any false light* or lights, with intention to bring any " ship or vessel into danger, then and in all such cases, the " person or persons so offending, shall be deemed guilty of " felony, and being lawfully convicted thereof, shall suffer " death, as in cases of felony, without benefit of clergy." Sec. 2. provides " that when any goods, or effects, which " are under the value of 40s. shall be lost, stranded or cast " on shore as aforesaid, if the same be stolen without any " circumstances of cruelty, outrage or violence, the per- " son or persons convicted of such stealing, shall suffer " only the punishment which the laws direct in cases of " petit larceny."

[21. *Alien returning.*] The act of 1798, 38 G. 3, c. 1, s. 8, 1 P. L. 391, (temporary law, continued 3 years by act 1830, 11 G. 4, c. 21.) directs " that if any alien who shall " be sent or removed without this Province as aforesaid, " shall return thereto or be found therein, during the con- " tinuance of this act, every such alien, on conviction " thereof, shall be deemed guilty of felony without bene- " fit of clergy." (see Epitome, vol. 1, p. 49—56.)

[22. *Quarantine.*] The act of 1799, 39 G. 3, c. 3, s. 11, 12, 1 P. L. 403, made it felony without benefit of clergy for any 'chief officer superintending' quarantine, to 'knowingly give a false certificate' to any vessel, person or goods, as having performed their quarantine, and being free from infection.—and sec. 12, enacted that concealing letters or goods from the authorities or clandestinely removing them from quarantine, should also be felony without benefit of clergy. (But this act is perhaps repealed by the quarantine act of 1832. 2 W. 4, c. 13.)

[23. *Sinking ship.*] The act of 1801, 41 G. 3, c. 14, s. 7, 1 P. L. 449, makes every attempt to endanger or destroy a vessel, whether in distress or otherwise, felony without benefit of clergy.

BOOK V.—CHAPTER IV.

OFFENCES AGAINST MORAL PURITY.

1. An attempt, (or as it is termed in law, an assault, with an intent) to commit an unnatural crime, is subjected to the punishment of *standing in the pillory*, and the offender may be also "fined, imprisoned, or be bound in sureties" for good behavior, at the discretion of the court. Act of 1758, 32 G. 2, c. 13, sec. 6, 1 P. L. 16.

2. Every "violent assault and battery committed" with an intent to ravish a female above 12 years of age, or to have intercourse with a female child under that age, is subjected to the same punishment of pillory, &c. as in the last offence. Same act, s. 8, 1 P. L. 16.

3. *Incest*—Subjects the offender to "be set in the pil-"lory for the space of one hour," and adds a forfeiture of £50 "to the use of his his majesty's government, or six months imprisonment. Act of 1758, 32 G 2. c. 17, s. 8, 1 P. L. 25.

4. *Adultery.* Subjects the offender to a forfeiture of £50 to the use of his majesty's government, or to 6 months imprisonment, and to an action of damages. Same act.

sec. 9, 1 P. L. 25. The act makes incest and adultery triable by the Supreme Court, and also by the quarter sessions.

5. *Blasphemy.* Any person who shall "presume wil- "fully to blaspheme the holy name of God, father, son, "or holy ghost—or to deny, curse, or reproach the true "God, his creation or government of the world, or "to deny, curse, or reproach the holy word of God, "that is, the canonical scriptures in the books of "the old and new testament;"—is to be set twice "in the pillory, for the space of one hour each time, "or be imprisoned for three months, at the discretion "of the court, where such offender shall be convic- "victed." The act gives jurisdiction both to the Supreme Court and sessions to try this offenee. Act of 1758, 32, G. 2, c. 20. s. 1. 1. P. L. 28.

6. *Swearing. Any justice of peace* may convict a person who shall prophanely "*swear or curse*" in his presence or hearing, or on the oath of one credible witness,—or by confession of the delinquent. The offender is to forfeit, to the use of the poor of the town when the offence is committed, "for the *first offence two shillings*," for a *second offence* after conviction of the first, to forfeit *double*,—for *third* offence, *treble* that amount,—"and upon neglect of "payment, the justice shall issue his warrant to a consta- "ble, commanding him to levy the said forfeitures by dis- "tress and sale of the goods of such offender." Forfeitures to be paid over to the overseers of the poor for the use of the poor. "In case no distress can be had," the offender if above 16 years old "shall by warrant of the "justice, be *set in the public stocks* for *one hour* for every "single offence, and for any *number of offences* whereof he "shall be *convicted at one time, two hours;*" if under 16,—on non payment of the forfeiture, he shall by warrant "of the justice, be *whipped* by the constable, or by the "*parent guardian*, o master of such offender, in presence

" of the constable."—Every such offence must be prosecuted within 10 days after it is committed. Act of 1758, 32, G. 2. c. 20, s. 2. 1 P. L. 28, 29.

7. *Drunkenness.* " Every person who shall by *view* of " any justice of the peace, or *confession* of the party, or " *oath* of one credible witness before any such justice, be " convicted of drunkenness" *forfeits to the poor of the town* where the offence is committed 5*s.* on non payment to be levied " by warrant of distress, and sale of the offen- " der's goods," to be paid over to the overseers of the poor. " For want of such distress, such offender shall *be set in* " *the stocks* for any time not exceeding *three hours*," at the discretion of the justice or justices before whom he is convicted. On a second conviction, besides the penalty, he shall " be bound with *two sureties*, in the sum of *ten* " *pounds*, with condition for the good behaviour,"—and for want of such sureties, be committed to the common jail till he find them. Every such offence must be prosecuted within ten days after it is committed.—Act of 1758, 32 G. 2, c. 20, s. 3, 1 P. L. 29. (In convictions for swearing, cursing or drunkenness, the justice of peace is to record the conviction, and certify it to the next quarter sessions, where it is to be kept upon record by the clerk of the peace, to be seen without fee. ibid. sec. 4. If any action be brought against a justice of peace, or officer for acts done under this law, defendant may plead the general issue, and give the special matter in evidence, and shall have *treble costs*, if plaintiff become nonsuit, or verdict pass for defendant. ibid. sec. 5, 1 P. L. 29.

8. *Gaming.* The punishment for this offence will be seen in volume first of this Epitome, p. 173, 190, 191, 211, 212.

9. *Breaking the sabbath.* See 1st vol. Epitome. p. 187, 188, 189, 212.

The act of 1832, 2 W. 4 c. 3, s. 24, imposes a penalty

of £5, and forfeiture of his license on any person holding a shop license, selling any thing, except bread and milk on the lord's day.

Sec. 25. If any person holding a license for sale of liquors, " suffer any disorderly persons, or any hired man " or woman servant, apprentice, male or female, or any " person or persons under the age of 21 years," to resort to his tavern, &c. to waste time and drink there, or entertain any persons (but travellers or lodgers) on the *lord's-day*,—one justice, on his own view, or oath of one credible witness, may apprehend the party and commit him to the county jail, unless he give recognizance with one or more sureties to answer at the sessions, and for good behavior in the meanwhile. He may also bind over the witnesses to prosecute. The grand jury, on their own knowledge, or otherwise, may present such offenders, who, if convicted by a verdict of a jury, forfeit the license, and also £50, the penalty of their bond. Sec. 11 & 25.

Fraudulent crimes.

1. *Forgery.* The act of 1758, 32 G. 2, c. 2, (act of council, sec. 12), 1 P. L. 5, imposes on any who forge any *entry* of any acknowledgment of any memorial, certificate or endorsement, directed by that act, the pains and penalties of the English statute. 5 Eliz. c. 14, for forging deeds, court rolls or wills. This extends to—1. a forfeiture to the injured party of double costs and damages—2. the offender is to stand in the pillory—3. have both his ears cut off—4. and his nostrils slit and seared—5. he is to forfeit the profits of his lands to the crown—6. he is to be imprisoned for life—and on a second conviction is to suffer death as a felon, without benefit of clergy.

2. Forgery of " any *deed* or writing sealed," " last *will* " or testament,"—" bond, writing obligatory,—" *bill of* " *exchange*"—" *promissory note* for the payment of money"

—" *endorsement* or assignment" of any such bill or note—" *acquittance* or *receipt* either for money or goods"—" or " any discharge of any action, account, debt, demand, or " any personal thing"—" with intention to defraud any " person." (The act of 1819, 59 G. 3. c. 17, s. 8. 3 P. L. 59, subjects any person forging or counterfeiting the common seal of the Halifax Fire Insurance company, or any policy or instrument under their common seal, offering to dispose of such forged policy, or demanding the amount to " the pains and penalties inflicted by law upon persons guilty of forgery within this province")—or *publishing* or exhibiting as evidence (knowingly) a forged deed or will —uttering or publishing as true (knowingly) any such forged bond, bill, note, or receipt—or *procuring* to be forged, or *willingly assisting* in the forgery of any such deed, will, bond, bill, note, endorsement, or receipt. In all these cases, the person convicted " shall be *set in the pil-* " *lory*, and there have *one of his ears cut off*, and shall also " suffer *imprisonment for the space of one year* without bail " or mainprize; and the party grieved shall recover *his* " *double costs and damages*, to be assessed in the court " where such conviction shall be."

The act gives *jurisdiction* to the *supreme court*, and to the *sessions* also, over these offences. It also exempts judges of probate, and registers who unwittingly may seal or authenticate forged documents, and parties who may " shew forth or give in evidence." Such papers, &c. not knowing them to be forged. Act of 1758. 32 G 2, c. 20, s. 8, 1 P. L. 30.

3. *Forging provincial treasury notes.* The act of 1812, 52 G. 2, c. 1, authorized the issue of £12000 in notes, and sec. 5, 2 P. L. 94, imposed on any person who should " counterfeit" any of them, " or alter any of the same so " that they shall appear to be of greater value than when " originally issued, or shall knowingly pass, or give in " payment, any of the notes aforesaid so counterfeited or al-

" tered"—the punishment of being set *in the pillory for one hour*, and *one of the offender's ears to* '*be nailed thereto*,' and he is also to " be *publicly whipped through the streets* " of the town or place where such offence shall be com- " mitted, and shall pay all charges of the prosecution." The act of 1815, 53 G 3, c. 15, authorized a new issue of notes to the amount of £20,000, and by section 8, (2 P. L. 112,) imposed the same punishment on forging, altering or uttering, as the act of 1812 had done. The act of 1817. 57, G. 3. c. 16. authorised an issue of £5000 in notes, and by sec. 3, (3 P. L. 15,) enacted the same punishment. So the act of 1818, 58, G. 3, c. 32, which authorised issuing £15000 in notes. Sec. 4. (3 P. L. 36,) contains same punishment. Act of 1820, 60. G. 3, c. 18, for an issue of £20,000 in notes. Sec. 3, (3 P. L. 69.) same punishment, act of 1820, 1821. 1 & 2. G. 4, c. 4, for issue of £66,227, in notes. Sec. 5, (3 P. L. 99,) same punishment. See also act of same year, c. 37, s. (3. 3 P. L. 115,) act 1823, 4 G 4. c. 12, s. 2. (3 P. L. 155.) So the act of 1826, 7. G. 4, c. 14, for issue of £40,000 in notes, by sec. 7, (3 P. L. 260) imposes the same punishment.

The act of 1828, 9. G. 4, c. 3, for issue of £40,000 in notes, enacts, sec. 7. " that if any person or persons who- " soever, shall counterfeit any treasury note or notes, issu- " ed by virtue of this act or of any former act of the gene- " ral assembly, or alter any of the same, so that they shall " appear to be of greater value than when originally issued, " or shall knowingly pass and give in payment any of the " said notes so counterfeited or altered, every person con- " victed thereof shall be *imprisoned* for a term *not exceeding* " *seven years in the Bridewell*, and there kept *at hard labor*, " and shall *pay all charges* of the prosecution." See also " act of 1829. 10, G. 4, c. 43. s. 3. 1830. 11 G. 4, c. 9. " s. 3.—1832, 2 W. 4, c. 64. s. 3, in which the punish- " ment is similar to that in the act of 1828.

4. *False tokens*. The act of 1758, 32 G. 2. c. 20, s. 14,

1 P. L. 31. enacts "that if any person or persons shall "*falsely and deceitfully obtain* or get into his, her, or their "hands or possession, *any money, goods, chattels, jewels, or* "*other things of any other person* or persons, *by color and* "*means of any privy false token, or counterfeit letter made in* "*another man's name, to a special friend or acquaintance,* for "the obtaining of money, goods, chattels, jewels or other "things, and shall be thereof convicted in any court of "oyer and terminer, court of assize and general gaol deli- "very, or quarter sessions of the peace, every such offend- "er shall suffer such punishment by *imprisonment,* setting "upon the *pillory, public whipping, or hard labour in the* "*house of correction, as such court* where the offender shall "be convicted, shall *in their discretion adjudge.*"

5. *Foreign coin.* Act 1758. 32, G. 2. c. 20, s. 6. 1 P. L. 29.—"*Counterfeiting, or impairing, diminishing or* "*imbasing* any foreign coins, current in the province, "by *washing, clipping, rounding, filing,* or *scaling* of "the same,"—"*uttering* any counterfeited or impaired "coin, knowing the same to be so,"—on conviction at the "supreme court or sessions, the offender is to be "set in "*the pillory* by the space *of one whole hour* and *one of the ears* of such offender shall be *nailed thereto.*" (The amending act of 1774, 14 & 15. G. 3, c. 10. 1 P. L. 190, adds to this punishment that any one so convicted of "counter- "feiting impairing, diminishing or imbasing" shall have "*one of his ears* "*first cut off* and then nailed to the pillo- "ry,")—"and such offender shall also be *publicly whipped* "*through the streets of the town* where such offence shall be "committed, and shall *pay all charges* of the prosecution." Every person "convicted as aforesaid, of *buying or receiv-* "*ing* any *clippings, scalings, or filings of money,* shall *forfeit* "the sum of £20." (half to H. M. Government—half to the informer who shall "sue for the same") and be *imprisoned* for 3 *months.* Sec. 7. 1 P. L. 30.

6. *Base copper coin.* The act of 1787, 28, G. 3, c. 9.

1 P. L. 258, imposes the penalty on any person who shall "*import, vend, or knowingly and wittingly offer in payment, or circulate,* any half pence or other copper coin, other "than tower half pence, or such copper coin as may and "do legally pass current in Great Britain or Ireland,"—of "*forfeiting* such base half pence and coin, and *paying* "for the use of the poor of the town where such offence "shall be committed, *a sum not exceeding double the amount "or nominal value, of such base half pence and copper coin,* "so imported, vended, offered in payment, or circulated "as aforesaid, to be recovered on information before any "two of H. M. Justices of the peace, within the town or "county where such offence shall be committed."

7. *Perjury.* By act of 1758, 32 G. 2, c. 20, s. 9, 1 P. L. 30, any one who "shall *wilfully or corruptly* commit "perjury, by his or their *deposition in any court of record,* "*or being examined ad perpetuam rei memoriam,*" shall *forfeit* £20, half to his majesty's government, half to the party grieved who sues for it "by action of debt, bill, "plaint or information in any court of record," and shall be *imprisoned* 6 *months.* "And the *oath of any such person "shall not be received in any court of record*" unless the judgment be reversed, in which case the party wrongfully convicted has an action on the case for damages against those who procured the judgment to be given against him.

Sec. 10, directs, that if the offender has not "any goods "or chattels to the value of £20, then *he, she, or they "shall be set on the pillory by the space of one whole hour, "and both his ears shall be nailed to the pillory.*" The amending act of 1774, 14 & 15 G. 3, c. 10, 1 P. L. 190, directs "that *both the ears* of such offender or offenders as shall "be convicted of perjury"—"*shall* for more exemplary "punishment, *be first cut off, and then nailed* to the pillory."

8. *Subornation of witnesses.* To "unlawfully and "corruptly procure any witness or witnesses" to commit perjury in any court of record or in testimony *in perpe-*

tuam rei memoriam, is subjected to the same "pains, pe- "nalties, forfeitures, and disabilities in all respects, as "are hereby directed for the like offences." Act 1758, 32 G. 2, c. 20, s. 11, 1 P. L. 31.

The next clause, sec. 12, empowers "the judges of the "the said courts where such perjury shall be committed," as well as the "justices of assize and gaol delivery"—(supreme court) and the quarter sessions to enquire into all the said offences of wilful perjury, and subornation "of perjury, and thereupon to give judgment, award pro- "cess and execution of the same. 1 P. L. 31.

Perjury before the register or deputy register of deeds, in taking the oaths prescribed in the act, is made "liable "to the same penalties, as if the same oath had been "made before any court of record within this province." Act 1758, 32 G. 2, c. 2, act of council, sec. 12, 1 P. L. 4. Every witness for the prisoner in criminal cases is directed to be sworn, and if "convicted of wilful perjury in "such evidence, he shall suffer all the penalties, forfei- "tures and disabilities which by law, may be inflicted on "persons convicted of wilful perjury." Act 1758, 32 G. 2, c. 13, s. 35, 1. P. L. 20. The act of 1759, 33 G. 2, c. 2, 1 P. L. 48, which allows a *quaker* "who shall be requir- "ed upon any lawful occasion to take an oath,"—(except in criminal cases) to make a solemn affirmation instead—by sec. 2, makes persons who "wilfully, falsely and cor- ruptly" affirm under this privilege to "incur the same pe- "nalties," "as in cases of "wilful and corrupt perjury." The act of 1763, 3 & 4 G. 3, c. 6, s. 8, 1 P. L. 93. for relief of *insolvent debtors*, directs that any debtor convicted of perjury in the oath prescribed by that act, "shall suf- "fer all the pains and forfeitures which by law be inflict- "ed on any person convicted of wilful perjury." By the act of 1829, 10 G. 4, c. 28, s. 13. (Copartner act, see p. 41—43. this vol.) those who swear wilfully to false state- ments in any examination directed by that act "shall be

"*imprisoned* for a term not exceeding seven years *in the* "*bridewell*, and there be kept *at hard labour*, and shall "*pay all charges* of prosecution."

By act of 1774, 14 & 15 G. 3, c. 4, s. 6, 1 P. L. 185, enabling a judge to take the deposition of any witness, who is aged, infirm, unable to travel, or obliged to leave the province, in writing,—any one convicted of perjury in such deposition, "shall incur the same penalties as per- "sons convicted of wilful and corrupt perjury." This clause is extended to depositions taken before a commissioner under act of 1829, 10 G. 4, c. 36, s. 2. The quarantine act of 1832. 2 W. 4, c. 13, s. 25, extends the provision to oaths taken under its regulations.

9. *Counterfeiting bail.* By the acts of 1768. 8, G. 3, c. 7. s. 3, 1 P. L. 141 and 1771. 11, G. 3, c. 3. 1 P. L. 166. It is made felony to personate any individual before any judges or commissioners authorized by law to take bail, so as to pass off for him as one of the bail required, but the acts do not take away the benefit of clergy from this offence.

10. *Suppressing wills.* This offence is subject to a penalty of £5 for every month during which the will is concealed or withheld improperly, by act 1758. 32, G. 2, c. 11. s.7 & 8. 1 P. L. 11. and the same penalty imposed *on an executor neglecting to prove one.*

11. *Buoys and beacons.* By act 1784. 25 G. 3, c. 6 sec. 1. 1 P. L. 241. To "*take away, cut down or destroy,*" (or to "*aid or assist*" in so doing) any "*buoys, beacons or seamarks,*" placed or set by the governor or other person "having authority so to do, in any harbour, "creek or bay," in this province, subjects the offender, on conviction "by the oath of one credible witness, before "two justices of the peace," to *a forfeiture of* £100,—or non payment, and no personal property appearing, to levy it on, the two justices are to *commit* the offender for a *twelvemonth*, to the *gaol of the county or place*, where the of-

fence shall have been committed. Sec. 2. 1 P. L. 242, Any person who shall "*make fast to any such buoy or sea-mark, any ship, vessel or boat,*" forfeits £20, or is subject to 6 *months imprisonment*, (trial and conviction before 2 justices as in first clause.)

12. *Mile posts.* "Whoever, shall be found guilty of "*defacing, displacing, injuring, or destroying* any *post, board* "*or stone*, erected, or to be erected, for the purpose of ascertaining distances," on conviction before two justices of peace, forfeits £2, half to the prosecutor and half to the county treasurer, for repair of mile boards in the county. If he is *not able to pay*, the two justices are to direct "and order the offender a corporal punishment *not less* "*than* 20 *lashes, nor exceeding* 30 *lashes*, to be inflicted "*at the most public place* within the said district, in the usual "and accustomed manner." Act 1790, 30 G. 3, c. 3, 1 P. L. 278.

13. *Bounds.* The act of 1791, 31 G. 3, c. 10, 1 P. L. 288. (sec. 3) which legalizes partitions by joint tenants and tenants in common effected by plan and survey, subjects any one who shall "wilfully or maliciously remove "and destroy," (or aid, abet or assist in so doing,) "bounds "or landmarks" "set up agreeable to said survey and plan," on conviction in the supreme court, or any other court of record, to be "fined, imprisoned or *whipped*, at the dis-"cretion of the judges of said court."

14. *Treasurers of counties.* By the act of 1765, 5 G. 3, c. 6, s. 7, 1 P. L. 113, "the treasurer in each county shall "*make up his accounts upon oath* of all his *receipts & payments* "at every court of assize, or general sessions, held for "said county, to be *approved* or *disapproved* by said courts, "and the same shall be *filed in the office* of the *clerk of the* "*peace* for said county." He is not to compound for any money to be raised on the county, nor to make any deduction from his payments without proper vouchers, "if "any treasurer shall *offend herein* or *neglect to* make up his

" *account* as aforesaid, he shall forever be *incapable to serve* " as treasurer again, and *be committed to gaol without bail* " or mainprize, until he fairly accounts with the court of as- " size or general sessions of the peace held for such town " or county, and from the said court to receive a certificate " of his having passed his accounts to their approbation."

The Act of 1827, 8 G. 4, c. 17, sec. 6. (Shubenacadie canal co.) directs that " *upon complaint made* on oath, to " the judges of the supreme court, at any of its sittings in " Halifax, that any person holding any office in the said " company, has been guilty of any *fraud or criminal miscon-* " *duct*, in managing the *affairs* of the said *company*, or the " stock, funds or property, real or personal, belonging there- " to, it shall be lawful for the said *supreme court to examine* " into the subject matters of such complaint, *and to hear* " *and try the same, either by jury or in a summary way, and up-* " *on conviction, to remove the person* or persons so *convicted*, " *from the office* held by him or them, in the said corporation."

Theft.

1. *Larceny.* Stealing to the value of 20s. or upwards (where not otherwise specifically punished by that act) is declared to be *larceny and felony*, by act of 1758, 32 G. 2, c. 13, s. 22. 1 P. L. 18. So, by the same clause to " em- " bezzle any of his majesty's stores, or the utensils, furniture " or clothing, in any storehouse or hospital of H. M." to the value of 20s. is made *larceny and felony.* Stealing " bills of exchange, bonds, warrants, bills, or promissory notes for the payment of money," is by sec. 14, of the same act, 1 P. L. 17, made equivalent to stealing goods to the same amount. So stealing provincial treasury notes is made equivalent to stealing money, by act of 1830, 11 G. 4, c. 9, s. 4. So if any one " take away with " an intent to steal, embezzle or purloin, any goods, chat- " tles or furniture, which by agreement they are to use, " or shall be let to them to use in his, her or their lodg-

" ing, such taking, embezzling or purloining, shall be ad-
" judged to be larceny and felony." Act 1758, 32, G. 2, c. 13, s. 17. 1 P. L. 17.

2. *Petit larceny.* In cases of theft " if the value shall " be found by verdict on trial, to be less than 20s. then " such offence shall be punishable as petit larceny." Same act. Sec. 22. 1 P. L. 18. The act of 1774. 14 & 15. G. 3. c. 7. 1 P. L. 189. authorizes the court " to punish such " offender by whipping or imprisonment, or commitment " of such offender to the house of correction, there to be " put to hard labor," for a term not exceeding 3 months, to be fixed by discretion of the court. Stealing wrecked goods under 40s. value " without any circumstances of " cruelty, outrage or violence," is declared petit larceny by act 1801. 41. G. 3. c. 14. s. 2. 1 P. L. 446." The statute of 1758, 32, G. 2, c. 13, sec. 16. 1 P. L. 17, enacts " that " if any person or persons shall buy or receive any goods " that shall be stolen, knowing the same to be stolen, he " she or they, shall be deemed accessaries to the felony " after the fact, and that it shall be lawful to prosecute " and punish persons, buying or receiving stolen goods, " knowing the same to be stolen, or that shall be accessa- " ry to such felony before or after the fact, as for a misde- " meanor, to be punished by fine and imprisonment, al- " though the principal felon be not before convicted of " the said felony, which shall exempt the offender from " being punished as accessary, if the principal shall be af- " ter convicted. The 26th section of the same act enacts " that notwithstanding the allowance of clergy, and burn- " ing in the hand of any principal offender, the accessaries " to such offender shall be arraigned and tried in the same " manner, as if such clergy had not been allowed. (—— " Taking rewards to help persons to stolen goods, is by " Brit. stat. 4 Geo. 1, c. 11, declared to be felony, unless " they cause the felon to be brought to trial. This act is " extended to H. M. dominions in America." C. J. Bel- ' cher's note. 1 P. L. 20.

BOOK V.—CHAPTER V.

MISCELLANEOUS OFFENCES.

Wrecked property.

The prov. act of * 1801, (made perpetual by the act of 1820, 1821, 1 & 2, G. 4, c. 19, 3 P. L. 111.) 41, G. 3, c. 14. sec. 1, 1 P. L. 446, directs that "all wrecked "stranded or abandoned ships or vessels, and shipwrecked "goods of every kind," that are "forced on shore, wrecked "or stranded, upon the coasts of this province, or of "the island of Sable," or "found floating in the rivers, "bays, or harbors thereof, or so near to the coast thereof "as to be within soundings" shall be taken care of for the owners. Persons discovering the same to give *immediate notice* to some of the following officers, viz: the *sheriff of the county*, the *coroner*, *officers* of the *customs*, *officers of impost and excise*, or *justices of peace*, whichever is nearest at hand. Such officer or officers (or the majority of

* By sec. 9, 1 P. L. 449, the clerk of the peace at every general sessions, is to read aloud the whole of this statute before the grand jury retire on the first day, under 20s. penalty, recoverable at the sessions by informer.

them if several attend) are to take all necessary measures to secure and preserve the property.

The 3d section authorizes any justice of peace, on information made before him on oath of wrecked articles being carried off or concealed, to issue his warrant " for " searching of all places, where the same shall be suspect- " ed to be concealed." If they are found in possession of any one who appears to the justice to have " wilfully con- " cealed, hid, or kept such goods from being found with a " fraudulent intention," the justice may commit him to the county jail.

The 4th section empowers such of the above officers as shall act, or any of them, to command the aid of persons in the neighborhood, and to require the commander of any vessel near the place to send boats and men to assist, in saving life, preserving vessels from shipwreck and danger, and saving property. Persons disobeying them in this respect, may on information upon oath be committed to the county jail for trial by any justice of peace, unless they find good security, to answer at the next general sessions. There, on information exhibited, if an offender be convicted of such refusal or disobedience, he is subjected to a fine not to exceed £50, or an imprisonment not to exceed 6 months, at the discretion of the sessions. It allows remuneration to the persons assisting. Their services are to be certified by the officer in charge, and the *quantum* to be settled on reference " to three of the neighboring justices " of the peace, to be mutually chosen by the parties." This " adjustment shall be binding to all parties, and shall " be recoverable in action at law, to be brought in any of " H. M. courts of record in this province."

If no person appear to claim goods saved, the officer or officers in charge of them may sell part to satisfy salvage and incidental expenses. If the goods are in danger of perishing or being lost by delay, the whole are to be sold. Some principal officer of H. M. customs, or if none such be pre-

sent, "some other responsible person" is then to be put in possession of the goods or money. If no legal claim be made by the owner within 12 months, any goods remaining are then to be sold at public auction, and the proceeds, deducting expenses, to be paid into the provincial treasury, with an account of the whole, " there to remain for the benefit of the rightful owner when appearing,"—who on giving proof of property by affidavit or otherwise, to to the satisfaction of the chief justice, or some judge of the supreme court " shall upon his order receive the same out of the treasury. Sec. 5. 1 P. L. 448, forbids any meddling with property in the charge of any person, under color of saving it, or of this act, unless aid be requested, in which case notice is to be given to some of the officers enumerated. It also declares it to be lawful for the master or person in charge of any vessel, (or for any of the public officers before mentioned who may come to his assistance) " to repel by force any person or persons" who attempt to enter the vessel or meddle with the goods without leave. Sec. 6 entitles parties sued in consequence of any thing they may do under this act, to give the act and special matter in evidence on the general issue, and if entitled to it, to have costs and an execution for them. On any appeal to the supreme court, by *certiorari* or otherwise, of proceedings under this act, enquiry into the real merits shall take place. The court above to amend the proceedings if necessary according to justice, and they are not to *be wholly* reversed except in case of wilful and corrupt error. There are also some severe penal clauses in the act noticed elsewhere.

Malicious injuries to cattle, The act of 1824. 4 & 5 G. 4. c. 4. 3 P. L. 181. imposes, sec. 1. on any who shall " *maliciously, unlawfully, and willingly, kill, maim, wound, or otherwise hurt,* any *horse, mare, gelding, ox, bull, cow, steer, heifer, sheep, or other cattle,*" *treble damages* to the party grieved, recoverable by action of trespass on the case, in any court of record.

Sec. 2. Imposes such punishment "*by imprisonment or* "*public whipping*, as such court shall in their discretion "adjudge," on conviction before the supreme court or the sessions. He is not to be punished however both civilly and criminally, if a suit is brought he is free from the criminal charge, and if punished criminally no action is afterwards to be brought by the party injured.

The act of 1825, 6. G. 4. c. 22, 3 P. L. 213, directs that if "any persons *owning or having the charge of any* "*horses, sheep or other cattle*, shall *wantonly and cruelly maim*, "*wound, or otherwise hurt*" them, they may be convicted before one magistrate, by one or more witnesses, and *forfeit for every offence* a sum not above £3.—nor under 5s. —on non payment to committed to the gaol, or house of correction, "for a time not exceeding 20 days, at the "discretion of the magistrate." Forfeiture to go half to prosecutor, half to the poor of the parish where the offence took place.

Malicious injuries to property. Wilfully and maliciously destroying or injuring *property, real or personal*, for which there exists no punishment except by civil action, is by act of 1832, 2 W. 4, c. 48, made a *misdemeanor* triable at the supreme court or sessions, punishable by fine not to exceed £20, or imprisonment in county jail or bridewell, or house of correction at Halifax, not above 2 years, at the court's discretion.

Sec. 2. If the aggrieved party be known, and has not been a witness for the prosecution, the fine imposed is to go to him—otherwise it goes to the crown. Public property is included in the act as well as private. Sec. 3, exempts any person trespassing "under a fair and rea- "sonable supposition that he had a right to do the act "complained of," from these punishments.

Sec. 4, makes every person "who shall aid, abet, coun- "sel or procure" any such offence to be committed "lia- "ble to be indicted and punished as a principal offender."

Sec. 5, dispenses with proof of any malice against the owner of the property. Sec. 6, limits the duration of the act to three years.

Deserters.—From the *navy.* The act of 1758, 32 G. 2, c. 12, 1 P. L. 14, s. 1, subjects any one who shall "*entice* "*any seaman or marine to desert, or harbor, conceal or assist any deserter from any ship of war, knowing him to be such,*" to a *forfeiture of* £20 for the use of H. M. government, "on conviction, by one or more credible witness, before "any three justices of peace (*quorum unus*)" to be levied by distress. For want of such distress the offender to be committed to his majesty's gaol for 6 months, without bail, or until the fine be paid.

Sec. 2, imposes £5 fine on any one who "shall buy or "receive as a pledge or exchange, any slop cloths from "any seamen or marine belonging to any of his majesty's "ships of war," Confession, the oath of one credible witness, or the articles found in party's possession to be sufficient proof to convict. The fine to be divided; 40s. to the informer, £3 to his majesty's government. One or more justices of the peace may convict. The clothes to be restored, and the purchase or loan money not to be reclaimable by any action. The justice or justices to levy the penalty by distress, for want of which the offender to be committed by the justice or justices to his majesty's gaol, to remain without bail for two months, or till the penalty be paid. Sec, 3, empowers *any person* to apprehend a seaman or marine offering to sell or selling his clothing or slops, and to carry him immediately to some justice of peace of the county. The justice is empowered to commit him, or give him up to the captain or other officer of the ship.

Sec. 4. On information made on oath before a justice of peace, by "any of the officers of H. M. ships of "war that one or more of the seamen in H. M. ser- "vice, have deserted or absconded, who there is reason to

"believe he concealed in some dwelling or outhouse, "where the said officer has been refused admittance," the justice is "to issue his warrant to some one or more "constables impowering him or them, in the day time, to "search for said deserters or absconders, in any dwelling or outhouse suspected, accompanied by one officer only, either lieutenant or midshipman, and no other seaman or marine with him. Any master or mistress of a dwelling or outhouse refusing entrance to a constable so empowered, to forfeit £20, "to be levied by warrant of dis-"tress under the hand and seal of two of H. M. justices" of the peace on offender's goods, for want of such distress to be committed to H. M. gaol for 6 months. If the justice be applied to in the night time, on such sworn information, he is to go in person with the constables, and one lieutenant or midshipman, and no other seaman or marine, and to demand entrance himself. The master or mistress refusing him entrance, under such circumstances, in the night time, to forfeit as above. Penalties in this clause to go to the uses of government. The persons apprehended as deserters are to be sent to H. M. gaol, until proof be made of their desertion before one or more justices of the peace. If proved to be deserters, they are to be delivered to any officer of the navy who demands them. If not deserters, or in the service, they are to be discharged without cost. (This act was only passed for the period of the war then carried on, but was made afterwards perpetual by act of 1759, 33 G. 2, c. 1, 1 P. L. 56.)

Deserters from the army. By act of 1795, 35 G. 3, c. 5, 1 P. L. 350, 351. "If any person shall * harbor, conceal "or assist, any deserter from H. M. service, knowing him "to be such,"—or, "shall knowingly detain, buy or ex-"change, or otherwise receive any arms, clothes, caps, or

* By act 1803, 43 G. 3, c. 1, s. 1, 1 P. L. 467, the penalty on "any person harboring a deserter, knowing him to be "such," is raised to £20.

"other furniture belonging to the king, from any soldier "or deserter, or any other person"—"or any hats, shoes, "shirts or stockings," or "regimental necessaries" (that have been supplied the soldier and charged to his pay,) "without leave in writing" from the captain or officer commanding the company,—"or cause the color of such "clothes to be changed," the offender in any of these cases is to forfeit for every offence £5. (See note in last page.) Conviction to be on the oath of one or more credible witnesses before *two justices* of peace. Penalties to be levied by warrant under the hands of the two justices, by distress and sale of goods, Half to go to the informer, residue to "the officer to whom "any such deserter or soldier did belong." For want of "sufficient goods and chattels" of the offender, the two "justices may, by warrant under their hands and seals, "commit such offender to the common jail" for 3 months, or cause him to be *publicly whipped* at their discretion. (The act allowed 4 days to pay the penalty before the warrant of commitment could issue, but by the amending act of 1824, 4 & 5 G. 4, c. 34, 3 P. L. 193, unless sureties be found, the commitment may take place at once.

"Upon oath made of a desertion, from the regiment to "which he belongs, and that there is reason to believe "that such deserter or deserters be concealed in the "dwelling or outhouse in which it is proposed to search "for him or them, and into which he the said officer has "been refused admittance," any one or more justices of peace are empowered to grant a warrant to a commissioned officer of the regiment. If any "commissioned "officer," without such warrant, "forcibly enter into, or "break open the dwelling house or outhouse of any per-"son whatsoever, under pretence of searching for deser-"ters," "upon due proof thereof," he is to forfeit £20. 1 P. L. 351.

By act of 1801, 41 G. 3, c. 4. s. 2, 1 P. L. 436, 437—

whoever shall, " directly or indirectly,* persuade, entice " or procure," any soldier or soldiers in his majesty's service, " to desert," or shall " endeavour to encourage, per- " suade, entice or procure" the same, may (at the "option" of the " commanding officer of the regiment, company " or party," to which they belong) " be prosecuted by in- " formation in his majesty's supreme court, or before two " of his majesty's justices of the peace." If convicted thereon by verdict of a jury in the supreme court, the offender is to forfeit a sum not exceeding £40, for each offence, and be imprisoned until the penalty and costs of prosecution be paid. If convicted before two justices of peace, upon the oath of one or more credible witnesses, he is to forfeit for each offence £5, and the justices are to commit him until the penalty is paid with the costs of prosecution, If he does not pay " within ten days after con- " viction by said justices," the justices are to cause him to be " *publicly* whipped, and discharged from said jail."

By act 1803, 43 G. 3, c. 1, s. 2, 1 P. L, 467, 468. The sheriff, or deputy sheriff, or any " constable of the town " or place, where any person who may be reasonably " suspected to be a deserter shall be found," or any " officer or soldier in his majesty's service," may arrest such suspected person, and bring him before a justice of the peace of the neighborhood for examination. If by confession, oath of a witness or witnesses, or by his own knowledge, the justice find that " such suspected person " is a listed soldier, and ought to be with the troop or " company to which he belongs," the justice is to send him to prison, and " transmit an account thereof" to the governor, " or to the commanding officer of the district."

* This offence is punishable by fine or imprisonment or both at discretion of the court, and assisting a deserter (knowing him to be such) to 20*l.* penalty, in any part of H. M. dominions : by Imperial act for punishing mutiny and desertion, passed 9th April 1832. Sec. 24.

Keepers of prisons are to receive "the full subsistence of "such deserter," for his maintenance while in their custody, and the sheriff, gaoler, &c. are to confine him while on the road under the warrant of commitment, or under the order of the governor or commanding officer of the district in removal from the prison. Sheriffs, prison keepers, &c. to receive no fees for such service.

By act 1801, 41 G. 3, c. 4, s. 1, 1 P. L. 436, *where* any *expenses incurred* by *magistrates* in *securing* deserters from H. M. *army or navy*, or in *maintaining* them, or in *transmitting* them to their corps or ship, "*cannot be recovered* upon 'due application to the corps or ship," the governor is "to *order* such *reasonable charges* as may have *actually* been "*incurred* in performing such service, to be *paid out* of the "*provincial treasury*."

Marshes.—By act 1766, 6 & 7 G. 3, c. 1, s. 2, 1 P. L. 122. 123. If any person shall "unlawfully *cut off*, *draw* "*up*, or *remove* and carry away any *piles or other materials*," "—driven into the ground, and used *for* the *securing* any "marsh lands or sea walls, banks, or dykes, in order to "prevent the lands lying within the same from being "overflowed and damaged," any two or more justices of the peace of the vicinity, are "upon complaint or infor- "mation upon oath of such offence," to summon the parties complained of, or "to issue their warrant"—"to ap- "prehend and bring before them" the persons accused "or suspected." On their appearing "or neglect to ap- "pear," they are to examine into the matter of fact charged, and upon due proof, by confession or sworn evidence, to convict the offenders. Penalty on conviction £20,—half to the informer, half to the poor of the place. Levy by distress and sale of goods, overplus after penalty and costs deducted to go to the offender. For want of sufficient distress "the said justices" are to commit the offender to the gaol of the place or house of correction, there to be kept at hard labor for six months.

Harbors.—The act of 1793, 33 G. 3, c. 3, 1 P. L. 315 directs, that "*no ballast shall be unladen*, or thrown over-" board from any ship, vessel, or boat, *below high water mark* " *into any port*, harbor, river or creek," " or at the en-" trance into the same." Any master, seaman, or other per-" son on board any ship, vessel, or boat"—who shall do so " shall *be obliged to remove* such ballast or impediment, or " in *default* thereof shall *forfeit* and *pay a sum not exceeding* £25," recoverable before two justices of peace for the county. Half to prosecutor, half to the poor of the township, " *subject to an appeal to the court of common pleas*," of the county " upon security given, for prosecuting the " same to effect."

Fishery.—The act of 1770, 10 G. 3, c. 10, 1 P. L. 162. 163, enacts that " if any fisherman in any vessel, bark or " boat, shall presume to throw into the sea within three " leagues of any of the shores of this province, any heads, " bones, or other offal of the fish they may take, the mas-" ter of such fishing vessel, bark or boat" on conviction by the oath of one credible witness before any justice of peace, or on the justice's own view shall pay for each offence the sum of £5. The penalty is directed by sec. 2, to go half to the informer, the other half to his majesty's treasury for the use of the province, and to be levied by distress and sale of goods and chattels. The 3rd clause provides " that nothing in this act " shall extend to the debarring any fishermen in boats who " split and dress their fish on shore, from throwing the of-" fal of their fish into what is called the land wash."

Wrecked property. The act of 1801, 41 G. 3, c. 14, s. 5, 1 P. L. 448, makes it a misdemeanor punishable on conviction in the supreme court or sessions, to molest or disturb salvors in possession of wrecked property, or public officers acting in case of wreck in pursuance of that act.

Sable island.—No one is permitted to dwell on this desolate spot, except the persons employed by the provin-

cial government to assist vessels that may be wrecked near it, and any one *wilfully going on the island, and sojourning there without a proper licence* under the hand and seal of the governor, may be removed to Halifax with all property he may have on the island, and on conviction before three justices of peace may be committed to jail for a space not to exceed six months, and until security for good behavior be given, and his goods may be sold to repay the expenses of removal—by the act of 1801, 41 G. 3, c. 14, s. 8, 1 P. L. 449.

Quarantine. The act of 1799, 39 G. 3, c. 3, 1 P. L. 399 404, imposed a variety of punishments (some clauses imposed capital punishment) for offences against quarantine regulations, but this has been repealed by the act of 1832, 2 W. 4, c. 13, passed for one year—which imposes a variety of pecuniary penalties of 100, 200, and £300 on infringements of the act. Sec. 19 imposes on any public officer, misconducting himself in matters connected with quarantine, a forfeiture of office, and an incapacity to hold or be reappointed to it, and a penalty of £200 beside, and every officer or person deserting from quarantine duty, wilfully suffering persons or goods under restraint of quarantine, to escape or be carried away, or granting a false certificate of a vessel's being aired, or having performed quarantine—is made by the same clause to be guilty of felony. Sec. 23 makes it felony to forge or alter any certificate connected with quarantine. Non-enumerated offences are subjected by sec. 31, to £100 penalty, or imprisonment not to exceed one year. Sec. 28 & 29, direct half the penalties to go to the informer and half to the crown, and all prosecutions for them to be in the name of the attorney or solicitor general, (under the direction of the governor or the board of health.) The attorney, or in his absence the solicitor general, may also stop any such suit if he see fit. Suits to be brought in any court of record.

Contagious diseases. The act of 1832, 2 W. 4, c. 14, (passed for one year,) to guard against the Indian cholera morbus, established penalties not to exceed £200, and also fines and imprisonment as for misdemeanor, on violations of the rules, the governor and council should adopt on this occasion, to be sued for in a court of record by the health officers, or wardens.

Sheep and lambs. See Epitome, 1 vol. p. 157. Penalties to be levied by warrant of distress on offenders goods and chattels, and to go to the use of the poor of the township.

Burning woods. See Epitome, vol. 1, p. 158.

Timber on crown lands.—The act of 1774, 14 & 15 G. 3, c. 3, 1 P. L. 184, 185, recites that several tracts of land had been reserved by the crown, for a supply of timber to be used in the royal navy; and sec. 1, imposes on any person destroying, injuring or cutting pines of any dimensions whatever, or any other timber trees, growing on such reservations, a fine not to exceed £100, for every tree. Prosecution to be in any court of record. Half penalty to the informer, half to the crown for the use of the province. Sec. 2. if offender is unable to pay, he is to be sentenced to six months imprisonment. Sec. 3, enacts, "that if any person shall purposely and maliciously set "fire to any places within the limits of the aforesaid re- "served and ungranted territories, and thereby destroy "any of the young growth, or timber trees thereon"—the offender on conviction before the supreme court, shall be adjudged guilty of felony. Sec. 4, excepts firewood and underwood used in the fishery, within half a mile of the sea shore.

The act of 1775, 15 G. 3, c. 1, 1 P. L. 193, exempts all the inhabitants of Cape Breton, and all fishermen from these penalties for cutting wood they may require for fuel or for the use of the fisheries.

Usury.—See Epitome, vol. 1, p. 176, (interest).

Aliens.—See Epitome, vol. 1, p. 102.

Vagabonds.—See Epitome, vol. 1, p. 196—198.

Combinations.—The act of 1816, 56 G. 3, c. 27, 2 P. L. 215. by it's first clause, annuls all contracts entered into by *journeymen manufacturers or other workmen*, or other persons "for obtaining an advance of wages,"—"or for lessen-" ing or altering," the "usual hours or time of working, or " for decreasing the quantity of work, or for preventing or " hindering any person or persons from employing whom-" soever" they choose in their trade or manufactures—or in any way to *control* or *affect* the masters or employers in their business.

Sec. 2, directs, that any journeyman, &c. entering into such a contract, on conviction, by his confession, or on the oath of one or more credible witnesses, before any two or more justices of peace of the county, town, or place, within three calendar months after the offence, "shall by "order of such justices" be imprisoned in the jail within their jurisdiction, for a period not to exceed 3 months, or if the justices think fit, in some house of correction within their jurisdiction, for any period not exceeding two months.

Sec. 3. Journeymen or others combining for such objects, or enticing other men not to hire, or to leave their employment, or hindering employers from hiring men, or endeavoring to do so, or refusing to work with other men, when hired, are subjected to the same punishment as in sec. 2. Sec. 4. annuls all contracts entered into by "mas-" ter tradesmen or manufacturers," or others, for regulating wages, adding to or altering the usual hours of work, increasing the quantity of work, "or for regulating or fix-" ing the price to be paid for any work done, or article " made or manufactured by such master tradesmen or ma-" nufacturers, or other persons, whereby their customers "or others who may deal with them may be affected." Any person convicted of entering into such a contract,

"by the oath of one witness, before two justices, within "twelve calendar months, shall forfeit and pay for each "and every offence £20," half to the informer, and half to the poor. If "not immediately paid with costs of "prosecution, such justices shall levy the same by war- "rant of distress, with the costs attending the distress and "sale." For want of sufficient distress the offender to be imprisoned in jail or house of correction for a period not exceeding three and not less than two calendar months. Section 5, declares that the act is not to be construed to prevent any persons combining to raise prices prices of labor, goods or provisions from being indicted, prosecuted or punished as for a conspiracy or combination.

BOOK V.—CHAPTER VI.

OFFENCES AT COMMON LAW.

1. Offences against the property of individuals.

1. *Larceny.* Stealing goods above 12d valne is a felony within clergy at common law. This is called grand larceny. Petit larceny or stealing under the value of 12d; is a felony, but was never punishable at common law with death. We have seen that our provincial law makes 20s the sum to discriminate grand from petit larceny.

2. *Piracy.* This offence is punishable capitally.

3. *Burglary.* This offence was felony at common law, but within the benefit of clergy. 4 B. C. 228. Lord Coke's definition of a burglar is "he that by night breaketh and entereth into a mansion house with intent to commit a felony." 3 Inst. 63.

4. *Arson.* Felony at common law. 4 B. C. 222.

2. Homicide. This is either justifiable, excusable or felonious. Homicide is *justifiable*—1. in case of executing a criminal in compliance with his sentence. 2. Where a

person is killed by an officer of justice in the execution of his duty, or by those who legally aid such officer. 3. Where a person attempting to commit an atrocious act by force, is arrested and slain, as an attempt to rob or murder. It is *excusable*—1, Where one who is doing a lawful act, unintentionally and accidentally kills another. 2. Where in self defence, or the just and necessary defence of a member of one's family under his protection, a death ensues. Manslaughter is either *involuntary*—1, as where a man in doing an unlawful act (not amounting to felony) kills another by accident; or 2, *voluntary*, as where on a sudden quarrel two persons fight and one is killed, or where a person, grossly provoked by some personal violence, in the sudden heat of passion kills the aggressor. *Murder* is thus defined "where a person of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the King's peace, with malice aforethought either express or implied." 3 Inst. 47.

3. *Assault and battery.* This is a misdemeanor at common law for which the offender may be indicted and punished by fine and imprisonment or both. See 3 B. C. 120, 4 B. C. 216. Archbold's Crim. Pl. & Ev. 240. False imprisonment, kidnapping, assaulting an officer of the public in the execution of his duty, assaults with intent to commit atrocious crimes, &c. are aggravated offences of this class, and subject to more severe punishments.

4. *Libels.* Scandalous writings against the government or individuals are called libels, and are misdemeanors at common law, punishable by fine, &c. with these may be classed seditious words, the publication of obscene or profane books, prints, &c. ibid 348. (Inciting soldiers or sailors in H. M. service to mutiny, is made capital by English acts 37 G. 3, c. 70. See Archbold's Crim. Pl. & Ev. 298, 299.)

5. *Escape.* If a constable or jailor through neglect, suffer a person charged criminally to escape from his keep-

ing, he is liable to indictment and fine for misdemeanor. So the prisoner is liable to fine and imprisonment for escaping. But if an officer of justice wilfully suffer a criminal to escape, he is liable to the same punishment as the prisoner—but the latter must be convicted first. (ibidem 305. 306.) Rescuing an accused prisoner is punishable by fine and imprisonment; but rescuing a convict renders the party liable to the same punishment as the convict. ibidem 311.

Perjury is at common law subject to fine, imprisonment and pillory at the discretion of the court. ibidem 313. *Bribery* of any judge or officer of the public, is punishable with fine and imprisonment, and so is the attempt to bribe them. *Extortion* is under the same rule, when committed by any public officer, and every misconduct or culpable omission of duty on the part of an officer of justice, is at common law a misdemeanor and punishable with fine or imprisonment, or both. ibid. 322, 325. Compounding a felony is also subject to fine and imprisonment. So are riots, affrays, and challenges to fight, and provocations to induce a challenge. ibid 332 to 344. So are all kinds of public nuisances, ibid 365. Such are the carrying on an offensive trade in a populous neighborhood, keeping a brothel, keeping a gaming house, obstructing a highway, or the navigation of a public river, and acts of open and notorious lewdness or vice. Solicitations to commit crimes. Disinterring a corpse, refusing to execute a public office, conspiracies to injure the community, a particular body of men, or to harm individuals. All these are misdemeanors, the general punishment of which species of crime is by fines and imprisonment, proportioned to the degree of criminality and to the rank and ability of the delinquent. Misdemeanor is used in English law in contradistinction to felony, and under it are comprehended all indictable offences which do not amount to felony. Judge Christian's note, 4 B. C. 5.

BOOK V.—CHAPTER VII.

COURTS OF CRIMINAL JURISDICTION.

1. The Supreme Court exercises the powers which in England belong to the Court of King's Bench. (See 1 P. L. 188.) and also to the courts of oyer and terminer and general gaol delivery (commonly called the assizes.) On the crown side, the King's Bench has cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace, and the supreme court accordingly exercises the same authority, wherever it sits throughout the province. The supreme court is empowered by prov. act of 1774, 14 & 15 G. 3, c. 8, upon application to issue "writs of *certio-* "*rari* for removing orders of sessions of the peace, under "such regulations, restrictions, and powers, as writs of "certiorari are issued by H. M. court of king's bench in "Great Britain, and conformable to the course and prac- "tice of the common law, and the several statutes for "that purpose made and provided." 1 P. L. 189. A *certiorari* also may be issued in all judicial proceedings in inferior courts of criminal jurisdiction, except where a

writ of error will lie ; and in all cases tried before justices of peace under penal statutes, this writ lies. Ld. Raym. 469, 580, unless express words are used in the act to take away this right. 2 Hawk, P. C. 27, s, 22, 28, but it does not lie after conviction unless there be special cause shewn. Stra. 1227, Burr. 749.

2. A special commission of oyer and terminer is sometimes issued to try a prisoner in the country where the supreme court would not sit in the county for a considerable period. This is generally granted to one judge of the supreme court or common pleas,—and the trial is conducted in the same manner as if it took place at the supreme court.

3. *The general sessions of the peace.*—This is held four times a year at Halifax, and twice or once a year in other places. See vol. 3, 61 to 63. This court is composed of all the justices of peace of the county or district. " It is " held before two or more justices of the peace, one of whom must be of the *quorum.*" 4 B. C. 271. In England it is held quarterly in every county by stat. 2 Hen. 5, c. 4, and thence it is frequently called the quarter sessions. The statute 34 Edw. 3, c. 1, gave the sessions jurisdiction over all felonies and trespasses, but it is the practice to try petty larcenies and misdemeanors that tend to disturb the peace, but not to try felonies there in general, or higher offences. 4 B. C. 271, and Christian's note. Offenders are tried by jury before the sessions, on indictments found by the grand jury.

4. The court of the coroner is a court of record, to enquire into sudden, violent, and suspicious deaths. See vol. 1, p. 128. When any one dies in prison, an inquest is requisite. 4 B. C. 274.

5. The court for trial of piracies, piratical offences and atrocious crimes committed on the high seas, has been already described.

6. Summary hearings before justices of the peace, &c.

In these the party accused is brought up by warrant or summons before one or more justices of peace, to answer for the alleged breach of some provincial act or act of parliament. The defendant must be notified. See 4 B. C. 282, 283. The magistrates may afterwards (on the defendant's appearing, or on his failing to appear on due and reasonable notice)—examine one or more witnesses under oath, and acquit or convict the defendant according as evidence appears, and reduce their judgment into writing. On this judgment a warrant usually is to be issued in the nature of an execution, when the judgment is not immediately complied with. This warrant is mostly to distrain for a penalty. But justices are bound in every respect to ground their proceedings on the directions of the acts of the province or parliament, on which alone their authority to proceed in a summary way is grounded. Contempts of a court of justice are also tried and punished in a summary way. See 4 B. C. 284 to 288.

All justices of the peace are required to attend on the Supreme court whenever it sits, and also more especially at every general or quarter sessions. The prov. act of 1799, 39 G. 3, c. 10, 1 P. L. 409, 410, enacts, sec. 1, that the clerk of the peace in each county shall keep a book, and enter in it at every court of general or quarter session, the actual attendance of each magistrate from day to day. If a magistrate leave the court before the business of the day is completed, unless by leave of a majority of those justices who are present, his attendance on that day is not to be entered.

Sec. 2. requires the clerk of the peace to return, on the first day when the supreme courts sits in the county, the names of all justices of peace "who have wholly neglect-"ed to attend at such preceding sessions." In districts or counties where the supreme court does not sit, the same return is to be made within six months to the supreme court at Halifax. Unless a justice so returned give "a

"reasonable excuse," the supreme court is required to return his name to the governor. On which return he is *ipso facto* discharged from his office of justice of the peace. It further imposes a fine of £5, for every neglect in such returns on the clerk of the peace, recoverable before two justices of peace, by any who will sue, half to the informer, half to the poor of the town or place where the clerk of the peace resides.

Court for the trial of piracies.

Robbery on the high seas is termed piracy. For the trial of this offence as well as that of murder, &c. committed at sea, a particular court is constituted by commission from the crown, under the authority of several English statutes, viz: 28, Hen. 8. c. 15. 29 Geo. 3. c. 43 Geo. 3. c. 1 Geo. 4. c. (5 Geo. 4. c. slave trade) 7 Geo. 4. c. 33. H. 8. c. 46 G. 3. c. &c. The commission is directed to the Governor, the President and other the members of the Council, the Chief Justice and other the judges of the colony, the Judge of Vice Admiralty, the Secretary of the Province, the Treasurer, the Commanding and the other officers of the Navy, or the persons exercising the duties of any of these Provincial offices for the time being. Any one or more of them are authorized to take informations, and to apprehend and commit or bail offenders. Any three or more to hold a Court, and try such causes (the governor, a common law judge or the judge of admiralty to be one.) This court proceeds according to the forms and rules of the common law. Under the Governor's order the sheriff summons the grand and petty juries and the prisoner is tried under indictment. This court has several times been called into operation at Halifax. A new commission is granted by each successive sovereign. In consequence of this being deemed necessary, the last prisoner tried here lay for above a year in

prison under a charge of murder before he could be tried. Several other offences are punishable capitally by this court besides murder and piracy. Mutiny—running away with a ship, &c. being made capital by English acts.—See 4 B. C. 71. So offences against the laws for abolishing the slave trade are within its cognizance. Piratical offences, &c. must be proved to have been committed within the jurisdiction of the admiralty to bring them under these acts. The open seas are within the jurisdiction, but any harbour, bay, &c. within its headlands, is considered within the county by the common law, and subject to the criminal courts of common law. See Archbold, Crim. Pl. & Ev. 152, 153. Coke, Lit. 392.

BOOK V. CHAPTER VIII.

PRACTICE IN CRIMINAL CASES.

Arrest

Every person accused on oath of a criminal offence, or strongly suspected of an atrocious crime, is subject to arrest, there being no privilege in such cases. A justice of the peace may issue a warrant to arrest in treasons, felonies, breaches of the peace, and (if necessary) in cases under penal statutes. Formerly the law was not held to authorize an arrest even for felony, unless an indictment were previously found,—but this principle has been abandoned and overturned by the practice of modern times.

A justice of peace is bound, before issuing a criminal warrant, to examine the accuser upon oath, and ascertain that the crime had been committed, and that there are good grounds for imputing it to the accused or suspected person. The warrant should state, with as much precision as possible the name and addition of the accused, and the offence imputed. It should bear a correct date of the time and place of its being made, and be signed and sealed by the justice, and addressed to a constable, &c. directing him to bring the party either before any justice of the

county, or before him who issued it. See. 4 B. C. 290, 291. Where a warrant is issued in one county and a criminal escapes into another, the prov. act of 1814, 54 G. 3, c. 15, sec. 8, 2 P. L. 122, 123, authorizes any justice or justices of the county into which he goes, on "proof being made upon oath of the handwriting of the justice or justices granting such warrant, to indorse his or their name or names on such warrant," which is to authorize those to whom it was directed to execute it in the second county, and to carry the offender, when apprehended, befor the indorsing justice, or some other justice or justices of the second county, who may (if the offence be bailable) take bail for his appearance at the next supreme court, or sessions, of the county where the offence is alleged to have been committed. The justice is to deliver the recognizance, with the examination or confession of the prisoner, and all other proceedings relative thereto, to the constable or other person apprehending the prisoner. The constable, &c. is to deliver them to the clerk of the supreme court, or to the clerk of the peace of the county where the recognizance requires the prisoner to appear. If the constable or other person receiving those papers neglect or refuse so to deliver them he is to forfeit £10, recoverable by bill, plaint or information, in the supreme court. If the offence be not bailable, or if satisfactory bail be not given, then the constable, &c. is to carry the prisoner before some justice of the peace of the county where the offence was committed, there to be dealt with according to law. [This act is in conformity with the English acts 23 Geo. 2, cap. 26 and 24 Geo. 2, c. 55.]

The names of the members of H. M. council and of the speaker of the assembly, being introduced into the commission of the peace for every county in the province, a warrant issued by any one of them will not require to be indorsed under this act. See 4 B. C. 291, 292.

Justices of peace, sheriffs, coroners, and *constables*, may ar-

rest any person, *without warrant*, who commits a breach of the peace, or a felony, in their presence. When *felony* has been *actually* committed, or where a person has been wounded, and his *life is in danger*, a *constable* may upon *probable suspicion* arrest the accused, and may even break doors in order to do so, and this without any warrant. 4 B. C. 292. Where any felony is committed a private person who is present may arrest the offender, or pursue him and use force to seize him. A private person may also arrest on probable grounds of suspicion in cases of felony, being permitted by law to do so—but if a bystander where felony is committed, he is bound to make the arrest and liable to fine and imprisonment, if he neglect to do so.—ibid. 293.

Commitment and bail.

When a delinquent is arrested he should be carried before a justice of the peace, who by provincial act of 1768, 8 G. 3, c. 3, s. 5, 1 P. L. 136,* is to cause the examina-

* Act of 1768, 8 G, 3, c. 3, s. 5, 1 P. L. 136, enacts, "that "the justices of the peace before whom any person shall be "brought for any murder, manslaughter, or felony, or for "suspicion thereof, shall take the examination of such pri- "soner, and information of those that bring him, of the fact "and circumstance thereof; and the same, or as much there- "of as shall be material to prove the fact, shall put in writing; "and the same shall certify, together with the bailment of "such prisoner (in case the crime whereof such prisoner is "charged, is bailable) at the next sessions of oyer and ter- "miner or gaol delivery, to be holden within the limits of their "commission; and that the said justices shall bind all such "by recognizance or obligation, as do declare any thing ma- "terial to prove such murder, manslaughter, or felony, against "such prisoner, to appear at the next sessions of oyer and "terminer, or gaol delivery, to be holden within the county "where the trial of such murder, manslaughter, or felony, "shall be, then and there to give evidence against such pri- "soner; and that the said justices shall certify the said bonds "or recognizances taken before them, in like manner as the "examinations of such prisoner, and the witnesses, are herein "before directed to be certified." See Eng. stat. 1 & 2 Phil. & Mar. c. 13. 2 & 3 Phil. & Mar. c. 10. The justice of

tion of the prisoner, and the evidence of informers sworn against him to be reduced to writing. If the charges appear totally groundless, the justice is bound at once to liberate him: otherwise he must commit him to prison or bail him. 4 B. C. 296. To refuse bail to a prisoner when he is by law entitled to it, is a high offence for which the magistrate is punishable by common and statute law, 4 B. C. 297—and demanding excessive or unreasonable bail, is equally illegal. Originally all felonies were bailable, but this has been modified by statute. No *justice of peace* can take bail, 1, in case of treason. 2, murder. 3. manslaughter, (unless the charge be dubious, and no indictment found previously). 4. When the person accused of felony has broken prison. 5. Where the person is taken in the fact in felonies, or in theft with the stolen property in his possession. 6. In cases of arson. Justices of peace are obliged to admit to bail persons of good fame, charged with suspicion only of manslaughter, or other homicide, not capital—or charged with other felonies or misdemeanors not excepted from bail. In other cases they may or may not bail the party at their discretion, according to the circumstances of the case, 4 B. C. 298, 299. No person imprisoned after conviction, where the imprisonment is part of his legal sentence and punishment can be bailed by any justice or judge, nor can a person committed by either house of the legislature, as long as the session lasts, nor one committed by the superior courts of justice for contempt. A judge of the supreme court may in his discretion admit to bail persons accused of any offence whatsoever. ibid. 299. If the offence be not bailable, or the prisoner cannot procure sufficient bail, the justice is to commit him to jail, by warrant under his

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peace in cases of burglary, robbery, or theft, is also to deliver all goods, &c. found in possession of the prisoner, to the sheriff, deputy sheriff, or the constable of the town where such offence was committed, for safe keeping. See post.

hand and seal (called a *mittimus*) containing the cause of his commitment, there to remain till delivered by due course of law. ibidem. 300.

Prosecutions.

The provincial act of 1758, 32 G. 2, c. 13, 1 P. L. 15, sec. 1, enacts, "that such acts of parliament as directed "the proceedings and evidence against, and trials of such "traitors shall have their full force and effect, and be ob- "served as the rule in all trials for treason in this province." and the same act, sec. 36, 1 P. L. 20, enacts, "that all in- "dictments, process, pleadings, and trials, and the rules "of evidence upon any trials for any felonies or misde- "meanors, either by the common law of England, or by "virtue of this act, shall be according to the usage, prac- "tice and laws of England."

1. *Prosecution by indictment.*—The mode of returning and summoning grand juries is provided for by a provincial act detailed in the 3rd volume of this Epitome, p. 172, 173. The grand jury in every county and district in this province are annually drawn and summoned by the sheriff under that law, and they are to serve at every supreme court and general sessions held there during the year—and also the grand jury of the year is to serve before the court of piracy, in whatever county it may be convened. A grand jury must consist of 24, summoned, but not more than 23, nor less than 12, are to be sworn. 4 B. C. 302. To make the finding of any indictment or presentment valid, twelve at least of the grand jurors present must concur in it. ibid. 306. Like the petty jury they have one of their own number for a president or foreman. I should conclude that they have an indubitable right to elect him, though I understand a practice has crept into some parts of this province, of the nomination of the foreman by the presiding judge of the supreme court, but I cannot conceive it to be legal or sustainable.

Charge.—The presiding judges intimates to the grand jury, at the opening of the term or sessions, the nature of the business to wnich their attention is to be turned. On being thus charged, they withdraw to the apartment provided for them, where they sit from day to day during the term or sessions, as long as there is matter for their investigation. Indictments are preferred to them, either by the crown lawyers or by private prosecutors, and they hear the witnesses in support of the accusation, who are previously sworn in court and sent to the grand jury, with a certificate of the prothonotary or clerk of the peace, of their having been sworn. This examination is usually private, none being allowed to be present but the grand jurors themselves, the witnesses for the prosecution, and the counsel acting for the crown or for the private prosecutor. In ancient times, at the request of the crown lawyers, it was usual to hold the examination before the grand jury in public in important cases. 3 Hargr. St. Tr. 417, but this is not the modern usage. The depositions taken before justices of the peace ought not to be submitted to the grand jury, unless where they may also be used as evidence in the cause. Leach 580. The grand jury, if satisfied, as far as they can judge from the proof brought before them, that the accusation is correct, and that the witnesses are deserving of credit, are to find the bill, but it is not their duty to do so, unless they are "thoroughly persuaded of the truth of an indictment, as far as their evidence goes." 4 B. C. 303. A case occurred a few years since, where the grand jury at Halifax, not being satisfied with the evidence adduced in support of some indictments, (respecting a riot and rescue of a member of the assembly in custody of the serjeant at arms, for an alleged contempt of the house)—of their own accord sent for persons who had been present at the transaction, but who had not been produced before them by the crown lawyers,—and examined them. Their authority for taking this step was

not undisputed at the time. I am not aware of any course that could be adopted that would obstruct their exercise of this power, and it would seem unreasonable to deny them such a privilege. It should, however, be exercised but rarely, as the trial of the cause before the petit jury opens to the accused a fair opportunity of proving his defence. It seems to be the duty of a grand jury to put the accused upon his trial, in every case where the weight of testimony bears strongly against him. If however there be contradiction or glaring inconsistencies, in the testimony offered against an individual, it seems hardly within their province to reconcile it by conjecture, but rather to dismiss the bill, leaving it to the prosecutors at some other period, to repeat their charges upon more congruous and better connected proof. No one should be put upon trial as a criminal, without strong grounds being previously exhibited, as the presumption of law is in favor of every man's innocence, until decisive marks of guilt shall be attached to him.

The grand jury sometimes presents a public nuisance or offence of a similar description, upon their own knowledge or observation, without any indictment. A bill of indictment is in criminal cases analogous to a declaration in civil cases. It is a written statement of the crime alleged against the accused, In Halifax indictments, for such offences as the attorney general thinks of sufficient importance, to bring to trial at the supreme court, are usually drafted by him or in his office, and the clerk of the crown (an office held in conjunction at present with that of prothonotary) has it copied out fairly. In minor offences tried at the sessions, the clerk of the peace of the county prepares the indictment. At the circuits of the supreme court in the country, the king's counsel, (or if none are present, the senior barrister on the circuit) drafts the indictment and conducts the prosecution. With the express or tacit permission of the crown lawyers

a party interested in a criminal prosecution may employ counsel to prepare the indictment and conduct the proceedings against the prisoner. This is most frequently done in cases where the public is very slightly, and the private prosecutor is much interested. The clerk of the peace, who has the custody of the informations laid before magistrates, usually submits them from term to term to the crown officers. It is not usual in England for the principal lawyers of the crown, to interfere in any criminal cases except they are of enormity, or of some interest to the government. An indictment lies for treason, felony, or for *misprision*, that is concealment of either. 4 B. C. 120, and for all misdemeanors that tend to the public injury, under which notion the law includes all libels, breaches of the peace by assault and battery, &c. So disobedience to the commands of any statute in which the public are interested, whether it be by acts of commission or omission, is a subject of indictment for misdemeanor. Archb. Crim. Pl. & Ev. 1, 2, but a mere private injury is not. ibid. An indictment begins in the following form, viz. "Halifax, to wit, the jurors for our lord the king, upon their oath present that," &c. going on to state the offence as charged. The county named in the margin of the indictment is called the venue. By the common law every offence was to be tried in the county where it was committed, and a grand jury (under the oath they take) are only to enquire into facts which have occurred within their county. There are several exceptions made in England to this rule by statute. See Arch. Crim. Pl. & Ev. 3 to 6, 4 B. C. 303, 304, some of which has been introduced here by the provincial statute of 1768, 8 G. 3, c. 3, s. 1 & 2. By the first clause, where a person is struck or poisoned in one county, and his death ensues in consequence in another, the accused may be indicted for murder or manslaughter in the county where the death took place.—And any person entitled to an ap-

peal of murder may prosecute the principals and accessaries in the county where the death occurs. Sec. 2. provides that where a murder or felony is committed in one county, and any person is accessary to it in another county, the accessary may be indicted and tried in the county where he has been accessary. In case of theft, the offender may be indicted in the county where he took the goods, or in any other county, through or into which he carried them. See 4 B. C. 305. The offences committed within the province must be tried within it. There is an exception in the case of oppressive acts of a governor, which may be tried in England as we have seen vol. 1, p. 93.—It was at one time proposed to send prisoners from the colonies to England to be tried for treason, alleged to have been committed in the colonies, under the supposed authority of the statutes referred to in 4 B. C. 303, but those acts cannot apply to a colony like Nova Scotia, possessing regular criminal courts. In some codes a criminal may be tried in the place where he was born, or that where he dwells, if no prosecution has been commenced in that where the offence was committed. The last is every where considered the most suitable, but to send a prisoner from the land of his birth and residence, and that where the facts alleged took place, to a remote country for trial, would be contrary to the English common law, which invariably tries the offence in the same place where it was committed, and that by a jury of residents.

On hearing the evidence, if the grand jury do not think there are good grounds for the accusation, they indorse the words "*not found*," or "*not a true bill*," on the indictment. (This is called *ignoring* the bill, from the latin word "*ignoramus*," which means "we know nothing of it," which was formerly used in such cases.) On this the prisoner is to be discharged. If they are satisfied of the truth of the accusation, they then endorse on it "a true bill :" anciently "*billa vera*." 4 B. C. 305. On

the indictment being thus found true, it is delivered publicly to the court by the foreman, accompanied by the rest of the grand jurors. The statute 1 Hen. 5, c. 5, requires the christian names, sirnames of the accused, and an addition of their " estate, or degree or mystery," and also of the town or place and the county " of which they were " or be, or in which they be or were conversant," to be stated in the indictment.

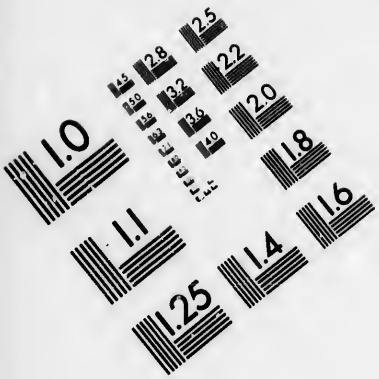
It is also requisite to insert the christian and sirname of the party injured, if he be known. 2 Hawk, c. 25, s. 71. 72. Time and place must be stated as to every material fact in an indictment. 1 T. R. 69, 5 T. R, 607, but the correctness of such statement is not essential, except in particular cases, as for example in burglary, a misdescription of the place would be a fatal defect. If the precise date of a fact be a necessary ingredient in an offence, it will be a fatal variance if not truly stated. See Archb. Crim. Pl. & Ev. 16. 4 B. C. 306, 307. All the facts and circumstances constituting the offence must be specifically set forth. Archb. C. P. & E. 17. If any are omitted the defendant may demur, move in arrest of judgment or bring a writ of error. In some offences the law requires particular words to be used, " feloniously," " murdered," and several others. ibid. 24. In an offence against a statute, if there be an exception in the clause creating the offence, the indictment must negative the exception. ibid. 26. The indictment must not contain figures, but dates and numbers must be in words at full length, except where a *fac simile* is set out, as in forgery. 1 East. 180. An indictment may (like a civil declaration) consist of one or more counts, but in general each count must be confined to the alleging of a single offence. In burglary, however, the charge of breaking or entering a house, and committing a felony therein, may be and usually are joined in the same count. Several overt acts of treason may be laid in one count, and in conspiracy, the rule is similar, The facts

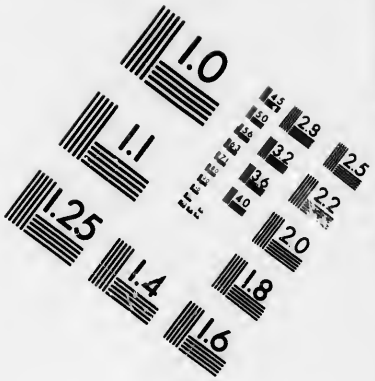
must be alleged *positively*, and not by way of recital. See 2 Ld. Raym. 1363, 3 Salk. 171. The statements must be *consistent* with each other, or the whole is void. Arch. Cr. Pl. & Ev. 38. The conclusion of an indictment for an offence at common law is "against the peace of our lord the king, his crown and dignity." If for an offence created by statute, it concludes thus "against the form of the statute in such case made and provided, and against the peace of our lord the king, his crown and dignity."—Where an offence is committed by several persons in concert, all or any of them may be indicted either in the same or distinct indictments. Principals and accessaries may be joined, or the principal having been first separately indicted and convicted, the accessary may be then separately indicted. A prisoner should not be charged with different offences amounting to felony, in the different counts of the same indictment; but he may with misdemeanors, provided the judgment upon each be the same. As an indictment is found on the oath of the grand jury, the court cannot strike counts out of it, as they can in case of a civil declaration. 2 Str. Indictments may be preferred at any *length of time* after the offence, unless where a period is limited by statute. In most kinds of *treasons* the stat 7 & 8 W. 3, c. 3, s. 6, limits the prosecution to three years after the offence. See Fost. 249. The court will generally quash an indictment on application of the defendant, before plea, if it is so defective that no judgment could be given on it, were the party be convicted. If an indictment be found at the sessions which is defective, for want of jurisdiction in that court, or from some fault in its wording, it should be removed by *certiorari* into the supreme court, and the motion made then for quashing it. If the prosecutor wish it quashed, there must be a previous finding of a new bill for the same offence, and the court will usually impose terms on him. Archb. on Cr. Pl. & Ev. 37, 38.

2. *Prosecution by information.*

There are two kinds of information in use in England. 1.—The information *ex officio* which is filed by the attorney general, or (when that office is vacant) by the solicitor general. It is in form a written suggestion or complaint made by the attorney general on the part of the crown, charging some person with a misdemeanor,—on which charge he is tried without the previous finding of a grand jury. It is chiefly used in cases of sedition, riots of a public nature, and libels against the executive government, and in enforcing the revenue laws. 2. Informations by the master of the crown office in the king's bench. These are written suggestions, charging a defendant with some misdemeanor filed in that court, at the instance of an individual, with permission of the court, by the master of the crown office without the intervention of a grand jury. They are usually confined to offences of some magnitude and notoriety, not affecting the government particularly. A rule to show cause why such an information should not be filed, is first applied for, on affidavits disclosing all the material facts of the case. The master of the crown office anciently used to file informations at his own discretion, *and being filed in the name of the king*, the prosecutor paid *no costs* although the complaint turned out groundless. The act 4 & 5, Wm. & M. c. 18, limited this right and put them under the discretion of the court, and also compelled the prosecutor to give £20, security by recognizance for costs to the defendant if acquitted, unless the judge who tries the cause should certify that he had probable grounds for complaining.

Both kinds of information are limited to misdemeanors; as in treasons or felonies, there must be an indictment preferred by the grand jury. Informations are often authorized by statute for breach of revenue laws, and such have been used in this province: but I do not think any





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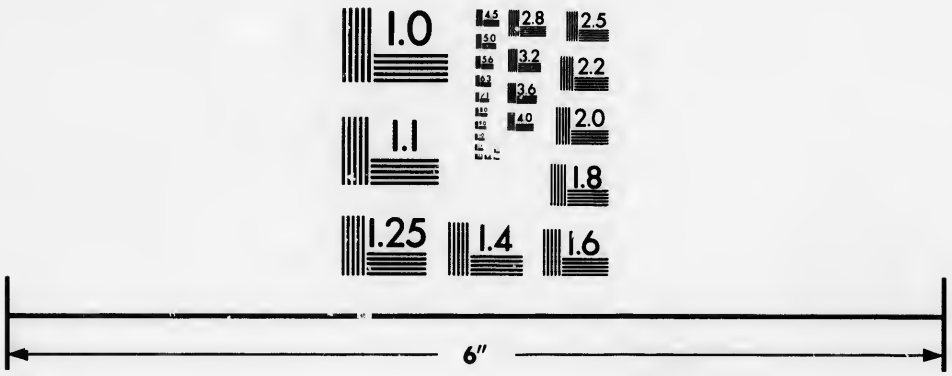

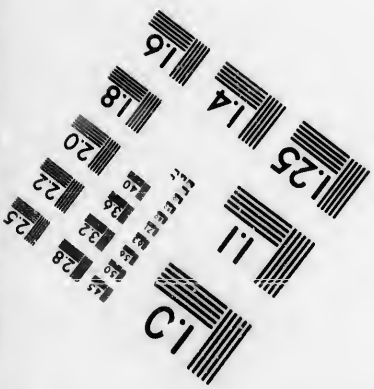

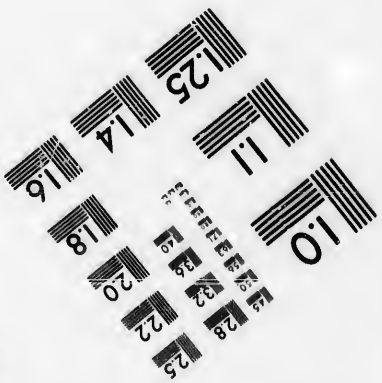

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other kind of *ex officio* information has been brought into our practice. The master of the crown office is an officer unknown here, nor am I aware that any information, such as those filed by him in England, have ever been attempted among us. The learned commentator, vol. 4, p. 309, 310, endeavors to characterize informations as constitutional, and derived from the early common law. Such an opinion savors strongly of the high prerogative lawyer, and is hardly in keeping with the genius of English liberty and law. Surely, the grand jury is a sufficient means of bringing to trial all flagrant offenders against law or good government, and seldom if ever liable to the imputation of deserting the principles of good order. Why then arm an individual, or even a court of law, however dignified the individual, or exalted the judges, with the power of putting a man on trial, when the grand jury are not willing to view his conduct as a subject of accusation,—for where the grand jury would indict, such powers of filing an information are quite unnecessary. Informations had their chief seat and origin in the Star Chamber, that odious and un-English court, abolished as a grievance in the 17th century. Our act already quoted, (1758, 32 G. 2. c. 13, sec. 36) while it introduces indictments, and he proceedings under them in express terms, seems designedly to avoid the introduction of *ex officio* and other informations. They are certainly engines liable to much abuse for party purposes, by those who are in power, and I should therefore conclude as they are yet unknown to our practice, and are rather parasitical plants entwined round the venerable tree of the common law, than any part of its branches or genuine products, that they should be considered by our jurists as no part of the common law introduced into this colony, but with inquests of office, and many other anomalies of a congenial description, be suffered to slumber undisturbed in the dust of our libraries.

Prosecution by appeal.

The appeals now spoken of do not mean any applications made to a higher court to redress any want of justice of inferior tribunals. An appeal in the criminal law of England is an accusation of one private individual against another, for some heinous crime. The only appeals in force for things done within the realm are stated in 4 Com. 314, to be in cases of felony and mayhem. The appeal in felonies in general is recognized in the provincial act of 1758, 32 G. 2, c. 13, s. 34, 1 P. L. 19, which provides that a person allowed the benefit of clergy may nevertheless be afterwards indicted or appealed, for any felony committed before, on which clergy is not allowed by that act. The appeal in in cases of murder and manslaughter is also recognized in the provincial act of 1768, 8 Geo. 3, c. 3, s. 1, 1 P. L. 365, which we have already seen, directs the mode of procneding where the stroke is given, or poison administered in one county and the death ensues in another.

An appeal for *murder* or *manslaughter*, may be brought by the wife for the death of her husband, or by the heir male for the death of his ancestor. By the statute of Gloucester, 6 Edw. 1 c. 9, all appeals of death must be sued within a year and a day from the death of the party which year and day are also mentioned in the prov. act of 1768, 1 P. L. 365, just referred to.

An appeal may be brought for felony by the party injured, in cases of *larceny*, *rape*, or *arson*. So the aggrieved party may bring an appeal for a *maihem*, that is in legal phrase, the violent deprivation of some limb or part of the human frame required in fighting for attack or self defence. These appeals may be brought before any indictment, and if the person appealed be thereon acquitted, he cannot be afterwards indicted for the same offence. 4 B. C. 315. A person indicted for murder, and either acquit-

ted, or convicted and pardoned by the crown, is still liable to be appealed for it. But on a conviction of manslaughter on an indictment and punishment inflicted accordingly, the delinquent cannot afterwards be appealed, according to the law maxim, that no one is to be twice punished for the same offence. This kind of prosecution was frequent in early periods of English history, but has become almost obsolete, in consequence of the privilege the appellee has of claiming a trial by battle, a kind of duel with cudgels, between the accuser and accused. See 3 B. C. 337, 4 B. C. 346, 347. Still the law exists, and within the present century a case occurred in England of an appeal of murder. If vanquished in the duel, the accused is, in cases of felony, to be hanged, but if he conquers, or holds out on equal terms till night closes, he stands acquitted. So if tried by a jury on the appeal, the punishment on conviction is the same as on a conviction under an indictment. In appeals the king cannot pardon, but the private prosecutor may. See 5 Burr. 2643, 3 P. Wms. 453, 11 Hargr. State Trials 124.

Process on indictment. Where the party is under arrest or recognizance, when the indictment is found no process is required to bring him into court: but if he has fled or hid himself, (or in small offences has not been bound over to appear)—a *capias* issues, to bring him before the court. If he cannot be taken, he may then by a particular method of proceeding be outlawed. See 4 B. C. 319. This outlawry is recognized and subjects the party to the same judgment in cases of felony as a conviction would, by the provincial act 1758, 32 G. 2, c. 13, s, 31, 32, 1 P. L. 19.

Certiorari. This writ lies at any time before trial to remove an indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the supreme court. It may be obtained by the prosecutor as a matter of course, but when applied for by the accused, it is in the discretion of the supreme court to grant or refuse it. 4 B. C. 320.

Arraignment. When a prisoner is brought before the proper court to answer to an indictment, or voluntarily appears there for that purpose, he is immediately to be *arraigned*; that is, called to the bar of the court to answer to the charge preferred against him. He is called by name, (and required to hold up his right hand in cases of felony and treason.) The indictment is then read to him by the clerk of the crown, if in the supreme court, or by the clerk of the peace if at the sessions. The clerk then demands of him whether he be guilty or not guilty of the crime of which he is indicted. If a prisoner makes no answer, or one foreign to the purpose, or having pleaded not guilty, he will not put himself on the country for trial by a jury,—in any of these cases he is said to *stand mute.* If he says nothing, a jury is to be empannelled to decide whether his silence is wilful, or from inability to speak. In case of wilful silence the prov. act of 1758, 32 G. 2, c. 13, s. 31, 32, 1 P. L. 19, subjects all offenders in felonies to the same judgment as on a conviction, and the law is the same in treason where a party stands wilfully mute or is outlawed. See 4 B. C. 319, 325. When the prisoner pleads guilty, the court has no further duty but to award judgment and execution; but in cases of a capital nature, it is the practice not to receive a plea of confession, until after admonishing the prisoner to withdraw it and plead not guilty. If he persists, it must be recorded against him. This must be the voluntary act of the prisoner, as any compulsion or torture, of a physical or moral kind, is abhorrent to the principles of English criminal law. A person under indictment arraigned for treason or felony, sometimes before pleading confesses his guilt, and offers to act as evidence for the crown against his accomplices in the same crime, in order to obtain a pardon. This is called in capital cases turning approver—and in ancient times these approvers were sometimes permitted to appeal those they accused; but this

allowance of appeal is entirely disused, although pardon is occasionally granted, where the testimony of one criminal is requisite to secure the discovery and conviction of his coadjutors. See Christian's note 4 B. C. 330, 331.

Plea to the jurisdiction

Pleading. If an indictment is brought before a court having no jurisdiction to try the offence charged in it, the accused may avail himself of the objection, by plea to the urisdiction, without a direct answer to the alleged crime. 4 B. C. 333, but this is rarely resorted to, as advantage may be taken of it at the trial under the general issue, where the offence was committed out of the limits of the court's jurisdiction; and where the objection appears on the face of the record, it will support a demurrer, motion in arrest of judgment or writ of error.

Plea in abatement. If the prisoner be wrongly named in the indictment, he may plead it in abatement. This is the only case in which a plea of abatement is usual in practice. But a new bill may be immediately framed and found with the name properly stated. 4 B. C. 334.

General issue. This is pleaded by the prisoner *viva voce*, in these words "*not guilty*;" on which the clerk demands "how will you be tried?" and the prisoner replies "by God and my country," the clerk adds "God send you a good deliverance." When the prisoner pleads not guilty the burthen devolves upon the prosecutor, of proving every act and circumstance constituting the offence as it is alleged in the indictment. Under this plea also the prisoner may give in evidence, not only every thing which negatives the statements contained in the indictment, but likewise all matters of excuse or justification. For this reason special pleas in bar seldom occur in criminal causes. A *former acquittal*, a *former conviction*, a *former attainder*, and a *pardon*, should respectively be specially pleaded in bar. A pardon should be always pleaded at the first opportuni-

ty of doing so, as the general issue would be a waver of a pardon from the crown—but a pardon by statute cannot be deemed waived by any neglect in pleading. The plea should allege the pardon to be under the great seal, and set it out with a *profert*, or offer to show it in court.

Demurrer. This is seldom used in criminal practice, as the same points may be taken at trial, or in arrest of judgment, on which a demurrer would lie. If a special plea be overruled, the judgment is that the prisoner answer over, leaving him room then to plead not guilty. 4 B. C. 338.

Plea of clergy. This is not used, as it is more to the advantage of a prisoner to *pray* clergy after conviction. If objected to, the crown answers this prayer by what is termed a counterplea of clergy, showing the objections to the allowance of this benefit. Arch. Crim. Pl. & Ev. 60.

Expense of carrying offenders to the county gaol.

The prov. act of 1768, 8 & 9 G. 3, c. 2, 1P. L. 147, directs that persons committed by justices of the peace shall defray the expense of themselves, and those who guard them to the county gaol. If they fail to do so, the justice or justices, who commit them, are to issue a warrant under hand and seal to the constable of the place where the delinquent resides, or whence he shall be committed, or where he has any goods, to sell so much as the justice or justices settle for the cost of conveyance. Four inhabitants of the place where the goods are must appraise them, and the overplus is to be given to the owner. Sec. 2. directs that where the delinquent has not goods to pay the expense, the justice or justices who commit, on application of the officer who conveyed the party to gaol, is to enquire by sworn evidence into the reasonable expenses to be allowed, and to grant a warrant under hand and seal without fee or reward, to the county treasurer, to pay the

amount, which the treasurer is to do at once, and it is to be allowed in his accounts. Sec. 4. If there be not a treasurer chosen, or the treasurer has not money to pay it, the amount is to be paid out of the public treasury. Sec. 5. enables any person sued for acts done under this law, to set out the act in general terms, without special pleading, and gives treble damages and costs to defendant on acquittal or nonsuit.

BOOK V.—CHAPTER IX.

TRIAL BY JURY IN CRIMINAL CASES.

The trial by jury in criminal cases merits more unqualified approbation than in civil questions. In the former, the point to be adjudged is generally open to the apprehension of every intelligent mind, possessed of just, moral and religious principles,—in the latter the niceties of law are frequently entangled with the facts in such a degree, as to require an extensive acquaintance with the science to unravel them, so as to give to the parties in litigation their just rights. The jury to try criminal causes in the supreme court, is the petty jury of the term. Special juries may be obtained in trials for misdemeanor. See 3 vol. p. 172 to 176. In case of a special commission of oyer & terminer, or in a criminal trial in piracy, a jury is to be summoned in the same way. The English practice appears to be, to try all persons charged with treason or felony, and those in actual confinement for lesser crimes, at the same term in which they are arraigned; but in misdemeanors, where the accused is not in prison, on his plead-

ing, and giving security to abide his trial atthe next court, he obtains the interval to prepare for it. Where the crown prosecutes an offender, it is usual at the request of the attorney general, stating that he is not ready, to continue the accused in prison, or under his recognizances, till the next term, and sometimes longer according to circumstances. When a prisoner has pleaded not guilty, and put himself upon the country, that is submitted his cause to be tried by a jury of his countrymen, he is usually asked when he will be ready for bis trial; and if he requests it, a delay of a few days in the term will be granted him. In capital cases and felonies in general, it is usual also to ask him whether he has counsel to assist him, and if he has not, the court requires some of the bar to assist him. In cases of high treason the accused is entitled to a copy of the indictment, a list of the crown witnesses, and a copy of the list of jurors, some days before the trial, and besides in treasons and misdemeanors he has the full benefit of counsel to argue and address the jury for him, while in every kind of felony, and in petty larciny, his counsel can only examine witnesses, or address the court on questions of law arising in the course of the cause, the prisoner being only allowed to state his defence himself to the jury. A singular cruelty to prisoners in capital felonies, who are to defend themselves from an ignominious death, without the skill and practice of public speaking, when against them counsel are arrayed, and in some cases prejudices excited that a jury can hardly be free from. See 4, B. C. 351 to 356.

Jurors may be set aside on the challenge or objection of either party for reasons assigned, in the same way as in civil trials. Besides these challenges for which a reason is to be given, a prisoner can object to jurors without giving any reason for so doing; at common law he could object peremptorily, (that is, without shewing cause) to 35 jurors: and so stands the law in England, in cases of high

treason. But in felonies the prisoner is restricted to challenge but 20 jurors peremptorily, by stat. 22. H. S. c. 14. The prov. act of 1758. 32, G. 2, c. 13. s. 31, 32. 1 P. L. 19. enacted by s. 31, that "if any person or persons indicted of *any offence* for which by virtue of this act, they are *excluded from the benefit of clergy* or of this act, shall if they stand mute, or will not answer directly to the felony, or shall challenge peremptorily above twenty of the jury, or shall be outlawed thereupon, be ousted of the benefit of clergy, or of this act, and judgment shall be pronounced and execution awarded, as if such person or persons had been convicted of such offence by verdict or confession. Section 32. enacts that in all cases where the benefit of clergy, or of this act shall be allowed,"—if the prisoner stand mute, be outlawed, or challenge peremptorily above 20 jurors, he "shall be proceeded against by the court, in the same manner as if he, she, or they had been convicted by confession, or verdict." The act of 1760, session 2. 34. G. 2, c. 9. 1 P. L. 61, 62, recites the 31st section of the act 1758, c. 13, then states that "it will be more agreeable to the common course of justice, to allow the benefit of defence and trial"—and proceeds to enact "that in *all* *cases* where any prisoner shall *challenge* peremptorily *above twenty of the jury*, such challenge shall be *overruled*, and the jurors shall be sworn for the trial of such prisoner as if no such challenge had been peremptorily made." It may be presumed that this clause would be applied as well to clergyable as to capital felonies. See 4 P. C. 353, 354.

If a sufficient number of jurors do not appear to make up a jury free from objections, by standers may be impannelled as in civil cases. (See 3 vol. p. 174, 3 B. C. 364, 4 B. C. 354.) In capital cases the clerk of the crown administers the oath to each juror singly, first saying "juror, look upon the prisoner; prisoner, look upon the juror"—

it is at this time that the prisoner, if he has any objection or distrust of the juror, is to make his challenge. If not challenged, the juror is then sworn thus : "You shall well and truly try, and true deliverance make, between "our sovereign lord the king and the prisoner at the bar, "whom you shall have in charge, and a true verdict give, "according to the evidence." So help you God.* When the jury is sworn and publicly counted over, the indictment is read out distinctly by the officer, the arraignment and plea stated, and the legal points of enquiry noticed. The counsel for the crown or prosecution then addresses the jury, explaining the nature of the offence, and the proof to be adduced in support of it. It is usual in cases of felony, where the prisoner cannot have counsel to go to the jury, for the crown lawyers to confine their speeches to a simple explanation of the charges, and to avoid any oratorical attempt to move the passions of the jury. In such cases the court are also more particularly bound by law to watch the evidence and proceedings strictly, in order to prevent any innocent person accused from being convicted upon slight or unsatisfactory evidence. See Christian's note to 4 B. C. 355, 356. The cause being opened, the witnesses for the prosecution are examined, and then are cross examined by the prisoner or his counsel; after which the prisoner in felonies and larcinies; and in other cases, the prisoner or his counsel, addresses the jury, stating the defence, and the prisoner's witnesses are examined and cross examined by the counsel of the prosecution, who may close the case in reply. The judge then charges the jury. The jury, if they do not give their verdict at once, must not be allowed to separate, till they agree and give their verdict publicly. See 4 B. C. 360, 6 T. R, 527.

* In assaults and other misdemeanors, the oath is, "you "shall well and truly try the traverse joined between our "sovereign lord the king and the prisoner, and a true ver- "dict, &c."

Evidence in criminal cases.

The rules of evidence are in general similar in civil and criminal causes. There are, however, some peculiarities and differences between them. In indictments for larciny great strictness is required in describing the stolen articles, and any variance as to the species will destroy the indictment—as *shoes* for *boots*, a *cow* for a *heifer*, &c. Leach 123, 1 Camp. 212, but the number and value need not be precisely proved as stated. So the ownership of the goods must be exactly proved as stated. (1 Hale 513. Leach 286) in burglary and in larciny, and in burglary the ownership of the dwelling.

Where the offence consists of words spoken, they must be strictly proved, as laid in the indictment, or the defendant must be acquitted, but this rule does not extend to treasonable words. Archb. Cr. P. & Ev. 67. If the intention be an essential ingredient in the offence, it must be proved by circumstances. ibid.

Where intention, design, or malice is to be established against the accused, former acts of a similar kind may be proved. Thus in a case of uttering forged notes, a former uttering of such notes may be proved, to raise the inference that he acted knowingly, and in murder, former assaults, or menaces may be proved, from which a malice against the deceased may be inferred. So in rape, the prisoner may give evidence of the woman's general bad character, or of her connection previously with himself, but not with others, ibid. 71. A prisoner may also give in evidence his own general good character, to rebut presumptions of guilt.

The examination of a prisoner taken before a magistrate under the statute, may be given in evidence against him, but not if he was sworn to it. So may other admissions, but a confession before the justice of peace must be voluntary, and so must every admission, or it cannot be

evidence. Any promises or threats operating on the mind of the accused, will render any confession or admission a nullity. ibid. 76. Presumptive or circumstantial evidence is admissable in criminal as well as in civil causes; but in capital cases and felonies in general it is to be received cautiously. Thus Sir Mathew Hale says that a man should not be convicted of larciny merely for having goods in possession of a person unknown, unless an actual felony of the goods be proved; and that in murder no conviction for homicide should take place, unless the body of the deceased be forthcoming. 2 Hale 290. As to the competency of witnesses, the rules are very much the same as in civil causes—but a person entitled to reward on the conviction of the prisoner is by English law allowed to give evidence. 1 Ph. Ev. 119, 127. The prosecutor may be a witness in all cases except forgery. Arch. Cr. Pl. & Ev. 97. The cashier whose name was forged, was held a competent witness in forgery. 1 Leach 350. An accomplice or accessary may be a witness, but such proof is of much less credit than any other. Gilb. Ev. 136. If two or more be indicted, and there be any one against whom no proof is brought that can affect him, he may by direction of the court be previously acquitted, and then he may give evidence in favor of his fellow prisoners. Gilb. Ev. 131, 132. It has been held that husband and wife may be witnesses against each other, but there are conflicting authorities on this point. In cases of personal injury to each other, of bigamy and of forcible abduction and marriage, they may testify against each other.

Number of witnesses.—In high treason (not relating to the coin or the seals)—two witnesses are necessary, both before the grand and the petit jury, by statute 7 & 8 Wm. 3. c. 3, s. 2. 1 Ed. 6, c. 12, s. 22, 5 & 6 Ed. 6, c. 11, s. 12. In petit treason, and in misprision of treason, there must also be two witnesses. 1 Ed. 6, c. 12, s. 22. So in perjury two witnesses are requisite at common law. 10

Mod. 194. In all other cases one witness may be sufficient. In felony the witnesses are usually bound over by recognizance to appear and give evidence, and in misdemeanors it is often done. A *subpœna*, or a *subpœna duces tecum*, may be obtained and served as in civil suits, to compel the attendance of witnesses and the production of documents in their custody. These may be taken out at the office of the clerk of the crown and prothonotary, or at sessions from the clerk of the peace. If the witness be a prisoner, you must apply by affidavit to the court, or to a judge at chambers for a *habeas corpus ad testificandum*.

Separation of witnesses.

When a criminal cause is called on, or at any other period during the trial, the court at the request of the defendant or the prosecutor, will order such of the witnesses of the opposite party, as have not yet been examined, or who are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of the other witnesses on the same side, who are to be examined after him. R. v. Vaughan, Holt, 689. 5 St. Tr. 191. Anciently the witnesses of the prisoner in capital cases, &c. were not sworn; but the prov. act of 1758, 32 G. 2, c. 13, s. 35 enacts that the prisoner's witnesses, "upon any trial for murder or felony" are to be sworn. The English statute 7 W. 3, c. 3, gives the same direction in cases of treason. The act which enables a *quaker* to be a witness, confines his evidence to civil causes only. Act of 1759, 33 G. 2, c. 2. s. 3. 1 P L. 48.

Payment of poor crown witnesses.

The prov. act of 1768, 8 & 9 G. 3, c. 2, s. 3, 1 P. L. 147, directs "that when any poor person shall ap- "pear on recognizance in any court, to give evidence

" against another accused of any grand or petit lar-
" ciny, or other felony"—the court is " in open court
" to order the treasurer of the county in which the
" offence shall have been committed, to pay unto such
" person such sum of money, as to the said court shall
" seem reasonable for his time, trouble and expense."—
This order is to be made out by the " proper officer of
such court" for the fee of sixpence and no more, and to
be delivered to the witness. The amount the county trea-
surer is to pay and be allowed it in his accounts. Sec. 4,
directs that if no county treasurer be chosen, or no money
be in the hands of that officer, the order is to be " paid
out of the public treasury of the province." Other wit-
nesses receive no compensation in criminal cases, nor do
jurors receive any in criminal trials. The oath of a wit-
ness in a criminal cause is " the evidence you shall give
to the court and jury, sworn between our sovereign lord
the king, and the prisoner at the bar, shall be the truth,
the whole truth, and nothing but the truth. So help you
God."

Consequences of verdict.

If the verdict be " *not guilty*," the prisoner is forever
free from any indictment for the same offence; but an ap-
peal may be brought against him in cases of felony, within
the time limited by law, which in homicide is a year and
a day after the death of the party. On a verdict of ac-
quittal being recorded, unless there are other charges be-
fore the court against the prisoner, a proclamation is im-
mediately made in open court, calling on all persons who
have any thing to say against his discharge. On this, if
no new charge be made, he is at once released from cus-
tody without the payment of any fees. If the verdict be
" *guilty*," the prisoner is said to be *convicted* of the crime
stated in the indictment.

At common law the owner of goods stolen was obliged to bring an appeal of robbery against the purloiner, as there was no restitution of goods consequent to the conviction by indictment. This has been remedied in England by stat. 21, Hen. 8, c. 11, (s. 4, B. C. 362, 363.) The prov. act 1758, 32 G. 2, c. 13, s. 22, 23, 24 & 25, 1 P. L. 18, regulates the restitution of goods stolen. The 22. sec. directs the court in cases of conviction for *petty larceny* " to order *the offender to make full restitution*, and in default " thereof to commit such offender to the house of correc- " tion, there to be put to hard labor for a term not ex- " ceeding three months, as the judges, in their dis- " cretion shall think fit." Sec. 23 enacts " that all " *monies, goods, chattels*, merchandizes or stores, *found* " *in possession of any burglar, house breaker, robber, thief,* " *or purloiner*, shall be delivered by the justice of " peace who shall take the examination of such offend- " er, into the custody of the provost marshal, (now altered " to the sheriff) or his deputy, or constable of the town " where the offence shall be committed, who shall be an- " swerable for the same until the offender be con- " victed ; and the judge or judges of *the court, wherein* such " offender shall be *convicted*, shall *order* the said *money,* " *goods or stores, to be restored to the lawful owners* thereof; " and where *no owner* shall appear to claim the same, they " shall be adjudged to be *forfeited*. Sec. 24. " and in cases " *where the evidence shall not be sufficient to convict* of a felo- " nious intent, *and the jury shall declare* that *the property* of " such money, goods, or stores, *is in the prosecutor*, it shall " and may be lawful for the court to order such money " goods or stores, to be delivered to such prosecutor." Sec. 25 " provided nevertheless, that such delivery shall not " debar the party so acquitted, or any other person who " may claim the same, from his or her action for the de- " tainer of such money, goods, or stores, so delivered to " the prosecutor."

I recollect a case where a hired servant on a farm was indicted for stealing 5 or £6, in provincial paper money from his employer. The farmer and his son both swore to the loss of a sum of money in similar paper notes, but they had no mark to identify them with those found on the prisoner, who stated that he had brought money with him to this country and changed it into our paper. The indictment stated the money to belong to the father, while the son claimed an interest in it the father did not choose to admit. The jury found a verdict of not guilty, and afterwards I moved that the notes should be restored to the prisoner. This the court felt extremely unwilling to do, as very strong suspicions of the theft rested on the prisoner, and my proposition appeared at first monstrous; but on mature consideration the judges ordered the money to be restored to the accused.—The owner is entitled to restitution, although the goods stolen have been sold in an open market. 3 B. C. 463.

The benefit of clergy.

In early days it was one of the privileges claimed by the church in England, and admitted in most cases, that persons in holy orders, then called *clerks*, should be exempted from punishment, and even from trial by lay tribunals in criminal matters. The test established for ascertaining whether the prisoner was to be considered a clergyman or clerk was his being able to read, as in those times learning was almost exclusively confined to the clergy and the monastic orders. As the invention of the press extended knowledge, this privilege became widely diffused, and by statutes the distinction was nearly obliterated, men and women being admitted to the benefit of clergy. The privilege itself never extended to treason, or to misdemeanors, but the statute 25 Edw. 3, st. 3, c. 4, extended it to *petit treason*, and to most kinds of capital felonies. It has become a mere technical distinction

between felonies that are capital, and those subject to lesser punishment. Those which are capital are excluded from the benefit of clergy by express statutes, and in those felonies not so excluded from clergy, the party convicted, (on being called up to receive judgment,) prays the benefit of clergy, which means that he prays that sentence of death (the old judgment in most felonies) should not be pronounced on him. The original and history of this distinction is given in 4 B. C. c. 28. The provincial enactments on the subject are contained in the act of 1758, 32 G. 2, c. 13, s. 27 to 34. 1 P. L. 18 & 19. Sec. 27 directs—that this privilege shall not be allowed to an offender who has before had the benefit of it, thus making a second offence in felonies liable to capital punishment, though the first offence were not so. It directs persons convicted of *manslaughter to be marked with an* M. and in *any other felony with a* T, "*upon the brawn of the left thumb,*" by the gaoler in open court; "and if any person convict-"ed of any felony, for which he ought to have the benefit "of his clergy, shall pray to have the benefit of this act, "he shall not be required to read, but without any read-"ing shall be allowed to be, and punished as a clerk con-"vict, which shall be as effectual and advantageous to him "as if he had read as a clerk." Sec. 28. empowers the court "*after allowance of* such *clergy and burning in the* "*hand,*" to discharge the prisoner,—to send him to the *house of correction* for a term not to exceed *one year*,—or to punish him "by public whipping." Sec. 29. extends the same privilege to women, and subjects them to the same burning in the hand and imprisonment or whipping. Sec. 30. directs "the clerk of the court or assizes" where such conviction takes place, "at the request of any in his majesty's behalf, to "certify a transcript containing the tenor "of every indictment and conviction of such man or woman, "of his having the benefit of the clergy, or her having "the benefit of this act, and the addition of every such

" person, and the certainty of the felony and conviction, " to the judge or judges of the court or assizes where such " man or woman shall be indicted; which certificate, be- " ing produced in court, shall be a sufficient proof that " such man hath before had the benefit of his clergy, and " that such woman hath had the benefit of this act, in the " same manner as if the record had been produced. Secs. 31 & 32 have been previously noticed. Sec. 33 & 34 repeat and enforce the direction, that the privilege shall only be allowed once to man or woman; and shall not extend to any capital offence committed before, or any clergyable felony committed after, but the one only on which it is prayed and allowed.

The following English statutes are referred to on this subject in the marginal notes of C. J. Belcher. 4 Hen. 7, c. 13. 5 Ann c. 6, s. 4. 18 Eliz. c. 7, s. 5, 23. 3 & 4 Wm. & M. c. 9 s. 2, 6. 7. 4 & 5 Wm. & M. c. 24 s. 13. It is stated in 4 B. C. 373, " that in all felonies whether new " created or by common law, clergy is now allowable, 'unless taken away by express words of an act of parlia- " ment," That where the act excludes the principal from clergy, the accessary is not also excluded unless particularly so mentioned. That when *the offence* is excluded from clergy, a principal in the second degree, as a person present aiding in a murder, robbery, &c. is excluded from clergy.—By this conviction, all the prisoner's goods are forfeited to the crown,—by the infliction of the sentence, (or by a pardon) he is restored and cleared of the offence in the eye of the law.

BOOK V.—CHAPTER X.

JUDGMENT AND EXECUTION.

After a verdict of *guilty*, the prisoner is either immediately or at a convenient time afterwards, brought to the bar to receive judgment. He is then, in capital cases, asked by the court if he has any thing to allege as a cause why judgment should not be given against him. At this time he has an opportunity to show any legal exceptions to the indictment or other part of the record, and if the objections be valid, the whole proceedings are annulled, but the party may, in such case be indicted anew. In other criminal cases also, this is the period for moving any such objections in *arrest* or stay of judgment. None of the English statutes for amending errors and supplying defects in pleading, extend to criminal cases, nor do the provincial acts of the same kind, (1764. 1 P. L. 98, 103.) and great strictness is required in capital cases, as to the regularity of the proceeding. A pardon may also be pleaded in arrest of judgment, and it is at this stage of the proceedings that the benefit of clergy is to be prayed for. Wherever there are any facts or circumstances that may tend to palliate or lessen the magnitude of the offence, or

to induce any peculiar favor or pity towards the person convicted, it is usual for him to bring such things before the notice of the court at this period, in order that where the court has a discretionary power in passing sentence, they may mitigate his punishment, or in case they have not such discretion, they may recommend his case to the favor of H. M. government. The jury, in finding guilty of a capital offence, sometimes recommend the prisoner to mercy, and to such recommendation the highest attention is always paid.

If there be no sufficient objections in arrest of judgment, nor pardon pleaded, the court is then bound to deliver the judgment according to law. This is done usually by the senior judge present, who addresses the prisoner, and after briefly noticing the indictment and other proceedings to the conviction, and sometimes animadverting on the nature and circumstances of the crime,—expresses the sentence prescribed by law for the offence, modifying it where the court has a discretion, and directing in general terms the manner of its execution. Where the court has a discretionary power of fine or imprisonment, the principles of law recognized by *Magna Charta*, c. 14, require, that the fine should not exceed the ability of the prisoner to pay, without taking from him the implements of his calling or trade. If he be poor, it is the practice to imprison for a limited term, instead of imposing a fine, and in all cases the circumstances and means of the party, are to be considered by the judge in fixing the amount of the fine. A previous imprisonment before trial and judgment, in most cases of lesser offences, is considered as a part punishment already incurred, and in some instances, accusation and public trial form no inconsiderable penalty. It is the duty of the judge to attend to these circumstances, and also to the situation of the prisoner and his family in giving judgment. Many of the statutes give the court a limited discretion, by which the *maximum* and *minimum* of

punishment are settled. When sentence of *death* is passed, the offender is said to be *attainted*, and from this moment he is civilly dead, being deprived of all the legal privileges of a subject or citizen. 4 B. C. 380. In case of *high treason*, by this attainder all his estate both real and personal is *forfeited* to the king, and all sales or disposition of it by mortgage, will, lease, &c. *after the act of treason committed*, are void in law, and even the *dower* interest of the wife in his lands is lost by act 5 & 6 Ed. 6, c. 11, see 4, B. C. 381, 382. In *petit treason* and *felony*, all goods and chattels are forfeited to the king on conviction. So leases for terms of years are forfeited, and the crown besides has a right, on an attainder, to the use of his freehold lands till the death of the offender, and for a year and a day afterwards. Besides this forfeiture, the lands escheat for corruption of blood, on attainder, to (the king, as to all lands in this country, as) the lord of the soil, the children or relatives of a person attainted not being allowed to derive any title through him. See 4 B. C. c. 29. The provincial acts 1758, 32 G. 2, c. 13, s. 2, 15, and 1768, 8 G. 3, c. 3. s. 4, (1 P. L. 15, 17, 136,) declare that "corruption "of blood, loss of dower or disherison of heirs" shall not follow on attainder for *stealing bills, bonds, &c.* made felony by the first of these acts, sec. 14. and that no attainder of any felony of *maiming* declared by sec. 2, of same act, shall "work corruption of blood, or forfeiture of dower, "lands, or goods of the offender." See State Trials, vol. 6, p. 212. Woodburne & Coke's case.

Reversal of judgment. A judgment in a criminal cause may be reversed, without a writ of error, for matters foreignto the record ;—as for example, where a commission empowers A & B, with certain other persons, or any two of the commissioners, to try offenders, provided always that either A or B be one of the two acting, and under this C & D proceed to act without either A or B being present or interposing. In such a case the judgment may be an-

nulled on inspection, without writ of error. See 4 B. C. 390. It may be reversed by *writ of error*, which lies from all inferior criminal courts to the king's bench (in this province to the supreme court.) Where there is an error manifest on the face of the pleadings, this course may be pursued effectually. In England it lies also from the king's bench to the house of peers. Criminal judgments may also be reversed by act of parliament. So an outlawry may be reversed for error.

Reprieve. The judge may, in his discretion, suspend the execution by a reprieve for an interval of time, where he is dissatisfied with the verdict, suspects the evidence, has doubts as to the validity of the indictment, or as to the legal punishment of the crime,—or where there is room to hope for a pardon from the crown. The court is bound to stay execution in capital cases, where a woman is convicted, and states herself to be pregnant, and a jury of matrons is made use of to enquire into the truth of her assertion. If they pronounce it true, her execution must be suspended until after the delivery. If the prisoner loses his senses, he is not to be executed. A person who is *non compos mentis* ought not to be tried, and if a prisoner becomes so at any period of the proceedings, it is a legal bar to any further steps against him, while he so continues deprived of reason.

Pardon may be granted after judgment. The crown has a general power of forgiving offences, to which there are a few exceptions. 1. Imprisoning a subject out of the realm by the *habeas corpus* act 31 C. 2, c. 2, is made unpardonable. 2. *Appeals* for crime, wherein not the king but the injured party possesses the power of absolving. 3. Common nuisances, while they remain, but after their removal the crown may remit the fine. 4. In offences against penal statutes after information laid, where the informer is entitled to a part of the penalty, he is not to be deprived of it by pardon. 5. Parliamentary impeach-

ments cannot be stopped in their progress by a pardon, but after the trial is fully ended and judgment pronounced, the crown may interfere by reprieve or pardon.

A pardon must be under the great seal, and be very specific and accurate in designating the offence to be forgiven. It may be conditional, as in a capital case imprisonment for life, banishment or transportation may be substituted in this manner for the punishment of death. 4 B. C. 401. A pardon from the king must be pleaded without allowing the cause to proceed, as going to trial would be a waver of it. A pardon may be by statute, and then the prisoner is not bound to plead it, but the court *ex officio* must notice it. If a pardon be not granted till after attainder, it will not restore the corruption of blood without an act of parliament. The governor, or person exercising the functions of governor in a British colony has, by the royal instructions, power to pardon at his own discretion all offences he thinks proper, * except *high treason and murder*. In these he can only suspend the execution, and recommend to his majesty's mercy; but such recommendation has been rarely if ever negatived. On receiving notice that his majesty approves of such recommendation, he can then issue the pardon under the great seal of the province.

Execution.

In all criminal cases, as well capital as otherwise, the execution must be performed by the sheriff of the county, or by his deputy. For capital punishments the sheriff must have a written authority signed by the judge. The governor and council usually adjudge upon the expediency of executing a criminal under sentence, and a strong and laudable anxiety to restrain the number of executions has distinguished the administration of the government of

* See 1 Epit. 95. 1 Chalmer's Op. 199.

Nova Scotia for very many years. That this humanity is not mistaken, may be inferred from the fact that crime has not increased in the country, notwithstanding the constant additions to the population. The temper of the native inhabitants is pacific and obedient to the laws, and strangers settling here, after a few years, adopt in general the same mild and moderate habits.

Costs.

The provincial act of 1828, 9 G. 4, c. 13, enacts, sec. 1, "that whenever in the absence of H. M. attorney general, "and solicitor general, from the supreme court, or any "court of oyer and terminer," the court think it expedient, they are to direct a king's counsel, and if there is no king's counsel present, some barrister attending, to conduct the criminal prosecutions for the crown. Fees to be taxed in his favor as for counsel and attorney in a civil suit. The counsel fees in any one prosecution not to exceed £5, and the whole charge for attorney and counsel not to be above £7 10s. in any one cause. Sec. 2, requires 24 hours notice of taxation to be given to the clerk of the crown, or his deputy, and restricts the costs to necessary services and expenses. Sec. 3. On a certificate of such costs under the seal of the court, the governor is to give a warrant on the provincial treasury for the amount, which the treasurer is to pay. Sec. 4. "that in all cases where the party "prosecuted shall be convicted, and be found by the "court of ability to pay the expenses of prosecution to be "taxed under this act, the said court shall and is hereby "required to adjudge such defendant to pay the expenses "of prosecution, and shall issue execution accordingly, "and the amount levied shall be paid to the treasurer of "the province."

Punishments.

The act of 1816, 56 G. 3, c. 6, 2 P. L. 201, after reciting that "the punishment by imprisonment of clergyable felo-

" nies, larcinies, and other lesser criminal offences, is often " nugatory and a useless expense to the counties." enacts, " sec. 1, that it shall and may be lawful for the court " before whom any person or persons shall be convicted of " any clergyable felony, larciny, of receiving stolen goods " knowing them to be stolen, or other lesser criminal of- " fence, to sentence the offender to be put and kept to " *hard labor*, in the house of correction at Halifax, or " elsewhere, or upon the highways or other public works, " in the province, for *any term or time not exceeding seven years*, " on such terms and conditions as shall appear to be best " calculated to promote the reformation of the offender, " a good example to others, and a just retribution to the " public for the injury done to it by such offender." Sec. 2. authorizes the supreme court, " from time to time" to make " rules, general or special, for the government of offenders so sentenced to hard labor, and to prescribe " *corporal punishment* or deprivation" in case of disobedient or refractory conduct.

APPENDIX.

Fees est

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APPENDIX.

Fees established by the Provincial act of 1787, 28 *G.* 3, *c.* 15, 1 *Prov. Laws*, 259—265.

SEC. 1.—*IN THE PROBATE COURTS.*

JUDGE OF PROBATE.

For probate and registering a will, administration, or letter of guardianship,	each,	£1	0 0
Citation and service,		0	3 0
Letters *ad colligendum*		0	10 0
Decree for distribution,		1	0 0
Warrant of appraisement,		0	5 0

REGISTER.

For probate and registering a will, administration, or letter of guardianship,	each	1	0 0
Drawing bond,		0	3 0
Attending execution of do.		0	2 6
Letters *ad colligendum*,		0	10 0
Citation and service,		0	3 0
Filing inventory, accounts, &c.		0	1 0
All searches,		0	1 0
Copy of will & probate, per sheet of 90 words		0	0 9
Collating,		0	5 0
Copying inventory accounts, per sheet of 90 words,		0	0 9
Certificate and seal,		0	6 8
Decree for distribution,		1	0 0
Copy of citation,		0	3 4
Warrant of appraisement,		0	5 0
Every exhibit,		0	0 4

COURTS OF COMMON PLEAS.

JUSTICES.

Entering cause—1st Justice, - -	0	2	6
Assistants, each -	0	1	0
Trial and final judgment—1st Justice,	0	6	0
Assistants, each	0	3	0
Summary cause.—The whole court,	0	5	0
Taxing a bill of costs, - -	0	1	0
Taking bail at Chambers - -	0	2	0

JUSTICES OF PEACE.

Issuing writ or summons, - -	0	2	6
Subpœna, - - -	0	0	6
Judgment, - - -	0	1	0
Execution, - - -	0	1	0
Every bond or recognizance, - -	0	1	0
Every affidavit in writing, - -	0	1	0
Sending proceedings to Common Pleas or other court,	0	1	0
Warrant in assault and battery, on conviction,	0	1	0
Acknowledging instrument or deed,	0	1	0
Every examination in assault and battery, on conviction,	0	2	6

To swear chainbearers without fee by act of 1793, 33 G. 3, c. 8, 1 P. L. 319.

Justices of Peace. Fees in civil actions, by act of 1822, 3 *G.* 4, *c.* 30, *s.* 5, 3 *P. L.* 135.

On writ of summons, - -	0	2	0
Capias and affidavit, - -	0	2	6
Judgment - -	0	1	0
Execution, - -	0	1	0

SUPREME COURT and COMMON PLEAS.

CLERK OF THE COURT.

Entering action, filing oath, warrant and praecipe, the whole	0	2	6
Sealing and signing every writ, execution or other process,	0	1	0

Filing every writ and entering return,	0	0	6
Filing declaration, and all other pleadings,	0	0	6
Entering appearance, - -	0	1	6
Entering and filing every rule of court,	0	0	6
Copy of every rule, when given by clerk,	0	0	6
Swearing and impannelling jury,	0	1	0
Swearing each witness or constable,	0	0	6
Taking and entering verdict, -	0	1	0
Entering judgment, - -	0	2	0
Retraxit or discontinuance -	0	0	6
Copies of all records or pleadings, each 90 words,	0	0	6
Every exhibit in a cause filed in court,	0	0	4
Attending striking special jury and copy of panel to each party,	0	5	0
Taking affidavit in court, -	0	1	0
Filing each affidavit, - -	0	0	6
Searching the records, - -	0	0	6
Entering every default, - -	0	0	6
Entry of consent rule in ejectment, -	0	1	0
Taking and filing special bail piece,	0	1	0
Drawing and taking every recognizance,	0	1	0
Entering every nonsuit, - -	0	0	6
Sealing and signing subpœna, -	0	1	0
Continuance of every cause - -	0	1	0
Filing the roll in every action - -	0	1	0
Taxing every bill of costs - - -	0	1	0
In every summary cause, not tried by a Jury, in lieu of all other fees, including signing and sealing writ, together with the final judgment.	0	5	0

Writs of partition, writs of certiorari, and writs of error, the fees of the clerk to be as above stated and none other.

CLERK OF THE PEACE.

Drawing an indictment, if found -	0	2	6
Every trial and judgment - -	0	2	6
Every submission - - - - -	0	2	6
Concordatum fee - - -	0	1	6
Every petition and proceedings thereon	0	2	6
Every cause continued by traverse or otherwise, - - -	0	1	0
On truckman's license at Halifax, 1809, 2. P .L. 55. - - -	0	2	6

Every presentment proceeded on, to be paid by the delinquent, - -	0	3	4
Certificate of administering the state oaths	0	1	0
Militia arms bond, see 1 Epit. 215	0	0	6
Warrant from the Court - - -	0	1	0
Every recognizance, each person, -	0	1	0
Discharging a recognizance, - -	0	1	0
On every license for sale of spirituous liquors for all services including bond taken, by act 1832. 2. W. 4, c. 3, s. 13	0	5	0
On auction license the same, by act 1332 2 W. 4 c. 15, s. 3. - - - -	0	5	0
On ship licenses, the same, by act 1832. 2. W. 4. c. 16, s. 3. - - -	0	5	0

ATTORNIES

Summary causes.	For writ, præcipe, affidavit and declaration,	0	11	8
	In all summary causes, that do not go to a jury, for all other proceedings until final judgment. - -	0	8	4
Retaining fee, in each cause, above £20		0	10	0
Drawing affidavit of debt - - -		0	1	6
Every writ, summons or other original process		0	5	0
Term fee - - - - - - -		0	5	0
Every declaration, not containing more than 3 sheets, at 90 words each		0	5	0
Copy for service and filing each - -		0	2	6
Drawing every special declaration, plea, replication, rejoinder or other necessary pleadings, each 90 words -		0	1	0
Copy to file and serve, each 90 words,		0	0	6
Every common plea, replication, or rejoinder,		0	1	0
Copy for service and filing, each -		0	0	9
Drawing brief - - - - - -		0	5	0
Each copy for counsel - - -		0	2	6
Notice of trial, copy and service -		0	3	6
Notice of taxing costs, - -		0	2	6
Drawing notice of exceptions to bail, copy and service - - -		0	3	6
Every continuance - - - - -		0	1	0
Every discontinuance, or retraxit. -		0	1	0
Attending, ballotting or striking special jury		0	10	0
Attending taking every inquisition before sheriff - - - - - -		0	10	0

Making bill of costs, - - -	0	2	6
Attending to get same taxed, - -	0	2	6
Arguing a demurrer, special verdict, motion for new trial, or other special motions	0	10	0
Trial fee - - - - -	1	0	0
Drawing common rule in ejectment -	0	3	0
Copy - - - - -	0	2	0
All other rules and copies each, - -	0	1	0
Every subpœna, - - - - - -	0	2	0
Every ticket and service, - - -	0	2	6
Travel per mile for service, the same as to sheriff - - - - -			
Every execution, *venditioni exponas*, *venire facias*, *habeas corpus*, writ of error, writ of possession, writ of *habere facias*, and writ of enquiry, each.	0	6	0
Making up issue, every 90 words -	0	0	6
Copy for service, every 90 words -	0	0	6
Making up records, every 90 words -	0	0	6
Engrossing the same, every 90 words -	0	0	6
All other drafting and copying necessary to be done by an attorney, in the conducting of a cause, to be paid for, for every 99 words	0	0	6

SHERIFFS

Every deed, - - - - - -	0	5	0
Bringing up a prisoner by habeas corpus	0	5	0
Attending prisoner before judge on any special occasion. - - - - -	0	8	6

The act of 1795, 35, G. 3. c. 1. s. 8. gives the following fees to Sheriffs. 1 P. L. 346. 7.

Serving every summons, or *scire facias*, and making return thereof. - - -	0	3	6
Serving every other writ of *mesne* process	0	5	0
Serving execution, & making return thereof	0	5	0
Serving writ of possession - -	0	10	0
Travel, three pence per mile, for every mile from the place of residence of the sheriff to the place where he shall serve any writ	0	0	3
and one penny per mile and no more, for every mile from the place of residence of the sheriff, to the court house, where such writ is returnable; provided such court be out of his bailiwick and not otherwise.	0	0	1

Bailbond - - - -	0	3	0
Summoning a jury in each cause. -	0	2	6
Executing writ of enquiry, summoning a jury, and making return,	0	10	0
Returning special jury, - -	0	10	0

On *executions*, or *attachments* (*where a sale shall take place*) extended on *personal* property, *sale* and *payment* of the monies received to the plaintiff, or his attorney, as follows, viz.

For any sum not exceeding £50, -	0	1	0
From 50 to £100, -	0	0	9
All above £100, -	0	0	6

On *executions* or *attachment*, *where a sale shall take place*, extended on *real* estates, Three pence in the pound on the appraised value for laying the same thereon, 0 0 3

And the *sale* of *such real* estate, and payment of the proceeds of such sale to the plaintiff or his attorney, the further fee of 3d. in the pound,	0	0	3

Making inventory of goods and chattels, taxed by the court at their discretion.

Appraisers (each) on execution or attachment,	0	2	6
Or if the goods, &c. require much time 3s. 6d. per day each. Sec. 9, 1 P. L. 147. - -	0	3	6
Under the election of 1817, the sheriff is to receive from each candidate for every day polling or scrutiny. 1 Epitome, 71.	0	10	0

JURORS.

For every cause tried, each juror,	0	1	0

Fees for attending on a view to be taxed at the discretion of the court:

Special jurors at Halifax, for every cause tried, each,	0	5	0
In other places, - -	0	2	6

By act of 1805 and 1825. See Epitome 3, 176.

On coroner's inquests, by act 1828, 9 G. 4, c. 16, each,	0	1	0

WITNESSES.

For attendance per day at court, -	0	2	6
Travel per mile, - -	0	0	3

Same fees in civil suits before justices of peace.

CRYER.

For every default or non suit, -	0	0	4
Calling jury in each cause, -	0	0	6
Every verdict, - -	0	0	4
Swearing every witness, -	0	0	3
Every one discharged by proclamation,	0	0	6

CONSTABLE.

Attending a jury, in each cause, -	0	1	0
Serving every warrant or summons,	0	1	0
Summoning a jury by warrant from coroner, and attendance per day,	0	2	6
Travelling per mile the same as sheriff,	0	0	3

Fees in causes before justices of peace for small debts, by act of 1822, 3 G. 4, c. 30, s. 5, 3 P. L. 135, viz.

Service of writ of capias, summons or subpœna,	0	1	0
Travel per mile, - - -	0	0	3

As to fees in Commissioners' court at Halifax allowed to constables, see below.

Clerk of the Assembly's fees, in private affairs.

Reading and entering every petition, or other instrument in writing,	0	1	0
Reading every private bill, each time	0	0	6
The perusing an act, or one day's minutes,	0	1	0
Entering every order, - -	0	0	6
Entering a report in the journals of the house,	0	0	9
Engrossing every private bill per sheet 90 words,	0	0	9

The clerk of the assembly's fees to be taxed by the speaker, provided no bill be called private which concerns counties, towns, or precincts.

CORONER.

For serving a writ, summons, or execution, and travelling charges, the same as allowed the sheriff.

On certificate of clerk or deputy clerk of the crown, of every inquest returned and filed in the supreme court, to be drawn by warrant from the treasury—£2 10, to include 12s. to jury, and 2s. 6d. to constable, if any extraordinary expense be incurred the county is to pay it, the bill of items being rendered to the sessions, and approved by grand Jury. Act of 1828, 9 G. 4, c. 16.

The inquest is to be paid for out of estate of the deceased if any be found. See 1 P. L. 264.

If any person exact greater fees for any services named in the act, he forfeits for every offence, £10, half to the government of the province, and half to the prosecutor, recoverable by action of debt, bill, plaint, or information in any court of record, with full costs—and the party convicted to refund double the sum of excessive fees taken.—Sec. 6.

All suits for this cause to be commenced within six months after offence, and to be sued in the county where the offence was committed. Sec. 7, 1 P. L. 264, 265.

The act of 1795, respecting sheriffs fees adds the same provision against exactions.

Fees in subsummary suits in supreme court or common pleas, being civil actions between 5 and £10, under act 1822, 3 G. 4, c. 30, s. 7, 3 P. L. 135.

ATTORNIES.

On writ,	0	5	0
Trial and judgment,	0	4	0
Subpœna,	0	1	0
Execution,	0	2	6

JUDGES.

On judgment only, the whole court,	0	2	6

PROTHONOTARY.

On writ,		1	0
On judgment,	0	1	6

CLERK OF MILITIA COMPANY.

On every arms bond, Sec. 1, Epitome 215.	0	0	6

COURT OF CHANCERY.

Under act of 1820, 1821, 1 & 2 G. 4, c. 40, 3 P. L. 119.

CHANCELLOR'S FEES.

Every hearing of a cause, each day -	1	0	0
Pronouncing decree, and signing and sealing the same - - -	2	6	8

COUNSEL AND SOLICITORS.

Retaining fee for counsel, - - - -	1	3	4
Making draught of a bill, or answer, for every 90 words, - - -	0	1	0
Engrossing the same, every 90 words,	0	0	6
Entering an appearance in each cause	0	3	4
Every subpœna, injunction, or other writ	0	5	0
Copies for service, each - -	0	1	6
Drawing affidavit of service of subpœna, injunction, or master's report - -	0	2	0
Every petition necessary in the conducting of a cause - - -	0	3	4
Counsel's fee for making or defending every special motion to be taxed, not to exceed - - - - - - - -	1	3	4
Drawing brief in every cause, every 90 words	0	1	0
Replications and all other pleadings in a cause, every 90 words . .	0	1	0
Engrossing the same, every 90 words	0	0	6
Counsel's fee for examining and signing each pleading	0	11	8
Draughts of interrogatories, every 90 words	0	1	0
Engrossing interrogatories, every 90 words	0	0	6
Counsel fee, on trial of a cause, to be taxed by the court, but not to exceed	3	10	0
Making up bill of costs . .	0	3	4
For serving every subpœna, or other writ, or master's report . .	0	3	6
Travel actually performed, per mile, from the residence of the person making the service to the place of service 3d and no more, ...	0	0	3
Draught of decree every 90 words .	0	0	6
Attending registrar to compare decree before signing and sealing,	0	6	8
Engrossing the same, every 90 words .	0	0	6

Master of the Rolls or Master's fees. By act of 1826. (7 G. 4. c. 11.) no fees are to be allowed to master of the rolls. (3 P. L. 258.) and masters in chancery are restricted by the same to the poundage on sales, fees on drawing deeds and on references.

MASTERS.

	£	s	d
References for taxing costs, -	0	7	6
All other references on which a special report shall be made, 11s. 8d. & no more,	0	11	8
Poundage, on all sales, for receiving and paying the money, if less than £300, £2 per cent.	2	0	0
All above, £1 per cent, including auctioneers charges.	1	0	0
Drawing and executing every deed,	1	3	4

REGISTRAR'S FEES

Copies of all papers, for every 90 words,	0	0	6
For drawing and signing every rule or order,	0	1	0
Sealing every writ, including order therefor, filing praecipe, & certifying copies,		2	6
Every search, - -	0	1	0
Entering and filing every bill, -	0	2	0
Entering and filing every answer, plea, replication, or demurrer,	0	1	6
Filing all other papers, each paper	0	0	6
Attending every hearing, each day,	0	5	0
Making up final decree, enrolling and getting the same sealed,	0	6	8

Commissioners court at Halifax, under act 1824, 4 & 5 G. 4, c. 35, s. 12, 3 P. L. 195.*

COMMISSIONERS.

For taking affidavit, and endorsing a bailable writ,	0	1	0
or every trial and judgment, to the whole court,	0	3	0

CLERK OF COMMISSRS. COURT.

For every writ of summons, -	0	2	0
every affidavit and bailable writ,	0	2	6
All subsequent proceedings, including final judgment,	0	2	0

* By sec. 13, £5 is imposed on extorting greater fees, recoverable in this or supreme court in a summary way.

Execution, - -	0	1	0
Every recognizance, each person,	0	1	0
Each and every writ of subpœna,	0	0	6

SHERIFF OR CONSTABLE, in Commissioner's Court.

Service of every writ or process,	0	1	0
Every bailbond, - -	0	2	0
Poundage, if the money be paid without sale of property, 3d. in the pound,	0	0	3
If property be taken and sold,	0	0	6
Travel per mile, - -	0	0	3

WITNESSES. Commissioners Court.

For attendance, at discretion of the court not exceeding for each day,	0	2	6
Travel per mile, - -	0	0	3
If the debt recovered be under 20s. costs are not to exceed -	0	7	6
If under 10s. - -	0	5	0
If under 5s. at discretion of court wholly, but not to exceed -	0	5	0

CLERK OF LICENSES.

On every license for sale of spirituous liquors, for all services, by act 1832, 2 W. 4, c. 3, s. 13,	0	5	0
On auction license, the same, by act 1232, 2 W. 4, c. 15, s. 3,	0	5	0
On ship licenses, the same, by act 1832, 2 W. 4, c. 16. s. 3,	0	5	0

SECRETARY OF THE PROVINCE.

For every pass, - -	0	1	0
every bond for a pass, -	0	2	6

See 1 Epitome, 45.

REGISTER OF DEEDS.

For a deed not above 200 words,	0	2	0
For one longer, 1s. per 100 words,	0	1	0
Every certificate, - - -	0	1	0
Every search, - -	0	1	0

See 2 Epitome, 224.

REGISTER of BIRTHS, MARRIAGES & DEATHS.

For each entry,	0	1	0
do certificate,	0	1	0

See 3 Epit. 201.

CULLERS OF DRY FISH.

Inspecting per quintal,	0	0	1
Travel per mile,	0	0	4

1 Epitome, 161.

INSPECTORS OF PICKLED FISH.

Each certificate,	0	1	3
Branding tierce,	0	0	10
" bbl.	0	0	7½
" half barrel,	0	0	5

besides packing and cooperage.

Empty barrels inspected, each	0	0	1
Travel per mile	0	0	6

1 Epit. 162.

INSPECTORS OF BUTTER, in Cumberland,

For each firkin inspected,	0	0	3

1 Epit. 162.

INSPECTORS OF BEEF AND PORK.

For a barrel,	0	1	0
half barrel,	0	0	7½
New hoop,	0	0	2
Pickling, &c. barrel,	0	0	7½
" half barrel,	0	0	5

Owners finding salt.

1 Epit. 163.

INSPECTORS OF GRAIN.

Per 100 bushels,	0	4	0
Oats per 100 bushels,	0	2	0

1 Epit. 163.

Inspectors of

Lime, per hogshead,	0	0	6
Bricks, per 1000,	0	0	9
Free stone, flag stone, per ton	0	0	9
Other free stone,	0	0	6

1 Epit. 166.

SURVEYORS OF LUMBER, &c.

For viewing per 1000 feet, -	0	0	4
Measuring and marking, -	0	0	6
Travel per mile - -	0	0	4

SURVEYORS OF TIMBER.

For survey per ton, - -	0	0	3
For travel per mile, - -	0	0	4

1 Epit. 167.

MEASURERS OF COALS.

Per chaldron, - -	0	0	6

MEASURERS OF CORD WOOD.

Per cord, - -	0	0	4

1 Epit. 168.

SEALERS OF LEATHER.

Inspecting each hide, -	0	0	3
Calf or sheep skin,	0	0	1
Travel per mile, - -	0	0	3
to be paid by the seller.			
Tanned leather, each hide -	0	0	3
for calf skin, -	0	0	1

SURVEYORS OF HAY.

Per cwt. - -	0	0	1
Travel per mile, - -	0	0	4

1 Epitome, 170.

WEIGHERS OF BEEF.

From seller per carcase, -	0	0	9
If 3 or more at a time, -	0	0	6

1 Epitome, 170

GUAGERS.

Each puncheon, - -	0	0	3
hhd. or tierce, -	0	0	2
If 10 or under, double.			
Travel per mile - - -	0	0	6

1 Epitome, 110, 137, 1 P. L. 291.

As to the establishing new fees. See 1 Epit. 101.
Fees of clergy on marriages. 2 Epit. 22.
Judgment to be signed without fee. 2 Epit. 260.
Insolvent debtor to be discharged without fees. 4 Epit. 13.
Convictions for swearing and drunkenness to be shewn without fee. 4 Epit.

LICENSE LAWS.

Taverns and Licenses.—The acts mentioned in the 1st vol. of this work, p. 172—175, were repealed by act 1832, 2 W. 4, c. 3, which consolidates their provisions with some amendments. Sec. 1, repeals the act of 1799, 39 G. 3, c. 13, and all subsequent acts connected with it.

Sec. 3.—Licenses to be granted to sell wine, beer, ale, cider or perry, rum, brandy, or other distilled spirituous liquors.

Tavern license, " for sale of liquors, and for the using " or consuming the same in the house of the party li- " censed."

Shop licence, " for the sale of liquors, in quantities not " less than one quart, delivered at one and the same time, " and not to be drunk in the house or shop of the party " licenced."

General licence, " to be granted to the holder of a tavern " licence, giving permission to vend goods, wares, or mer- " chandize whatsoever in his house, or to the holder of a " shop license, giving permission to sell liquors to be con- " sumed in his house or shop." This general licence is only to be granted to persons residing in the town or peninsula of Halifax, by second clause of act 1832. 2 W. 4, c. 17.)

Sec. 4. The sessions are to grant licenses " at the first " general quarter sessions of the year."

Sec. 6. The grand jury for the county of Halifax, at the first quarter sessions annually, are to recommend proper persons for tavern licenses within the town and peninsula of Halifax, and none are to obtain tavern or general licenses there, unless so recommended. Sec. 7. But on application made after that period, a licence of any kind may be granted either by a general or special sessions of the Peace, provided the application for a *tavern* licence be recommended " by the grand jury at some o " their sittings, or be signed by 12 of the grand jurors."

Sec. 8, directs, that on an application in any other county or district for a licence after the first general quarter sessions, it may be granted by any general session, or by any three justices in special session, provided that the application for a tavern license (when made to a special session) be recommended by three justices of the county or district not of that special session, and provided that the issuing of any such tavern licence be first recommended by the grand jury.

Sec. 9. directs the licences (of which forms are annexed to the act) to be signed by the clerk of licenses of the county or district, "the clerk of the peace first certifying "thereon, that security has been given therefor, as here- "inafter prescribed." Such licence is to continue in force from its date until the end of the first quarter sessions of the ensuing year.

Sec. 10. One-twelfth part of the license duty to be deducted when the licence is granted after the first sessions, for every full calendar month elapsed between the last day of the sessions and the date of the licence.

Sec. 11. The person taking out a tavern or shop licence, shall give bond to his majesty, his heirs and successors, with one or more sureties to be approved by the justices, in the penalty of £50, conditioned for obedience to this and other acts respecting licensed persons, and for paying to the clerk of licenses the duty within ten days after each payment is due. A form of this bond is annexed to the act, and when executed it is to be filed in the office of the clerk of the peace.

Sec. 12. The clerk of the peace, and the clerk of licences of every county and district, shall each keep a book and register in it the licenses granted every year, "names, "additions, and residences of the parties licenced,"— "the house or shop for which such license is granted,"— the dates, a statement of the bond given, amount of duty, time when payable, and when paid or received. These books are to be produced and exhibited to the sessions, and to the grand jury, when either require it.

Sec. 13. Fixes a fee of 5s. each, to the clerk of the peace, and the clerk of licences, on the issuing every licence in full for their services.

Sec. 14. Licence duty to be paid to the clerk of the licences, one half in advance on receiving the licence, the residue in advance in 6 months from date of licence. The

reduction of duty for broken time to be deducted from second payment, if the licence be obtained within 6 months after the first quarter sessions, but if after that date, it is to be deducted on issuing the licence.

Sec. 15. Imposes on those who sell liquor without licence a forfeiture for every offence of a sum not to exceed £20, nor to be less than £5. Two justices, on their view, on confession, or oath of one credible witness may impose this fine. If it be not immediately paid (on conviction) to the clerk of licences, with the costs, the two justices are to issue a warrant under their hands and seals to levy it by distress and sale of the offender's goods and chattles. If no sufficient distress can be found, they are then by a similar warrant to commit the party to the jail of the county, there to remain in close confinement, or to be put to hard labor for 3 months, or until the amount be paid,—or be bound out for a period not exceeding three months, "to "serve and labor for any person who will pay the fine "and costs." Prosecutions must be brought within three months. Sale of liquor, mixed or unmixed—sale by children, servants, wife, substitutes, &c.—exposing to sale, bartering, &c. are all expressly included in this clause.

Sec. 16. Requires a sign or inscription to be hung out by every person holding a license, stating that spirituous liquors are there to be sold—£5 penalty for every neglect.

Sec. 17. Imposes on any person, who having no licence shall hang out such a sign, the same penalties as in sec. 15, for selling without licence.

Sec. 18. Places those who having a licence, sell in any place not designated in it under the same penalties of sec. 15.

Sec. 19. Empowers the quarter sessions at their discretion to grant licenses *gratis*, to persons on remote and unfrequented roads, who entertain travellers.

Sec. 20. Authorizes the justices at Halifax, in any of their sessions in their discretion, to grant licences to persons keeping an inn and country market, at the reduced duty of £3 per annum.

Sec. 21. The justices in the first quarter sessions, annually, are to name a day during that session, on which the clerk of licence is to attend them, and he is then to receive the half yearly advances of duty, and to take a list of the names and places of abode of licenced persons. If any neglect to take it out, or any having it die, the

justices in any session may grant the vacant licence to some one in the neighborhood on the same terms.

Sec. 22. No tavern licence is to issue (except in the town of Halifax) to any but those who keep houses of public entertainment for travellers. They are to have a sign over or near their door, setting forth that entertainment may be had there for man and horse, to keep two good spare beds, provision, liquors, hay and provender,—failing in this, the justices in session on complaint of one or more witnesses on oath, to take away the licence as forfeit.

Sec. 23. Requires the holder of any licence to maintain good order, and not to suffer riot, disturbance, or breach of the peace in his shop or tavern, raffles or gaming—failure to forfeit licence.

Sec. 24. Person having shop licence, opening a shop or warehouse, or selling any thing except bread and milk, on the Lord's-day, £5 penalty for every offence, and forfeiture of licence. (For former laws on this subject, see Epit. v. 1. p. 187—191.)

Sec. 25. Keeper of licensed house or shop, who suffers disorderly persons, servants, apprentices, or minors, to resort there to waste time or to drink—or who suffers any inhabitant of any town where he resides to resort on Sunday to his place either to waste time or drink liquor—(boarders, lodgers, and travellers excepted) may be committed by one justice on view, or information of one credible witness, or else give security with one or more bondsmen to answer at the next quarter sessions, and for good behavior in the meanwhile. The justice may bind over the witnesses to prosecute. The grand jury may present and indict any such offender, at the quarter sessions on their own knowledge, or on information of witnesses. On conviction the license is to be forfeited and the penalty of the bond (£50) is to be forfeited also. Every holder of a licence must post up a copy of the 23, 24, & 25th clauses of this act in a conspicuous place in his tavern or shop, and in every room therein of common resort.

Sec. 26. Forbids the sale of any goods or articles, except food or drink, in or about a tavern (except under general license which is limited to Halifax Peninsula.) under £20 penalty for each offence.

Sec. 27. Holders of shop license selling less than a quart, or suffering any to be drunk in the shop, to be sub-

ject to penalties of sec. 15, as if selling without license. They are also bound to post up in a conspicuous part of the shop. sec. 26 & 27 of this act, failing to forfeit licence.

Sec. 28. Declares sale of liquor after expiration of license, liable to the penalties of selling without license.

Sec. 29. Merchants (in town and peninsula of Halifax) may sell liquors in the cask, case or package as imported, (or liquors manufactured or distilled in the town or peninsula, in quantities not less than 10 gallons, delivered at one time,) without licence.

Sec. 29. Merchants in the country may sell liquors in quantities not less than 10 gallons, or in the case, package or cask as imported.

Sec. 31. Witness neglecting or refusing to give evidence, or to attend when summoned, in any prosecution under this act, to be fined £10, to be levied by warrant of distress and sale, or for want of distress, imprisonment for 3 months or till fine is paid. No one is bound however, to give such evidence before his expenses are paid or secured.

Sec. 32. Penalties (after charges deducted) to be paid half to informer, half to clerk of licenses.

Sec. 33. Clerks of licenses are to visit licensed places "at such times as they shall see fit," to see that the act is obeyed. They are required to prosecute all offenders "and shall be sworn faithfully to carry this act into exe-"cution to the best of his or their power and ability, and "to discharge honestly and justly all the several duties "herein and hereby imposed on him or them."

Sec. 34. Any person who shall "interrupt or assault" the clerk of licenses in his visiting such places, is made liable to be indicted, and on conviction to fine or imprisonment.

Sec. 35. The Governor is to appoint (during pleasure) the clerk of licenses for Halifax. In the other counties and districts, when the office is vacant, the grand jury to return three candidates, one of whom the general sessions are to appoint as clerk of licenses. (See Epitome 1 vol. p. 136.)

Sec. 36. When any half yearly payment of duty on any licence is 10 days in arrear, the clerk of licence is to sue the party or his sureties, on the bond, before any one justice of peace, or in any court of record, for the amount of licence duty. Justice to give judgment and grant execution, for the amount due and costs, against the debtor and his sureties.

Sec. 37. On complaint on oath made against any licensed person of infringing this law, any two justices of the county or district may suspend the licence, and direct the clerk of licenses to notify the party of the suspension. If he sell liquor after this notice he incurs the penalties of selling without licence. The party may appeal from the order to the next general sessions, where the clerk of the peace shall file an information,—the party appealing plead without delay, and the cause be tried by a jury. If the party be acquitted, the suspension is removed, —if convicted, the licence is to be wholly taken away, and the licence bond put in suit against him and his sureties.

Sec. 38. The clerk of licences at Halifax, on receiving any money in his official capacity, is to deduct 5 per cent for commission, and pay over immediately four fifths of the residue to the commissioners of streets for the town and peninsula of Halifax, to be appropriated as other funds receivable by them,—and the remaining fifth to the county treasurer towards the support of the Police and bridewell at Halifax.

Sec. 39. The clerks of licence elsewhere are to render a just account half yearly, and pay over to the county or district treasurer the amount received by them, deducting 7 1-2 per cent. commission.

Sec. 40. In all counties and districts except Halifax, the justices in session are to appropriate and apply the amount raised, to the service of roads, bridges and ferries. In towns where commissioners of streets are appointed, the county treasurer is to pay over to them quarterly 3-5 of the monies arising from the duties on licences granted for taverns and shops, within the commissioners' limits, to be expended by them under their commission.

Sec. 41. The sessions, general or special, are to require security from clerks of licence and county treasurers, by bonds to his majesty, his heirs and successors, the sureties to be approved and amount of penalty fixed by the sessions, "for the due and faithful performance of the "duties" of their offices. Refusal to give such security renders the office vacant, and another person is then to be at once appointed to fill it.

Act 1832, 2 W. 4, c. 15.

Sec. 1 *Licence duty at Halifax, town or peninsula.*

Tavern licence,	-	-	£10 0 0
Shop licence,	-	-	10 0 0

General licence, - - 0 10 0
Sec 2. Auctioneer's licence, annually, 20 0 0

Sec. 3. The auction licence is to be "granted to the "applicant by the order of any justice of the peace, deli- "vered to the clerk of the peace at Halifax, and shall be "made out and issued by the clerk of the licences," on payment of £20 duty. Fees on it of 5s. each, to clerk of peace, and clerk of licences.

Sec. 4. *Auction duty* to be paid over forthwith by clerk of licenses to commissioners of streets for Halifax, who may apply it to the new road and bridge at Freshwater, but not beyond £100 of it to go to that purpose.

Sec. 5. Selling at auction without licence in town or peninsula of Halifax, subjects the party to £50 fine, for every offence, recoverable by clerk of licence in any court of record, with costs, and to be applied as penalties under the act of licence for liquor. Sales by public officers under process of law, decree or direction of a court, and sales by justices or commissioners of public property in Halifax exempted from this law.

Sec. 6. Act to continue till 31st March, 1837.

Act 1832, 2 W. 4, c. 16, *Shiplicences.*

Sec. 1. Duty on each ship licence, £10, payable at or before its issuing. It may be granted by any two justices of the county or district. It is to be issued by the clerk of licences, and signed by him and the clerk of the peace, and to be in such form as the justices in session prescribe. It is to contain the name of the vessel, and to continue in force 3 months, if the vessel stay that time.

Sec. 2. If any sale of goods by retail take place on board any vessel arriving in this province from abroad, "save and except from some British colony or possession "in North or South America, or the West Indies," the master or other person having charge of her shall forfeit £50. Recovery and application of penalty the same as in case of selling liquors without licence.

Sec. 3. The ship licence, in Halifax town and peninsula, is to be paid over to the commissioners of streets. In other places to "be paid as other the licence duties on "tavern or shop licences." Fees and allowances to clerks of peace and clerks of licences, the same as on other licences, and licence duties. Proviso. The act not to extend to "*brick, stone, lime, or building materials*, or to *tim-* "*ber* or *lumber* of any description, or to *salt* or *coals*, im-

"ported or brought as aforesaid, nor to any *resident inhabitant* or *householder* of this province, importing, or selling as aforesaid."

Sec. 4. Act to continue until 31st March, 1833.

Act of 1832, 2 Wm. 4, c. 17.

Sec. 1. Fixes the duty on tavern and shop licences, out of the town and peninsula of Halifax, viz.—Tavern licence, £3, Shop licence, £5.

Sec. 2. Forbids any general licence to be granted, "except only to persons residing in the town or peninsula of Halifax. Sec. 3. Act to be in force until March, 1833.

MISCELLANEOUS.

Addenda. Vol. 1. p. 153. *Common fields.—Boundaries.*

Act of 1765, 5 G. 3. c. 1, s. 4, 1 P.L. 107 108, that "every "proprietor of lands *laying unfenced*, or in any common field, "shall once in two years, on 6 days notice given him, his "agent or attorney, by the next proprietor, or proprietors "adjoining, *run the lines, make* and *keep up* the *boundaries* "of such lands or common field, by *stones or other sufficient marks*, and every party so neglecting and refusing, "shall forfeit the sum of 20s," half the fine to belong to the informer, half to the *poor* of the township, recoverable before any justice of peace of the county. "And the "*proprietors of any field held in common, whether divided or undivided* shall and they are hereby *impowered* to *order, improve* and *fence*, in such way or manner *as* shall be concluded and *agreed upon by the major part* of the interested "therein; the voices to be collected and accounted according to their respective interests;" If any one does not perform his *quota* of fencing, (after notice by a proprietor,) for thirty days, the fence viewer on application shall do the fencing or repair so neglected, and the delinquent pay double the expense thus incurred. "In "case of refusal such fence viewer may recover the same "before" the com. pleas, or 1 or 2 justices, according to the amount. The fenceviewer is to judge of the necessity of repairs ordered, and he is allowed 3s. a day for his trouble. Sec. 5, directs the proprietors to make their regulations annually, 10s fine is imposed on every refusal or neglect to comply with them, to the use of the *poor* of the place, recover-

able on oath of one credible witness, before any justice of peace of the county, to be levied by distress and sale of offender's goods. Offender also is made liable to pay for any damages consequent on such neglect or refusal.

The regulations of the above 4th clause are stated to have been found inconvenient, and in some instances impracticable. Act of 1820, Preamble c. 27. How far is this a repeal?

Addenda. *Guagers*, 1 v. Epitome, p. 110, 137.

Act of 1701, 1 P. L. 72, authorizes the governor to appoint two guagers for the port of Halifax, who are to be "sworn to "the faithful discharge of their duty"—they are authorized "to guage all rum, or other distilled spirituous liquors, "which shall be imported into or distilled within the "same,"—they are to use no instrument whatever, except "Gunter's callipers" (unless by consent of parties, when they may use a rod, by act of 1792, 32 G. 3, c. 3, s. 3, 1 P. L. 291.) £25 per annum (each) is allowed them by this act. 2. Guagers at outports to have 6d per mile travel besides the fees. 3. Guager neglecting to attend on due notice to forfeit £5, with costs for each offence, on conviction by oath of one credible witness, before any two justices of the peace, by warrant of distress signed and sealed by the justices—half to informer, half to the poor of the town. 4. No fees to be paid guagers for liquors distilled in the Province, when guaged at the distillery.

Act of 1792, 32 G. 3, c. 3, 1 P. L. 291. Sec. 1. Casks of rum, wine and molasses imported, to be guaged at the wharf before removal, and marked by the guager with a brand (on the stave next the bung-stave, or on the head,) of no. of gallons contained, and guagers's initials.—Guager's fees to be (if ten or under guaged, double fees by the act of 1761)—puncheon 3d, hhd. or tierce 2d. bbl. 1d.—Sec. 2. Guager not proceeding conformably to the acts to forfeit 40s. for each offence, recoverable before any Justice of the peace,—half to informer, half to the poor of the township. Sec. 3. Unguaged casks removed or exposed to sale, are to be seized by Excise officers as forfeited—half to informer, half to H. M. Government. A rod may be used in the outports, till persons can be obtained to measure with callipers.

Addenda. *Epitome, vol.* 1, *p. p.* 163. *Grain.*

Act of 1792, 32 G. 3, c. 4, s. 2, "all grain exposed to

" sale shall not be deemed merchantable unless it be of " the following standard weight, to say—

" Wheat shall weigh per bushel			58lb.	Avoirdupoise
" Rye	do	do	56	
" Indian Corn		do	58	
" Barley		do	48	
" Oats	do	do	34	
" Pease	do	do	60	1 P. L. 292.

Addenda. Epitome, v. 1, *p.* 156. *Pounds.*

Act of 1800, 40 G. 3, c. 7, 1 P. L. 424, one commissioner to be appointed for every pound to be erected. Commissioner to receive tenders and lay them before the ensuing sessions, who must approve before it is undertaken, and also the sessions fix the scite. The commissioner to continue in office till the pound is built, reported, and approved by the sessions as built according to contract. Sec. 2. If the grand jury neglect to present the sums necessary " to be raised and paid by the inhabitants of " the respective townships for the building or repairing of " such pounds," the sessions to ameree any township where such outlay is required a sum sufficient to meet the purpose,—to be assessed on them by the sworn assessors of county rates, and collected by the co''ectors of town or county charges in the township limits.

Addenda. Epitome, v. 1, *p.* 109. *Public Accounts—Fines.*

Act of 1776, 16 G 3, c. 3, s. 1, 1 P. L. 202, enacts " that all accounts of the receipt of any monies"—granted and raised by the general assembly, " and the accounts of the issuing and disposal" of all monies that come into the treasury, " by any ways or means whatsoever " shall be laid before the General Assembly at the " several sessions held from time to time, for their examina- " tion, approbation and allowance, in such manner as to the " General Assembly shall be judged proper." Such approbation and allowance shall be to collectors, receivers, treasurers, and other persons concerned " a full and final " discharge, and be a bar against any action," &c. 2d clause provides that all monies arising from provincial acts of revenue are notwithstanding to be accounted for to his majesty in Great Britain, and to the commissioners of H. M. Treasury or High Treasurer for the time be-

ing, and audited by the auditor general of H. M. Plantations, or his deputy.

Act of 1783, 23 G. 3, c. 1, s. 8, 9, 1 P. L. 230, 231.—S. 8. enacts that "all clerks of the crown and clerks of the peace"—"shall once in every six months certify "under the seal of their respective courts, into the office of "the clerk of the supreme court at Halifax an account"—of all fines, penalties and forfeitures adjudged to the King in their respective courts, and names of persons fined. Penalty on every neglect in making returns £5, recoverable by any person by information in the Supreme Court at Halifax. Every Sheriff who shall not, in two months after his year of office expires, "render an account on oath" to the clerk of the supreme court at Halifax, "of all such fines, forfeitures, penalties or other debts or dues of the crown as shall be levied by him, together with the names of the persons on whom the same shall be levied," for every neglect shall forfeit £20, recoverable "on the information of any person whatsoever, before H. M. Supreme Court at Halifax," half to the informer, half to the crown. Sec. 9 requires "that at the end of every Easter term, the clerk of H. M. Supreme Court in Halifax shall state a general account of all the fines, forfeitures, and penalties, adjudged to the crown, in the several courts within this Province," particularizing the counties, the names of persons fined, sums levied on account, sums then due, and defaulters names. This he is to certify under the seal of his court into the treasury of the Province. If he omits to do it for fourteen days after Easter term he forfeits £20 for each neglect, recoverable before the Supreme Court in Halifax, on the information of any person whatsoever," half to the king, half to the informer.

Coal Mines.

The act of 1818, 58 G. 3, c. 22, 3 P. L. 29—32, recites in the preamble that in grants of land in this province, his majesty had reserved to himself all coals and other mines and minerals, and that he had been pleased to allow his coal mines in Nova-Scotia to be opened and worked under certain regulations. Section 1. enacts that whenever His Majesty's government deem it expedient that any mine of coal should be opened and worked "within any lands of any person or persons," on the application in writing of any party licensed and authorized by govern-

ment so to do—the general or special sessions of the county or district where the lands lie, are "to cause the "clerk of the sessions to make out a list of the names of all "the freeholders within at least two of the townships of the "said county or district next adjacent to" the township in which the lands are. The names to be written on separate slips and put into a box, from which the clerk in presence of the sessions is to draw 24, who have no interest in or claim to the lands, and who are not of kin to the owner or to the persons licensed. A precept is then to be issued by the clerk with a list of the 24 names, to the sheriff or deputy to summon them "to appear at some con-"venient place upon or near to the said lands, upon a cer-"tain day in the said precept mentioned, which shall be at "least 14 days after the issuing thereof." It is to be made returnable at the next general sessions. Notice in writing of these proceedings is to be made out and signed by the clerk, and with all reasonable dispatch, "posted up in one of the most public places in each and every township within the said county or district;" and if the owner does not reside in the county or district, a notice to the same effect is to be inserted in one of the provincial newspapers.

Sec. 2. On the day appointed the sheriff or deputy is to call over the 24 names, and to swear the 12 first who answer, as a jury "to the faithful discharge of the duties "required of them by this act,"—the jury are then to lay out and set off" so much of the land "as in their opinion will be sufficient to sink a proper shaft or pit," for lodging or depositing what may be raised,—or what may be necessary to bring there,—to "lay out and mark" what may be requisite in their judgment for a drain,—for a road to the mine from the nearest sea water, navigable river or highway,—and also to assess damages in favor of the owners and occupiers according to their respective interest, for loss of the land, fencing, &c. and to fix an annual rent for the lands so laid off. Sec. 3 requires a list of the jurors sworn to be made out and annexed to the precept, and the verdict of the jury, fixing the amount of damages and rent,—who to pay and receive, and at what time or times, to be written at the foot of the list and signed by all the jury. This is to be returned by the sheriff to the sessions—who are to confirm it on request of either party, and it is then to be filed in the court as a record. As soon as the parties licensed pay the damages and give

bond with sureties to the owner, to the approval of the sessions, for payment of the yearly rent while they continue to work the mine, the sessions are to make an order authorizing them to take possession. Sec. 4 restricts the parties licensed from using land so set off for any other purposes, but those necessary for the advantageous working and managing of the mines, and requires them to do so in the manner least injurious to the owners and occupiers of the same or adjoining lands. Sec. 5. authorizes the parties licensed to repair or construct roads, railways, &c. to erect houses and buildings for the use of the workmen, and for storing articles requisite, &c. Sec. 6 authorizes the parties holding the mines to remove, during their occupancy, any buildings, &c. although attached to the freehold. It also empowers the landowner to take possession of the lands so set off for the uses of the mine, if it has been for six months unworked, unless in case of temporary interruption in working it, from any unforeseen accident. Reasonable notice, however, must be given, and time allowed to parties working the mines, to remove their effects and materials. Sec. 7. In case it is required, either to recommence working a mine after the owner has resumed possession of the lands set off, or to alter or add to the land set off for the use of any mine, in both cases the same course of proceeding is to be adopted as the act has pointed out in the first instance. Sec. 8. In case of a change of the persons authorized to work a mine, or of a failure of the sureties in any bond given under this act, on application of either party, the sessions may order new bonds to be given. If their order be not complied with, they may order the possession of the lands set off to be restored to the owners, who, after such order may sue for possession and for arrears,—"it being the intent and "meaning of this act, that the owner of the soil, while kept "out of possession, shall be regularly paid the compensa-"tion allowed him by this act." Sec. 9. directs all expenses of carrying the act into effect, shall be borne by the parties authorized to work the mines. Sec. 10. declares that this act is not to change, alter or diminish any right the crown may have under the reservation in its grants.

Illegal taking of coals.

The act of 1823, 4 G. 4, c. 25, 3 P. L. 168, 169, recites that persons had without leave taken coals from

mines reserved to H. M. use in this Province. Sec. 1 enacts that any person convicted "of opening or digging in "any mine, vein or seam, of coal within this province, or "raising or taking from the same any quantity of coals"—without written leave from the governor, shall forfeit to the crown a penalty not to exceed £25, to be recovered in any court of record in the province, on bill, plaint or information. By sec. 2, if any quantity, not less than two chaldrons of coals (produce of the province) be found in any boat or vessel in the waters of the Province within one league of the shore, any officer of excise or customs "authorized for that purpose," may seize it as forfeited to the crown, unless a certificate be produced in such form as the governor shall establish. The officer may land the coal (by sec. 3) and prosecute it to condemnation in any court of record in the province—half the net proceeds go to the crown, and half to the officer who seizes and prosecutes.

Surveys of lands.

The provincial act of 1793, 33 G. 3, c. 8, 1 P. L. 318, 319, authorizes the deputies of the surveyor general, to swear chain bearers, 'that they will well and truly perform that service, according to the best of their skill and judgment, and according to the directions they shall receive from the said deputy surveyor or surveyors." When there is no justice of the peace within two miles of the place, where any survey is to be made.

Wells and pumps.

The provincial act of 1796, 36 G. 3, c. 9, 1 P. L. 379, 380, directs the inhabitants of the several towns in the province "at their town meetings to vote such sum or "sums of money, as they shall think necessary for sinking "wells, and for repairing and keeping in repair such "pumps as are now erected, and furnishing with pumps, "and keeping in repair, such wells as are now made, "or hereafter may be made in the streets and lanes "of the said towns,"—the money to be assessed and collected in the same manner and at the same time as the poor rates, and by the same assessors and collectors, under the same penalties and forfeitures. These monies are to be paid into the hands of the firewards of the respective towns, who are to apply them; and at the expira-

tion of their year of office, to render to the sessions next held an account of their expenditure, and if they hold a balance, to pay it over to their successors in office within ten days after the new firewards are appointed. If any person thinks himself overrated, he may appeal to the next sessions, whose decision in such appeal is to be final. Sec. 2. If any town fail to vote the amount necessary, the sessions, on complaint of any three inhabitants of the town, are to amerce it in the sum they judge right; which amercement is to be assessed, collected and paid, as if voted by the town for the purpose. Sec. 3. Any one "wilfully injuring or destroying any pump or well, made "and erected in any of the public streets or lanes of the "said towns," on conviction before any two justices of the peace, is to forfeit from 40s. to £5: half to prosecutor, half to firewards of the town, for repair of pumps and wells. If offender cannot pay, he is to be committed from 5 to 10 days, to hard labor in the house of correction.

Promissory notes.

The rule of common law that *choses in action* were not assignable, having been held to apply to promissory notes, the consequence was that no action at law could be maintained by the indorsee against the drawer, nor by the bearer of a note payable to bearer. To remedy this the English statute of 3 & 4 Ann, c. 9, was passed. This statute has been reenacted by the provincial act of 1768, 8 G. 3, c. 2, 1 P. L. 134, 135. It gives an action to the holder of such instruments, with costs, and if there be a non-suit or verdict for defendant, the act gives him costs. The 2nd section directs such actions to be governed by the same rule which the statute of limitations applies to actions on the case.

Transportation of gunpowder.

The act of 1826, 56 G. 3, c. 26, 2 P. L. 214.

Sec. 1. Declares it unlawful to convey by land, any quantity of gunpowder, exceeding 1000lb. weight.

Sec. 2. Forbids more than 50lb. to be conveyed in any one cart or carriage, unless it be completely covered with hair cloth or woollen, besides the cask and covering of the carriage.

Sec. 3. Declares it unlawful to stop any cart with gunpowder within 20 rods of any inn or dwelling house.

Sec. 4. Where more than 50lbs. gunpowder is in any cart or carriage, no metallic substance is to be carried along with it, and the powder must be conveyed in barrels, half or qr. barrels, tight and well hooped with wood or copper hoops.

Sec. 5. No quantity above 25 lbs. to be conveyed unless the cask or package be hooped and wrapped in woollen or haircloth.

Sec. 6. Forfeiture for every breach of this act, 40s. to £20, recoverable by bill, plaint or information in any court of record, half to informer, half to government.

Sec. 7. Act not to prevent the carriage of gunpowder for H. M. service in the usual manner.

The other provincial laws respecting gunpowder are local. See next volume.

Locking wheels of waggons, &c.

The act of 1823, 4 G. 4, c. 30, s 2. 3 P. L. 170, requires that whenever the wheel of a waggon or cart is chained or locked to prevent it's turning, in any public road, the driver should use "an iron shoe, not less than 5 inches in width, "and 16 inches in length, or a wooden shoe of the same "length and 8 inches wide, connected with a chain to 'some part of such waggon or cart, in such way that such "wheel or wheels, so chained or locked, shall be born up, "and drawn upon said shoe."

Sec. 3. Imposes 10s. fine on violation of the act, recoverable before one justice of peace, on oath of one credible witness. If not paid, to be levied by warrant of distress. If not so levied or paid, 24 hours imprisonment of offender in the county jail. Fine to go to repair roads in the same county.

HOUSES OF CORRECTION, OR WORKHOUSES.

The act of 1792. 32 G. 3, c. 5, 1 P. L. 293—295.

Sec. 1. Empowers the justices and grand jury in general sessions, in the several counties or districts, "when "they shall think necessary, to provide proper buildings, "or to appropriate a certain part of the county or district

"jail as a workhouse, or house of correction." Sec. 2, authorizes the sessions, or any one justice out of court, to commit to this house any person or persons coming within the following catalogue, viz. "disorderly and idle persons" —beggars, practisers of unlawful games, fortune tellers, common drunkards, persons of lewd behavior, vagabonds, runaways, stubborn servants and children, and persons who notoriously misspend their time, to the neglect and prejudice of their own, or their family's support. (See 1 Epitome, 195—198, 4 Epitome 209). The term of their commitment is to be till the next general sessions, or until otherwise discharged by law. The justice committing is to examine them as to their places of settlement, if any, and note them in the warrant of commitment. Sec 5 & 9.

The sessions are, by sec. 3, to employ proper keepers and masters. The keepers are authorized to make the prisoners work, if able, while in the house. Sec. 4, directs keepers to have regular accounts of all expences and earnings, and render them on oath to the sessions. If sufficient, the earnings of offenders to support them. If there be a deficiency, and the offender has a legal settlement in any township of the county, the deficiency to be paid for by the overseers of the poor of such township, on the certificate of clerk of peace, by order of sessions, that such expence has been fairly incurred. In other cases the county is to provide for deficiencies—sec. 5.

By sec. 6. The sessions may make bye laws for the house of correction, not to be repugnant to common law or statutes of the Province. At each sessions the justices are to choose three of their number, one of whom in rotation shall visit the house monthly, and report on its state. Sessions may remove keeper, and appoint another in case of any misconduct,, disobedience or negligence.

Sec. 7. A keeper guilty of cruelty, or of fraudulently depriving offenders of any part of their allowance of provision, on conviction before the sessions, is subject to a fine not to exceed £20—and is also to be imprisoned for a term not exceeding six months.

Sec. 8. Gives an appeal from any justice or justices acting under this law, to the next sessions. Reasonable notice of the appeal to be given, and order of sessions thereon to be final.

Sec. 9. The keeper at each sessions is to report to justices a list of all persons confined—for what offences, and by whom committed, respectively. The sessions are also

directed to make particular enquiry into the behavior of the persons committed as vagrants, &c. and to cause such as merit it to be liberated. Besides which a power is given to the visiting justices, or to any other two justices of the county, if they see reason, to discharge any such person.

If a keeper or other person refuse to give up possession of workhouse, in ten days after order of sessions to that effect, on proof of such refusal, any two justices may issue a warrant under their hands and seals to the sheriff, to remove the parties as on a writ of *habere fac. pos.*—to take care of the furniture, implements and materials belonging to the house, and prevent their removal.

Sec. 11. A person sued for any thing done in execution of this act, may plead the *general issue*, and give the special matter in evidence, and on verdict for defendant, nonsuit or discontinuance.—the defendant is to have *treble costs*. All charges of establishing and supporting such workhouse, incidental charges, and support o offenders beyond their earnings, &c. are, by sec. 1 & 12, to be raised by the grand jury by presentment, and levied and assessed like other county rates. (As to Halifax, see local laws Halifax; Bridewell, &c.)

Horsemen and carriages.

The act of 1823, 4 G. 4, c. 23, 3 P. L. 166, 167 (temporary law continued for 5 years by 1 W. 4, 1830, c. 15).

Sec. 1, forbids any person riding at full speed or gallop in the streets of any town. Sec. 2, forbids any vehicle used for carriage of goods, within the streets of any town, to be driven swifter than a slow or easy trot, and the driver of such vehicle is to lead horses with halters, or guide them with proper reins. Sec. 3, requires every kind of vehicle to be driven in a moderate and careful manner, in the streets of any town. Sec. 4, requires two good open bells, or four round sleigh bells to the harness of every sleigh or sled, wherever used. Sec. 5, requires sleds used on the highways for carriage of loads, to be not less than 4 feet wide from outside to outside of the runners. Sec. 6, forbids driving with a load of hay or straw wider than 12 feet, and also forbids return sleds from leaving pointed stakes standing, or carrying frames or projecting pieces outside. Sec. 7. The driver of every vehicle is to leave the centre of the street or road on his right hand. Sec. 8. A driver who attempts to pass another vehicle which

has its head in the same direction, is to pass on the right side of the other vehicle, so as to leave a sufficient way open on his left hand for the vehicle he is about to pass. Sec. 9, forbids any vehicle stopping being placed nearer the centre of any street or road than 18 inches. Sec. 10. Persons offending against this act, on conviction, on oath of one credible witness, before any one justice of peace, to forfeit for each offence 10s. to be levied by warrant of distress on goods and chattles of offender; for want thereof offender to be committed by justice to county jail for a period not exceeding 48 hours. Sec. 11. All prosecutions under this act must be commenced within 48 hours after the offence is committed. Sec. 12 The proceeds of such fines to be paid to county treasurer, and be applied to repair of highways in the county. Driving or riding over the side paths or walks in any town, is subjected by act of 1826, 7 G. 4, c. 3, s. 23, 3 P. L. 243, to a fine of from 5s. to 40s. recoverable by s. 5, same act, by commissioners of streets as a debt before a justice.—See further " local laws."

Passengers.

The prov. act of 1832, 2 W. 4, c. 16, requires the master of every vessel arriving from Great Britain or Ireland, to report a list of passengers at the custom house, stating their names, trade, &c. and no such vessel is to be admited to entry, until 10s. per head is paid for each passenger landed from her ; but if certified by chief officer of the customs at the port she comes from, that passengers were all embarked with the sanction of government, 5s. only per head to be paid. The vessel cannot be cleared out without this head money be paid. Money received under this act is to be paid into the prov. treasury and to be at the disposal of the Governor for the benefit of poor emigrants, and to be accounted for to the Assembly. Master not reporting truly, forfeits £100 to be sued for in any court of record in the province, at H. M. suit or that of any Officer of customs, by bill plaint or information. Half to prosecutor, half to prov. treasury, to be applied as head money is. Master landing passengers before entry, or against the act, to forfeit £10 per head, recoverable by bill, plaint or information in any court of record in the Province. Ships of war, packets, transports, storeships and other government vessels are exempted. The act is temporary, being passed for 3 years.

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