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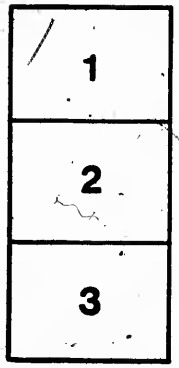

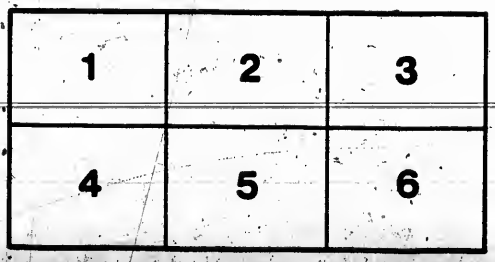

W. C. Kipsman [illegible], from the Author 1847

RULES

OF

ALL THE COURTS,

AND A COLLECTION OF

STATUTES RELATING TO PRACTICE,

WITH

NOTES,

AND AN

APPENDIX OF FEES,

BY

JOHN C. ALLEN, Esquire,

BARRISTER AT LAW.

FREDERICTON:
PRINTED BY JAMES P. A. PHILLIPS.
1847.

PREFACE.

The object of the following pages is to embrace the Rules of all the Courts, and the Acts of Assembly relating to Practice in the Supreme Court and Common Pleas, in one compact and portable volume. The cases decided in the Province up to the present time, upon questions of practice, are stated in the Notes; and reference is also made to some of the recent English decisions, which are not found in the Books of Practice: a more extensive reference to the latter, would have increased the expence of the work beyond what I considered myself warranted in doing.

Having had the privilege of access to the valuable Manuscript Cases of His Honor the Chief Justice, I am enabled to refer to many important cases decided in the Supreme Court of this Province between the years 1825 and 1833, and which are not elsewhere reported.

I cannot flatter myself that the remarks I have occasionally made, upon what appeared to me, to be conflicting rules of practice, are, in every instance, correct; but, I trust, with all its faults, that the work will be found useful, especially to the junior members of the Profession.

J. C. A.

Fredericton, *March*, 1847.

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CHIEF JUSTICES

AND

JUDGES OF THE SUPREME COURT,

During the period comprised in this Volume.

CHIEF JUSTICES.

George Duncan Ludlow, appointed November 25th, 1784; died November 13th, 1808.
Jonathan Bliss, app. June 28th, 1809; died October 1st, 1822.
John Saunders, app. October 19th, 1822; died May 24th, 1834.
Ward Chipman, app. September 29th, 1834.

JUDGES.

James Putnam, appointed November 25th, 1784; died, 1789.
Isaac Allen, appointed November 25th, 1784; died October 12th, 1806.
Joshua Upham, appointed November 25th, 1784; died 1808.
John Saunders, appointed October 20th, 1790; Chief Justice, 1822.
Edward Winslow, appointed July 2d, 1807; died July, 1815.
Ward Chipman, Sen., appointed June 28th, 1809; died February 9th, 1824.
John Murray Bliss, appointed July 9th, 1816; died August 22d, 1834.
Edward J. Jarvis, (temporary appointment from October, 1822, to April, 1823.)
William Botsford, appointed April 2d, 1823; resigned December, 1845.
Ward Chipman, appointed March 17th, 1825; Chief Justice, 1834.
James Carter, appointed July 12th, 1834.
Robert Parker, appointed October 6th, 1834.
George Frederick Street, appointed December 20th, 1845.

The Court sat for the first time, on the first Tuesday in February, 1785, being Hilary Term, 25th George III.

SECTION I.

GENERAL RULES OF THE SUPREME COURT.

EASTER TERM, 25TH GEO. III.—1785.

Records and Writs.

1st. It is ordered, that all the Processes, Records, Rolls, and Judgments of this Court, be made on parchment, according to the usage of the Court of King's Bench in England. (*a*)

2d. That the Bill issued out of the Court of King's Bench in England, commonly called the Bill of Middlesex, be the first process *ad Respondendum*, where it is to be executed by the Sheriff of the County where the Court sits; and that the first process, going into other Counties, shall be a common *Capias*, (*b*) in form of the *alias* or *Latitat*, leaving out the words "as before we have commanded you," except where it is actually the *Alias Capias*; the recital of the issuing and returning a Bill being now supposed unnecessary.

Sheriffs.

3d. That the Sheriffs indorse their returns (*c*) on all Processes delivered to them by the day of their returns respectively, (*d*) and deliver

(*a*) See Rule Hilary Term 50 Geo. 3.

(*b*) It is sufficient if the Writ or Process requires the Defendant to answer the Plaintiff in a plea of "*Debt*," instead of "*Trespass*," the usual form.—*Campbell* v. *Mossop*, Chipman's MS. 58.

(*c*) A mistake in the indorsement of a Writ by the Sheriff, as to the time he received it, may be amended on application to the Court; but parol evidence is not admissible on a trial to shew that the indorsement was a mistake.—*Johnston* v. *Winslow*, Bert. R. 53. So where an execution was returned by the Sheriff, "Satisfied," but it afterwards turned out that the goods levied upon were not the property of the Defendant, and the amount of them was recovered by the owner from the Sheriff, who was indemnified by the Plaintiff, the Court allowed the execution to be taken off the files, in order that the Sheriff might amend his return.—*Ketchum* v. *Giberson*, 1 Kerr, 519 If the Sheriff returns "*cepi corpus*," to a Writ issued against two Defendants, it applies to both, and he will be liable to an attachment for not bringing in the bodies, though one of them was never arrested.—*Rex* v. *Sheriff of Gloucester*, Bert. R. 187.

(*d*) Before the Rule of Hilary Term, 4 Vict., the mode of proceeding against a Sheriff out of office for not bringing in the body of a Defendant, was by distringas.—*Henry* v. *Murphy*, 1 Kerr, 207, Since this Rule, he may be ruled in the same manner as when in office. See Rule 2 Mich. T., 8 Vict., as to side-bar rules for the return of Writs.

them to the Attornies who issued the same. That they attend the Court every Term, (*e*) by themselves or their under-Sheriffs, and that they appoint Deputies, respectively, who shall always reside in the district in which the Court sits, and as near as convenient to the Court House; (*f*) who shall always attend the Court in the absence of the High Sheriff: and that all Writs, Rules, and Orders delivered to such Deputy, shall be of like effect as if served upon the High Sheriff.

Dockets and Fees.

4th. That every Attorney of this Court enter the return, and file the Writ or Process, in all actions which have not been agreed, and in which they intend to proceed; and shall make a docket of all such returns and rules, and on the last day of the term (*g*) shall deliver the same to the Clerk of the Court; and shall pay to the Clerk his own fees, as well as those of the Judges and Crier, in such actions. (*h*)

Special Bail.

5th. That there be allowed *twenty* days (*i*) to all Defendants to put in Special Bail; and the like number to all Plaintiffs to except against such Bail, from the time of due notice of Bail put in.

Declarations.

6th. That all Attornies file their Declarations on or before the last day of the Term next ensuing the return and filing the Writ, or be *non prossed*. (*k*)

(*e*) In *Scott* v. *Clarke*, Chipman's MS. 114, it was held that a Sheriff coming to Fredericton in Term was privileged from arrest, and that it would be intended his coming was on the business of the Courts, without enquiring into the particular cause. This part of the Rule is now never acted upon in practice.

(*f*) The Act, 9 Vict., c. 26, s. 4, requires that where the Sheriff resides out of the Shire Town of the County, he shall not only keep a Deputy Sheriff resident in the Shire Town, but also an office, as near as conveniently may be to the Court House, which office is to be kept open for the transaction of business at all reasonable times. See also 6 W. 4, c. 1, s. 10, regulating the appointment of Deputy Sheriffs.

(*g*) By Rule 2, Hilary T., 7 W. 4, the time for filing the Docket is extended to 30 days after the last return day of the Term.

(*h*) See also Rule of Hilary T., 50 Geo. 3, and Rule 2, Hilary T., 60 Geo. 3, to the same effect.

(*i*) The time for putting in Bail is extended to 30 days by Rule Mich. T. 59 Geo. 3. See also Rules of Hilary T., 2 W. 4, and Mich. T., 5 W. 4. The same time is allowed for putting in Bail in summary actions, by the Act 1 Vict., c. 13, s. 2.

(*k*) See Rule 5, Hilary T., 6 W. 4., requiring demand of declaration, &c., 10 days before signing Judgment. If two Writs for the same cause of action are simultaneously issued to different Counties, on both of which the Defendant is arrested and enters bail, and is afterwards informed that there is but one cause of action, and only one declaration is filed, he cannot sign Judgment of non-pros on the other. He should apply to the Court for relief.—*Johnston* v. *Bransfield*, Bert. R. 78. A judgment of non-pros will not be set aside for irregularity on a summary motion, where there has been unreasonable delay in making the application. *Ledden* v. *Rogers*, 2 Kerr, 326. A delay of ten months, not satisfactorily accounted for, after knowledge of the judgment, is too great.—*Lonchester* v. *Murray*, Ibid 334.

Rules to Plead.

7th. That all Defendants have twenty (*l*) days to plead from the day of the notice in writing delivered of the filing such Declaration, except where the Defendant is returned in custody; in which case the Defendant shall have twenty days to plead, from the time of serving a copy of the Declaration, and of the rule to plead, to be served on the Sheriff or Defendant. (*m*)

Interlocutory Judgment.

8th. That on filing a Declaration in any action, the Plaintiff be entitled to Judgment, if the Defendant doth not plead in twenty days after notice of Declaration being filed in the Clerk's Office, (*n*) the Rule to plead being first entered; and if the Defendant hath not entered his appearance in such action, the Plaintiff may file a common appearance, and enter an Interlocutory Judgment (*o*) for want of a Plea as of the preceding term, without any imparlance, and proceed to a Writ of Inquiry (*p*) as if the same Interlocutory Judgment had been rendered and entered the same preceding Term; and the like proceeding to entry of Judgment and executing Writ of Inquiry, where a Defendant in custody neglects to plead, pursuant to a rule served on himself, or the Sheriff as aforesaid. (*q*)

(*l*) The day of service is to be computed one of the twenty days.—*Clowes* v. *Scoullar*, 2 Kerr, 627. But see post note to Rule 10.

(*m*) See post Rules of Hilary T., 1 Vict., for the mode of proceeding against prisoners.

(*n*) It is not usual in practice to serve this notice.—*Johnston* v. *Cornwall*, 1 Kerr, 197. And see post Rule of Easter T. 26 Geo. 3.

(*o*) By Rule 1, Trinity T., 3 Vict., interlocutory judgment is not to be signed till the process and affidavit of service is filed.

(*p*) A judgment by default admits the validity of the contract stated in the Declaration: therefore where in an action of covenant a deed was declared on purporting to be executed in Birmingham, it was held that it was correctly admitted to be read in evidence by the Sheriff on the execution of a Writ of Inquiry, though it was not stamped.—*Hasluck* v. *McMaster*, Chip. MS. 4. But in an action on the common counts, the Defendant, on the execution of a Writ of Inquiry, may shew that he contracted merely as the agent of a third person.—*Falls* v. *Sargent*, Mich. T., 1846. (Not yet reported.) If the Jury give no verdict upon a Writ of Inquiry, a second Writ may be issued and damages assessed, without leave of the Court.—*Ward* v. *Dow*, Bert. R. 21. Where a Writ of Inquiry is ordered to be executed before a Judge at Nisi Prius, the Judge sits only as an assistant to the Sheriff, and the Writ should be directed to the Sheriff, and the inquisition returned by him and the Jurors, as in ordinary cases; therefore a Writ directed to the Sheriff and Judge, and an inquisition returned under the seal of the Judge was held a nullity, which could not be waived.—*Fowlie* v. *Stronach*, Bert. R. 57. If, when the writ is to be executed before a Judge, the damages are assessed by the Jury summoned to try the issues at the assizes, it is sufficient.—*Wheeler* v. *Gove*, 1 Kerr 580. By the Act 26 Geo. 3, c. 21, the Court is authorized to assess Damages in all actions on the case, where there is judgment by default: this power is extended to actions on bonds and covenants for the payment of money, by the Act 8 Geo. 4, c. 4; and to all actions of debt, covenant and case, where judgment is given on demurrer, by 7 W. 4, c. 14, s. 6. The Act 5 W. 4, c. 37, s. 9, gives the same power to a Judge in vacation. See also post Rule 7, Mich. T. 6 W. 4.

(*q*) For the mode of proceeding against prisoners, see post Rules of Hilary T., 1 Vict.

Appearance.

10th. That where an Attorney appears (*r*) for the Defendant, a copy of the Declaration, with notice of the Rule to plead, shall be served on him, he paying for such copy at the rate of Six pence per sheet, and on default of pleading in twenty days, Judgment to be entered, and a Writ of Inquiry may be executed as aforesaid, a Plea being first demanded after the said twenty days. (*s*)

Service of Notices.

11th. That all notices to be served on Defendants, or the Attornies of either party, shall be deemed well served if left at the dwelling house, or last, or most usual place of his or their lodgings. (*t*)

(*r*) Notice of Special Bail, signed "Attorney for the Defendant," is a sufficient appearance, without adding express words of appearance; nor is it necessary that a warrant of Attorney, or memorandum of it, should be filed in the Clerk's office.—*Fleming* v. *Shaw*, Chip. MS. 48. In Stephen on Pl. 27, it is said that, in bailable actions, appearance may be considered as effected by giving Bail. And in non-bailable actions notice of appearance to the Plaintiff's Attorney does not seem to be necessary.—See 1 Arch. Pr. 335—1 Sell. Pr. 98.

(*s*) The Defendant has twenty days to plead, from the time the declaration is filed in the Clerk's office, and though a copy may have been served upon him before the declaration was filed, a demand of plea before twenty days from the time of filing have expired, is irregular. —*Passmore* v *Turner*, Chip. MS. 46. On the other hand, the Defendant has twenty days to plead from the time of service of a copy of the declaration; and a demand of plea cannot be made before the expiration of such twenty days, though the rule to plead entered at the time of filing the declaration may have sooner expired.—*Fawcett* v. *Nethery*, 2 *Kerr* 81. The day of serving a copy of declaration is to be computed one of the twenty days allowed for pleading; therefore where the copy was served on the 9th January, a demand of plea on the 29th was held regular.—*Clowes* v. *Scoullar*, Ibid 628. This case was decided upon the authority of *Rex* v. *Adderley*, Doug. 463, *Castle* v. *Burditt*, 3 T. R. 623 and *Glassington* v. *Rawlins*, 3 East 407, the two former of these are expressly over-ruled in *Young* v. *Higgon*, 6. M. & W. 49, and as *Glassington* v. *Rawlins* rests upon the authority of *Rex* v. *Adderley*, it follows that the doctrine there expressed cannot now be supported. The rule laid down for computing time in *Young* v. *Higgon* is, that where time *from* a particular period is allowed to a party to do an act, the first day is to be reckoned exclusively. Now it is to be remarked that there is a material difference between the language of the seventh and tenth rules Easter T. 25 Geo. 3, the former allowing twenty days to plead *from* the day of notice of filing the declaration; the latter authorising judgment to be entered on default of pleading *in* twenty days. It seems clear under the authority of *Young* v. *Higgon*, that in construing the seventh rule, the day of serving the notice should be excluded, but as different words are used in the tenth rule, it is but reasonable to conclude that it was intended to have, and is subject to a different interpretation, and that the day of serving the declaration is to be included in the computation. It is therefore submitted, that as the case of *Clowes* v. *Scoullar* came under the tenth rule, notwithstanding the cases cited in support of it have been over-ruled, the demand of plea was not too soon. As to the demand of plea where the respective Attornies reside in different counties, see post, Rule 1. Trinity T. 5 Vict. Where a Defendant has appeared and pleaded, it is usual to serve a copy of the plea on Plaintiff's Attorney, but before the rule of Hilary T. 6 Vict. this was not necessary, and an Interlocutory Judgment signed after a demand of plea duly made, where the Defendant had filed the general issue but neglected to give a copy of it to the Plaintiff's Attorney, was set aside as irregular.—*Lockwood* v. *Brown*, 2 Kerr 82.

(*t*) Where the Plaintiff's Attorney had left the Province, putting a copy of a notice under his office door, and leaving one at the house where he had last lodged, was considered a sufficient service.—*Wheelock* v. *Alden*, 2 Kerr 172. Service of a notice or rule upon an Attorney's clerk, must be made at the office or dwelling house of the Attorney.—*Moulton* v. *Dibblee*, Bert. R. 128, *Califf* v. *Robertson*, Ibid 342.

15th. That all notices be served on the Attornies for the parties, except notices of exception to Bail, which may be served on the Defendant or his Attorney, or on the person who serves the notice of Bail.

HILARY TERM, 26TH GEO. III.—1786.

Special Bail.

ORDERED, That in all Process where an Affidavit is made and filed of the cause of Action, (*u*) the Sheriffs of the different Counties, at the time of taking the Bail Bond, shall serve the sureties therein with a copy of such process, subscribed with the following notice:

"A. B.

"Take notice, that unless Special Bail is put in above by the Defendant in this cause within *twenty* (*v*) days after the return of this Process, the condition of the Bail Bond you have entered into will be forfeited;" and upon affidavit made and filed, together with a return of the Process by the Sheriff, of the service of such copies as aforesaid, the Declaration may be filed *De Bene Esse*, at the return of the Process, with notice to plead in *twenty* days; (*w*) and if Defendant puts in Special Bail, and doth not plead within time, Judgment may be signed: provided such Declaration be filed in the

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(*u*) By Act 26, Geo. 3, C. 25, no person is to be arrested on any Process issued out of the Supreme Court, unless the cause of action amounts to £10. Section two provides that an affidavit of the cause of action shall be made and filed, and the amount indorsed on the writ, otherwise the Defendant is not to be arrested. In *Sherar* v. *Baker*, at Chambers, Chip. MS. 12, an order for bail was made on an affidavit sworn before a Judge of Gaspe, in Lower Canada, with a certificate of two Justices of the Peace, verifying his hand-writing and certifying that he was a Judge of that Province, and that no Notary Public resided in that district; and also an affidavit made in this Province, that he was a Judge. But it seems that the signature of the Judge should also have been verified by an affidavit made in this Province, see *Kirk* v. *Ansley*, 1 Kerr 301, *Fraser* v. *Harding*, 2 Do. 290.

(*v*) Extended to thirty days by rule Mich. T. 59 Geo. 3. The same time is allowed in summary actions, by the Act 1 Vict. c. 13. s. 2.

(*w*) There is an inconsistency between this rule and that of Mich. T. 59 Geo. 3, which allows the Defendant thirty days to put in bail. Suppose the declaration should be filed at the return of the writ, and bail should not be put in till after the expiration of the twenty days, would the Defendant then have a right to plead? Until bail is put in, the Plaintiff cannot proceed in the action, nor can he take an assignment of the bail bond till the thirty days have expired, because before that there is no breach; but when the Defendant has appeared, or in other words when bail is entered, the tenth rule of Easter T. 25 Geo. 3 requires that a copy of the declaration shall be served upon his Attorney, to which declaration he has twenty days to plead.—*Fawcett* v. *Nethery*, 2 Kerr 81. It is submitted therefore that this rule ought to be read in connexion with the rule of Easter T. before alluded to, and taking them both together, the construction is that on putting in bail within thirty days from the return of the writ, the Defendant is entitled to receive from the Plaintiff a copy of the declaration, to which he is bound to plead within twenty days, and cannot be required to plead sooner. In summary actions the Defendant is allowed thirty days from the return of the writ, to put in bail and plead.—1 Vict. c. 13, s. 2.

Clerk's Office with notice thereon within *twenty* (*x*) days after the return of the Process.

EASTER TERM, 26TH GEO. III.—1786.

Declaration De Bene Esse.

IT IS ORDERED, That upon all Process where no Affidavit is made or filed of the cause of action, the Plaintiff may file or deliver the Declaration *De Bene Esse* at the return of such Process, with notice to plead in twenty days; and if Defendant doth not enter an appearance or file common Bail, and plead within the said twenty days, Plaintiff having first filed common Bail (*y*) for Defendant, may sign Judgment (*z*) for want of a Plea, provided that such Declaration be delivered or filed in the Clerk's Office with notice thereon, within *twenty* (*a*) days after the return of such Process, and a rule to plead be duly entered.

TRINITY TERM, 26TH GEO. III.—1786.

Assessment of Damages.

ORDERED, That in causes where Interlocutory Judgments have been signed, and the causes of action appear to be upon complicated accounts, the same shall be referred to a Jury of Inquiry, (*b*) and

(*x*) By rule 2, Hilary T., 7 W. 4., the Plaintiff is allowed thirty days after the last return day of the term to file the writ and enter the rule and return; it would seem that this is an implied extension of the time of filing the declaration.

(*y*) In *Johnson* v. *Cornwall*, 1 Kerr 197, it was held that an Interlocutory Judgment signed before common bail filed, was only an irregularity which might be waived: there the Defendant's Attorney had given notice that he had appeared and filed common bail.—*Davis* v. *Hughes*, 7 T. R. 206, and *Williams* v. *Strahan*, 1 N. R. 309, are to the same effect. But in *Roberts* v. *Spurr*, 3 Dowl. 551, it was held that a judgment signed without any appearance was a nullity, because without it, there is no person before the Court against whom a judgment could be signed, and perhaps, because the Uniformity of Process Act requires the appearance to be in a prescribed form; for generally where a proceeding is expressly directed to be taken by a statute, its omission renders the proceedings null. Thus in *Lingley* v. *Huestis*, 2 Kerr 4, a plea in a summary action pleaded after the expiration of thirty days from the return of the writ was held to be a nullity. see also *Mortimer* v. *Pigott*, 2 Dowl. 616, and the Act 26 Geo. 3, c. 25, s. 1, authorising the Plaintiff to file common bail for defendant.

(*z*) A judgment by default obtained upon a mutilated paper is bad; thus, in *McLoon* v. *Lowell*, Chip. MS. 18, the parties had referred certain differences to arbitration giving mutual notes to each other, which were intended to hold to abide the event of the award. An award for a small sum was made in favor of the Plaintiff, and indorsed on his note; the lower part of the paper containing a statement of the reference, and a part of the indorsement was torn off; the judgment was set aside as fraudulent. Applications to set aside proceedings for irregularity must be made within a reasonable time after the irregularity took place.—*O'Regan* v. *Berrymont*, 1 Kerr 167. If the irregularity occurs in vacation, and there is time during the course of that vacation to apply to a Judge at Chambers, it is the duty of the party complaining to do so, if by delaying to move till the next Term, he is likely to change the situation of the other party.—*Cox* v. *Tullock*, 2 Dowl. 47, *Holmes* v. *Russell*, 9 Dowl. 488.

(*a*) Extended to thirty days by rule 2, Mich. T., 6 Geo. 4.

(*b*) See Act 5, W. 4, c. 37, s. 9, also note (*p*) ante page 3.

Judgment shall be considered to be entered as of the precedent Term.

MICHAELMAS TERM, 31ST GEO. III.—1791.

Agents.

ORDERED BY THE COURT, That all Attornies practising in this Court, who are non-residents of Fredericton, or the City of Saint John, do appoint an Agent at one or other of the said places, and give notice to the Clerk or his Deputy of the name of such Agent, and at which of said places he resides; which notice shall be put up in the Clerk's Office; and that all notices, served on such Agents, respectively, shall be deemed as proper and legal a service as if served upon such Attorney. (*c*)

MICHAELMAS TERM, 40TH GEO. III.—1800.

Bill of Costs.

ORDERED, That every Attorney of this Court deliver a regular bill of costs to his Client, or to the Client of the adverse Attorney, (*d*) as the case may be, before he demands the expences of the suit; and all receipts by Attornies from their Clients, without this previous step, will be considered as a breach of this Rule.

HILARY TERM, 45TH GEO. III.—1805.

Blank Writs.

IT IS ORDERED, That the Clerk of this Court be in future authorized to deliver blank Writs, signed and sealed, to the several and respective Attornies of this Court, to be by them filled up as occasion may require; they accounting to the said Clerk therefor, and forthwith forwarding to him proper Præcipes for such of the said Writs as they may from time to time fill up and issue, in the same manner as is practised by the Filacers in England. (*e*)

(*c*) This rule is never acted on in practice, and may be considered obsolete.

(*d*) In all cases between opposing parties, that is, where the proceedings are not by default, there must be notice of the taxation of costs; and a judgment signed, without such notice, will be set aside.—*Mitchell* v. *Long*, Chip. MS. 66, *Turner* v. *Crane*, Ibid 463, *Connick* v. *Wilson*, 3 Kerr 110.

(*e*) See further Rules of Hilary T., 50 Geo. 3, and Mich. T., 6 Geo. 4, post.

HILARY TERM, 50TH GEO. III.—1810

Judgment Rolls, Writs and Dockets.

IT IS ORDERED, That the Rolls of all Judgments entered at the several Terms, be brought in and filed (*f*) on or before the first day of the Term next after the Term in which they shall be respectively entered.

That in all cases where blank Writs shall be filled up by the Attornies, the Præcipes and Affidavits for Bail, in cases of Bailable process, be transmitted to the Clerk's Office by the very first opportunity, after issuing the Process; (*g*) and that no Attorney do, on any account, suffer any blank Writ to go out of his hands to be filled up and issued by any other than an Attorney of this Court—and that no Rule to plead or other proceeding in the cause be had, unless the Præcipe and the Affidavit, in cases where an Affidavit is made, be duly filed.

That all Judgment Rolls be engrossed upon Parchment in a fair legible hand, with a margin of not less than an inch in breadth, and a sufficient space at the top for binding up the same, and at the bottom for numbering the Roll; and that no Roll be received or filed by the Clerk that is not made up in the manner herein directed.

That no Processes be signed or filed by the Clerk which are not engrossed upon Parchment agreeably to the former Rule (*h*) of this Court in that behalf made.

That the Rule respecting the filing of Dockets and payment of Fees be strictly enforced, and that the Clerk report to the Court any delinquency in this respect without delay.

EASTER TERM, 50TH GEO. III.—1810.

Replevin.

1st. IT IS ORDERED, That the Writ of Replevin, (*i*) under the Act of Assembly, 50 Geo. 3d, c. 21, be in the form following, viz:—

(*f*) Where a judgment roll has been lost or mislaid, the Court will not allow a new record to be made up and filed *nunc pro tunc* unless it satisfactorily appears that the former one was once actually in the Clerk's office.—*Shedden* v. *Smith*, Chip. MS. 51.

(*g*) It has been held at Chambers that this part of the rule is only directory, and that a Defendant is not entitled to be discharged out of custody on filing common bail, because the affidavit to hold to bail has not been filed in the Clerk's office before the writ is returned and filed.

(*h*) Ante Rule 1, Easter T. 25. Geo. 3.

(*i*) See post Rules of Mich. T., 4 Vict., for the form of Replevin Bonds and Posteas where there is a verdict for Defendant.

"George the Third, by the Grace of God, of the United King-
(L. S.) dom of Great Britain and Ireland, King, Defender of the Faith, &c. &c. &c.

To the Sheriff of GREETING.

"We command you if A. B. shall make you secure of prosecuting his complaint, and also of returning the Goods and Chattels, to wit: which C. D. hath taken and unjustly detained as it is alleged, if a return thereof shall be adjudged, that then the Goods and Chattels aforesaid, to him, the said A. B. without delay you cause to be replevied and delivered; and put by sureties and safe pledges, the aforesaid C. D., that he be before us at Fredericton on the Tuesday in next, to answer to the said A. B. of a Plea, wherefore he took the said Goods and Chattels of the said A. B., and them unjustly detained against gages and pledges, as he saith, and have there then the names of the pledges and this Writ. Witness at Fredericton, the day of in the year of our Reign." And if the Defendant shall not appear at the return of such Writ, or within twenty days after the return thereof, then the Plaintiff shall be at liberty to issue a Process against such Defendant, returnable at the next ensuing Term, in the following form, viz:—

"George the Third, by the Grace of God, of the United King-
(L. S.) dom of Great Britain and Ireland, King, Defender of the Faith, &c. &c. &c.

To the Sheriff of GREETING.

"We command you that you take C. D., if he shall be found in your Bailiwick, and him safely keep, so that you may have his body before us, at Fredericton, on the Tuesday in next, to answer A. B. of a Plea, wherefore he took the Goods and Chattels of the said A. B., and them unjustly detained against gages and pledges, as he saith, and have you there then this Writ. Witness at Fredericton, the day of in the year of our Reign." And shall serve such Defendant personally with a copy of such Process, upon which copy shall be written an English notice to such Defendant, of the intent and meaning of such service; which notice shall be in the form used in the service of Processes in actions in which no affidavit shall be made and filed of the cause of action; and if such Defendant shall not appear at the return of such process, or within twenty days after such return, the Plaintiff shall be at liberty, upon the usual Affidavit being made and filed of the personal service of such Process, to enter a common appearance, or file common Bail for such Defendant, and to proceed thereon as if such Defendant had entered his or her appearance or filed common bail.

2d. And it is further Ordered, That in all cases in which the Sheriff shall be a party, the foregoing Processes shall be directed to the Coroner, as in other cases in which the Sheriff is a party.

HILARY TERM, 59th GEO. III.—1819.

Writs of Assistance.

It is Ordered, That the Writs of assistance to the Officers of His Majesty's Customs in this Province, do issue out of this Court, from time to time, according to the practice of the Exchequer in England.

MICHAELMAS TERM, 59th GEO. III.—1819.

Special Bail.

Ordered, That the time for putting in Special Bail, agreeably to the rule made in Easter Term, in the twenty-fifth year of His present Majesty's Reign, be enlarged to thirty days.

HILARY TERM, 60th GEO. III.—1820.

Attornies.

1st. It is Ordered, That in future, no Attorney of the Court not being an established resident within the Province, be permitted to act as an Attorney of this Court.

Dockets and Fees.

2d. Whereas, by a standing Rule of this Court, made and entered of Easter Term, in the twenty-fifth year of His Majesty's Reign, it is Ordered, "That every Attorney of this Court enter the return and file the Writs or Process in all actions which have not been agreed, and in which they intend to proceed, and shall make a Docket of all such Returns and Rules, and on the last day of the Term shall deliver the same, with the Writs and Processes in such actions to the Clerk of the Court, and shall pay to the Clerk of the Court his own fees, as well as those of the Judges and Crier in such actions;" and whereas, notwithstanding the repeated orders of this

Court, enjoining a strict and punctual compliance with the said Rule, the same has been in various instances violated and neglected: It is hereby Ordered, that in future, if any Attorney of this Court shall neglect a compliance with the said Rule, in every respect, agreeable to the true intent and meaning thereof, on or before the first day of the Term next after the Term in which such Rule ought to have been complied with, every such Attorney shall be considered as in contempt of the Court, on account of such neglect of, and disobedience to the said Rule. And the Clerk of this Court is hereby enjoined not to receive or file from, or for, any such Attorney, at any time afterwards, any Writ, Præcipe, Process, or any other paper or proceedings whatever, of a date subsequent to the Term in which such Rule ought to have been complied with, until such contempt shall have been purged by a compliance with the said Rule. And the Clerk is further enjoined, on the second day of the Term next after the Term in which the said Rule ought to have been complied with, to prepare, and deliver to the Court, the name or names of all such Attornies as shall be so in contempt as aforesaid.

HILARY TERM, 2D GEO. IV.—1821.

Calculating Interest.

Interest upon Bonds, Debts, and other Securities for money, payable with Interest, should be ascertained by adding the Interest to the Principal at the time of each payment, and deducting the payment, which is the same thing as first deducting the Interest from the payment, and then giving credit for the balance on account of principal; and not by charging the Interest upon the whole Bond to the time of the last payment, and Interest for the Debtor on the several payments from their respective dates, thereby inverting the principle of compound Interest, and charging Interest on his own debts, when a payment is made of less than the Interest due at the time. Nothing should be credited until a sum is paid equal to the Interest then due, except by endorsing it specially as a sum paid in part of the Interest then due.

HILARY TERM, 4TH GEO. IV.—1823.

Admission of Attornies and Barristers

IT IS ORDERED, That hereafter, no person, who shall study the Law in this Province for the purpose of being admitted an Attorney

of this Court, shall be so admitted unless he shall have so studied with some Barrister of this Court for the term of four years, if he be a Graduate of any College, or if not such Graduate, for the term of five years: *Provided*, that this Rule shall not extend to any person who shall have commenced his studies under any Barrister of this Court before the commencement of the present Term.

2d. That no person producing a Certificate of admission as an Attorney of the Supreme Court of any other Province, Colony, or Island, in His Majesty's dominions, in order to obtain admission and enrollment as an Attorney of this Court, shall be so admitted and enrolled, unless he shall have served a regular Apprenticeship in such Province, Colony, or Island, agreeably to the terms prescribed in the foregoing rule for Students at Law in this Province, nor unless he shall produce an authenticated copy of the Certificate of such service, by virtue of which he may have obtained admission as an Attorney of the Supreme Court of such Province, Colony, or Island, nor unless such Certificate shall include the qualifications as to age and moral character requisite in that behalf to be included in Certificates of service as Apprentices to the Law in this Province. (*k*)

3d. That after the expiration of two years from the time of admission as Attornies, such Attornies may be called to the Bar, provided there appears no just cause to prevent such call. (*l*)

4th. That no person, admitted as an Attorney of this Court, shall, until he be called to the degree of a Barrister, be permitted to wear a Gown, or to make any motion as Counsel in any cause in this Court.

5th. That notice of every application, for admission as an Attorney of this Court, be filed with the Clerk of the Pleas on the first day of the Term at which such application may be made. (*m*)

6th. That no person, under the degree of a Barrister, be hereafter entitled to take a Student for admission as an Attorney.

7th. That every Barrister taking a Student (*n*) for admission as an Attorney, shall enter the name of such Student forthwith, with the Clerk of the Pleas of this Court, to be enrolled by him in a Roll to

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(*k*) See post Rule 5. Mich. T., 1 Vict., requiring further certificates, and Rule 9, requiring one year's study in this Province.

(*l*) See post Rules Hilary T., 6 Geo. 4, Mich. T., 6 W. 4, Rule 13, and Mich. T., 4 Vict. Rule 2.

(*m*) The remainder of this Rule is obsolete in consequence of Rule 8 Mich. T. 4 Vict.; and it may be questionable whether the whole Rule is not superseded by Rule 4, Mich. T. 1 Vict.

(*n*) See also post Trinity T. 6 Vict., Rules 2, 4, and 6.

be kept for that purpose, with the date of the commencement of such Student's term of study.

8th. That no Student in any Barrister's office, shall be permitted hereafter to practice in the name of any Attorney, or otherwise, in any Inferior Court of Common Pleas in this Province.

HILARY TERM, 6TH GEO. IV.—1825.

Admission of Barristers.

ORDERED, That whenever any Attorney of this Court shall be desirous of being called to the Bar as Barrister, he shall make known his wishes, by Petition to the Court, on the first day of the Term—which Petition shall be delivered to the Clerk, and be open for the inspection of Gentlemen of the Bar, until the sitting of the Court on Thursday following in the same Term, when the Court will determine upon the said Petition.

MICHAELMAS TERM, 6TH GEO. IV.—1825.

Signing and Sealing Writs.

Upon reference to the Rule of Hilary Term, 45 George III., relating to the delivery of blank Writs to the Attornies of this Court.

1st. IT IS ORDERED, That from and after Hilary Term next, no Attorney of this Court do presume to issue (*o*) any Writ or Process whatever, unless the same be actually signed and sealed (*p*) by the proper Officer of this Court; and that the Clerk of the Pleas do forthwith furnish a Copy of this Rule to every Attorney of this Court.

Declarations De Bene Esse.

2d. IT IS ORDERED, That the time for delivering or filing Declarations *De Bene Esse*, agreeably to the rule made in Easter Term in the 26th George III. be enlarged to thirty days.

(*o*) A writ is considered to be issued when it is sent from the Attorney's office for the bona fide purpose of reaching the Sheriff in the ordinary course, for transmission of such documents.—*Lunt* v. *Estabrooks*, Mich. T., 1846, (not yet reported.)

(*p*) A Writ of *Fieri Facias*, altered and re-issued as an *alias* after it has been returned by the Sheriff, is void.—*Johnston* v. *Winslow*, Bert. R. 53.

Discharge of Bail.

3d. ORDERED, That if any person or persons, who are, or who hereafter shall become Bail in this Court for any Defendant, in any action whatever, shall be impleaded by action of debt upon the recognizance in such suit acknowledged, such person or persons shall have liberty to surrender such Defendant by the space of twenty entire days next after the return of the Writ of Capias *ad respondendum* or other Process sued out against such Bail; and upon notice thereof given to the Plaintiff or his Attorney, in the suit aforesaid, all further proceedings against such Bail upon the Recognizance aforesaid, shall cease. (*q*)

HILARY TERM, 7TH GEO. IV.—1826.

Trials at Nisi Prius.

In order to prevent inconvenience and delay in the trial of causes at *Nisi Prius*,

1. IT IS ORDERED, That no record of *Nisi Prius* shall be received at any Circuit Court in any County in this Province, unless the same shall be delivered, to be entered with the Clerk of the Circuits, at or before the opening of the Court, on the first day of the sittings, unless the Judge, in his discretion, under special circumstances, shall allow the Clerk to receive a Record, and enter the cause for trial after the time above limited; and that every cause shall be tried (*r*) in the order in which it shall be so entered, beginning with *Remanets* unless it shall be made out to the satisfaction of the Judge, in open Court, that there is reasonable cause to the contrary, who thereupon may make such order for the trial of the cause so to be put off, as to him shall seem just. (*s*)

2. ORDERED, That a list of all the causes, entered as aforesaid, shall be made by the Clerk of the Circuits, and by him delivered to the Judge as soon as practicable after the entry so made.

(*q*) By Rule 11, Hilary T., 2 W. 4, costs are [illegible] up to the time of notice of render.

(*r*) By Rule of Trinity T., 3 W. 4, the first cause is not to be called on before the expiration of an hour after the opening of the Court on the first day of the sittings. The remainder of that rule having been superseded, is omitted. By Rule 7, Hilary T., 6 W. 4, a copy of the particulars is to be annexed to the record.

(*s*) A Judge at Nisi Prius has authority to make such order at the time of trial of causes as may seem necessary to him for the effectual despatch of business, and it is the duty of the Attorney and Counsel in a cause, to attend the court till the cause is disposed of.—*Bowes* v. *Sutherland*, 2 Kerr 1.

Crown Paper and Special Paper.

3. ORDERED, That the Clerk of the Crown do keep a paper to be called the Crown paper, in which shall be entered demurrers, and other special matters for argument on the Crown side; and that the Clerk of the Pleas do in like manner keep a paper, to be called the Special paper, in which shall be entered all demurrers, and other special matters, for argument on the Plea side: such entries to stand on such papers respectively, in the order in which they may be made, with the said respective Clerks; and that all the matters contained in the said papers shall come on to be argued on the *Monday in the second week* (*t*) in each term, in the order in which they are entered, always beginning with the Crown paper.

TRINITY TERM, 7TH GEO. IV.—1826.

Consent Rule. (*u*)

Whereas, by the common Consent Rule in actions of ejectment, the Defendant is required to confess Lease, Entry, and Ouster, and insist upon his title only; and whereas in many instances of late years, Defendants in ejectment, have put the Plaintiff, after the title of the Lessor of the Plaintiff has been established, to give evidence that such Defendant was in possession, at the time the Ejectment was brought, of the premises mentioned in the Ejectment, and for want of such proof, have caused such Plaintiffs to be non-suited;

And whereas such practice is contrary to the true intent and meaning of such Consent Rule, and of the provisions therein contained, for the Defendant's insisting upon the title only: It is therefore Ordered, That from henceforth in every action of Ejectment, the Defendant shall specify in the Consent Rule for what premises he intends to defend, and shall consent in such Rule, to confess upon the trial, that the Defendant (if he defends as Tenant, or in case he defends as Landlord, that his Tenant) was, at the time of the service of the declaration, in the possession of such premises; and that if upon the trial the Defendant shall not confess such possession, as well as Lease, Entry, and Ouster, whereby the Plaintiff shall not be able further to prosecute his suit against the said Defendant, then no costs shall be allowed for not further prosecuting the same, but

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(*t*) See Rule 5, Mich. T. 6 W. 4, and Rule 1, Hilary T., 6 W. 4.
(*u*) In case of joint tenancy &c., see rule, Trinity T., 8 Vict.

the said Defendant shall pay costs to the Plaintiff in that case to be taxed. (*v*)

TRINITY TERM, 8TH GEO. IV.—1827.

Writs of Error.

IT IS ORDERED, That henceforth no Writ of Error *Coram Nobis* shall be allowed but in open Court; and then on affidavit of the Error to be assigned.

HILARY TERM, 9TH GEO. IV.—1828.

Notices of Trial and Inquiry.

1. IT IS ORDERED, That from henceforth there be *at least* fourteen days' (*w*) notice of trial, and for Writs of Inquiry, in all cases, whether the Defendant lives within the County where the Court sits or not; any former rule of this Court to the contrary notwithstanding.

Notice of Countermand.

2. IT IS ORDERED, That no notice of countermand shall be deemed sufficient to save the costs for not proceeding to trial pursuant to notice, unless it be given at least ten days before the time of the intended trial.

(*v*) These costs are recoverable by attachment; but where no consent rule had been actually taken out, and the Clerk had taxed the costs and indorsed his allocatur thereof upon the agreement for the consent rule signed by the respective Attornies, an attachment for non-payment of these costs was refused.—*Doe* v. *King*, Trinity T., 1846. Neither will an attachment be granted though the consent rule has been taken out and a demand of the costs subsequently made, unless there has been a re-taxation of costs under the rule, Ibid Mich. T., 1846.

(*w*) The English Statute 14 Geo. 2, c. 17, s. 4. requires that notice of trial be given *at least* ten days before the intended trial. Under this statute it has been held that a notice on the 9th for a trial on the 19th is sufficient.—*Legge* v. *Williams*, cited in Tidd's Pr., 8th Ed., 815. The later cases however have decided that the words "ten days at least," mean ten clear days, thereby excluding both the day of giving the notice and the day of trial or other act to take place at the expiration of the notice.—*Zouch* v. *Empsey*, 4 B. & Ald. 522, *Reg.* v. *Justices of Shropshire*, 8 A. & E. 173, *Young* v. *Higgon*, 6 M. & W. 49, *Mitchell* v. *Foster* 12, A. & E. 472, s. c. 9 Dowl. 527, *Reg.* v. *Justices of Middlesex*, 9 Jurist 758, s. c. 14, Law J. N. S. M. C. 139. The rule adopted in *Legge* v. *Williams*, has been generally acted on in this Province, but since the recent decisions it can scarcely be considered the correct rule.

A notice of trial sent to the Defendant's Attorney through the Post office, can only take effect from the time it is received.—*Crane* v. *Taylor*, 2 Kerr 171, *Fraser* v. *Harding*, Ibid 375. There must be a new notice of trial where the cause is made a remanet, or put off by rule of Court or order of Nisi Prius.—*Fraser* v. *Harding*, supra. But if the Circuit is adjourned, a new notice of trial of a cause for the adjourned Court is not necessary.—4 Vict., c. 2, s. 6.

Scire Facias.

3. IT IS FURTHER ORDERED, That from henceforth all Defendants in Scire Facias have twenty days to appear from the return day of the Scire Facias; and that, where a Defendant appears in Scire Facias, there shall be the like time for pleading (*x*) as in other actions in this Court. (*y*)

TRINITY TERM, 2D WILLIAM IV.—1831.

Demurrer Books. (*z*)

Whereas expence is often unnecessarily incurred in making up Demurrer Books, from setting forth those parts of the pleadings to which the Demurrers do not apply: It is therefore Ordered, That from and after the end of this Term, when there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates shall be copied into the Demurrer Books; and, if any other parts shall be copied, the Clerk shall not allow the costs thereof on taxation, either as between party and party, or as between Attorney and Client.

HILARY TERM, 2D WILLIAM IV.—1832.

Special Bail.

1. IT IS ORDERED, That in all cases, where Bail is put in before a Commissioner, (*a*) the Bail-piece, together with the affidavit of the

(*x*) If the scire facias is in the ordinary form, to revive a judgment where no execution has been issued within a year and a day, the Defendant cannot plead any matter of defence which might have been pleaded to the original action.—*Johnston* v. *Tibbits*, Bert. R. 355. It was doubted in this case whether the same rule applies to a scire facias under the act of Assembly 26 Geo. 3, c. 24.—See *Mitchell* v. *Astle*, 2 Kerr 86, where relief was granted on motion. A scire facias to revive a judgment is not necessary, where execution has been issued within a year, and suspended at the instance of the Defendant, although the execution has not been returned and filed.—*Betts* v. *Johnson*, Chip. MS. 156. See also *Hiscocks* v. *Kemp*, 3 A. & E., 679. A parol agreement to waive a scire facias, is sufficient.—*Morgan* v. *Burgess*, 1 Dowl., N. S. 850. A ca. sa. issued on a judgment more than a year old, without a scire facias, is irregular, but not absolutely void, and if not set aside, it is a justification to parties sued in trespass for causing it to be executed.—*Blanchenay* v. *Burt*, 4 Q. B. 707. If a ca. sa. is set aside for irregularity, the Plaintiff is not bound to proceed by scire facias or action on the judgment, but may at once take the Defendant again on a fresh ca. sa.—*Merchant* v. *Frankis*, 3 Q. B. 1.

(*y*) The remainder of this rule is obsolete since the act 2 W. 4, c. 20, which abolishes the proceeding by two nihils, and substitutes a service of the writ.—See a form of the writ post rule 12, Hilary T., 2 Vict.

(*z*) See also post Hilary T., 6 W. 4, Rule 6,—Trinity T., 3 Vict. Rule 3,—Rules Mich. T. 9 Vict., and Hilary T., 9 Vict.

(*a*) See post Rule 1, Mich. T., 5 W. 4.

due taking thereof, shall be forthwith transmitted, by the Attorney who puts in the Bail, to one of the Judges of this Court; and the notice of Bail, in such cases, shall specify the Judge to whom the Bail-piece has been so transmitted, as well as the Commissioner, before whom the Bail was put in, and the names and additions of the Bail.

2. That Plaintiffs shall be allowed twenty days, after service of the notice of Bail, to except against such Bail: and such exception shall be entered with the Judge before whom Bail was put in, or to whom the Bail-piece has been transmitted, as the case may be.

3. That Defendants shall be allowed twenty days, after service of notice of exception, to procure their Bail to justify, or to add other Bail, who shall justify within the said twenty days, unless in either case, upon application made before the said twenty days expire, the Court, or a Judge, shall see fit to extend the time.

4. That Bail shall justify in open Court, or before the Judge with whom the exception is entered, notice of justifying being first duly given: and that in all cases, when the Bail reside more than ten miles from the place where they are to justify, they may justify by affidavit without personal attendance.

5. That Bail must be Housekeepers or Freeholders; and, in cases where the sum sworn to does not exceed three hundred pounds, must be worth double the sum sworn to; and in cases above three hundred pounds, must be worth three hundred pounds more than the sum sworn to, over and above their just debts, and every other sum for which they are Bail. (*b*)

6. That the affidavit of justification shall be according to the following form; and may be made before a Judge or a Commissioner of this Court for taking affidavits.

Form of Affidavit.

In the Supreme Court,
Between, &c.

A. B. and C. D., Bail for the Defendant in this cause, severally make oath and say, and first this Deponent, A. B., for himself saith, that he is a Housekeeper, *(or Freeholder, as the case may be)* residing at *(describing particularly the place of residence,)* that he

(*b*) Bail cannot justify on property which they hold in trust—it must be property which is absolutely and beneficially their own.—Per Chipman J. at Chambers, Tisdale's Bail, August 1832.

is possessed of property to the amount of £—— *(double the amount of the sum sworn to, if under* £300, *and if above* £300, *the amount of the sum sworn to, and* £300 *added thereto)* over and above all his just debts, *(if Bail in any other action add)* and every other sum for which he is now Bail—*(if not Bail in any other action, add)* that he is not Bail for any Defendant except in this action; that this Deponent's property to the amount of the said sum of £——, *(and if Bail in any other action,* "and of all other sums for which he is now Bail as aforesaid") consists of real property of the value of £——, and of personal property of the value of £——, *(as the case may be)* and this Deponent, C. D., for himself saith *(as before.)*

Sworn, &c.

7. That if the Notice of Bail shall be accompanied by such an affidavit of justification, and the Plaintiff afterwards except to such Bail, he shall, if such Bail are allowed, pay the costs of justification; and, if such Bail are rejected, the Defendant shall pay the costs of opposition, unless the Court, or a Judge, shall otherwise order.

8. That, in cases of exception, when Bail have duly justified and been allowed, and a Rule for an allowance has been entered in Court, or an order therefor made by a Judge, and a copy of such rule or order has been served on the Plaintiff's Attorney, the Bail shall be deemed perfected; and the Attorney who puts in the Bail shall forthwith obtain the Bail-piece from the Judge, with whom it lies, and file the same with the Clerk.

9. That if the Plaintiff does not except against the Bail, within twenty days after service of notice of Bail, the Bail shall, in like manner, be deemed perfected; and the Attorney who puts in the Bail, shall forthwith, after the expiration of the said twenty days, obtain the Bail-piece from the Judge, and file the same with the Clerk. (*c*)

10. That, in cases of render in discharge of Bail, the Clerk, upon production of a certificate of the Sheriff, to whose custody the Defendant has been committed, that such Defendant is in his custody, together with an affidavit of the service of notice of render upon the Plaintiff's Attorney, shall indorse upon the Bail-piece an EXONERETUR, (*d*) in the words following: "The Bail within named are exonerated;" and shall set down the day of the month and year of

(*c*) It is irregular to file a recognizance roll till the bail-piece is on file to warrant it.—*O'Connor* v. *Mott*, 2 Kerr, 509.

(*d*) The bail are entitled to have an exoneretur entered on the bail-piece, though the Defendant may have escaped between the time of the render to the gaoler, and the notice thereof to the Plaintiff's Attorney, if such notice has been given in a reasonable time.—*Ratchford* v. *Giles*, 1 Kerr, 459. Six days was considered a reasonable time in this case. If the Plaintiff,

his so doing, and sign his name thereto; and such certificate and affidavit shall thereupon be filed with the Bail-piece. (*e*)

11. That hereafter proceedings against Bail, in an action upon the recognizance, shall not cease, as provided for in the rule of this Court of Michaelmas Term, one thousand eight hundred and twenty-five, without the costs incurred in such action up to the time of notice of render being first paid. (*f*)

12. That any former Rules of this Court, inconsistent with any of these present Rules, relating to Bail, shall be hereafter of no effect.

13. That any Attorney, who shall neglect to transmit, or to file the Bail-piece, as the case may be, according to the foregoing Rules, shall be deemed to be in contempt of the Court for disobedience to its Rules.

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prevents the bail from rendering the principal—as where he procures him to leave the Province—the bail are entitled to have an exoneretur entered on the bail-piece, though they may be indemnified.—*Pollock* v. *Short*, Bert. R. 279. Where two writs for the same cause of action were simultaneously issued to different counties, and the Defendant was arrested and entered bail on both, an exoneretur was entered on the last bail-piece, and the expences of entering it, ordered to be paid by the Plaintiff.—*Johnson* v. *Bransfield*, Ibid 78. Any unreasonable delay on the part of the Plaintiff in the action, will entitle the bail to relief; thus where three terms had elapsed since the arrest, and no attempt was made by the Plaintiff to bring the cause to issue, the bail were discharged.—*Gault* v. *McIntosh*, Chip. MS., 52. So, where the Defendant had obtained an order to stay proceedings till security was given for costs, since which two assizes had passed and no further proceedings were taken by the Plaintiff.—*Hill* v. *Rind*, Bert. R. 281. A reference of the cause to arbitration without the consent of the bail, discharges them, unless a verdict is taken for the Plaintiff's security.—*Gilbert* v. *McLaughlan*, Trinity T., 1846, (not yet reported.) But the bail cannot plead this to an action on the recognizance; they must apply to the Court for relief.—*Sharp* v. *Connell*, 3 Kerr 125. The bail are also discharged if the Plaintiff declares for a different cause of action from that stated in the affidavit to hold to bail.—*Gilbert* v. *McLaughlan*, supra. *Ford* v. *Ladd*, Mich. T., 1846. In this case the Defendant was arrested on the ordinary affidavit for goods sold; the declaration contained several special counts, setting out a special contract between the parties, together with the common counts; the whole evidence on the trial referred to the special contract, and the Jury gave a general verdict for the Plaintiff. The bail may apply to be discharged after judgment is signed against the principal.—*Ford* v. *Ladd*, supra.

(*e*) See also 4 Geo. 4, c. 17, and 7 W. 4, c. 14, s. 3 and 4, as to the mode of rendering Defendants. Post section 2, title "Bail."

(*f*) Proceedings against the bail cannot be supported unless the *ca. sa.* against the principal returned *non est* is found on file in the Clerk's office.—*Merritt* v. *Lindsay*, Chip. MS., 233, see also *O'Connor* v. *Mott*, 2 Kerr 509. Where the Plaintiff's Attorney had induced the bail to suppose that an execution would issue against the property of the Defendant, proceedings on the recognizance were set aside on the ground of surprise.—*Haynes* v. *Chalmers*, Chip. MS., 3. But if the Plaintiff's proceedings against the bail are regular, he has a right to go on with the action till the costs are paid, and the proceedings will not be stayed except on payment of costs.—*Duff* v. *Hunter*, 1 Kerr 499. The bail should apply to a Judge at Chambers to stay proceedings and enter an exoneretur on the bail-piece, as soon as an action is commenced against them; they will then in general only be obliged to pay costs up to the time of the application. —*Gilbert* v. *McLaughlan*, ante note (*d*) *Sullivan* v. *Small*, Mich. T., 1846, (not yet reported.) In *Muldoon* v. *Beveridge*, 2 Kerr 532, where the proceedings in the action against the principal were defective, not having been entered pursuant to the rules of the Court, the bail was relieved without paying costs.

TRINITY TERM, 5TH WILLIAM IV.—1834.

Summary Actions.

1. IT IS ORDERED, That the Writ in Summary Actions (*g*) shall be on Parchment, according to the usage in this Court in other actions.

2. That in every action which has not been agreed, and in which it is intented to proceed, the Plaintiff's Attorney shall file the Writ, and enter the cause at the term in which the Writ is returnable, (*h*) and shall make a Docket of such causes, and deliver the same to the Clerk, and pay the fees in like manner as in other actions.

3. That in actions to be tried at Nisi Prius, the Writ and Plea (*i*) shall be delivered from the files of this Court to the Plaintiff's Attorney, and shall form the record, and be filed as such, at the Court of Nisi Prius.

4. That the result of trials at Nisi Prius shall be entered in a brief and summary form, according to the circumstances of each case, and endorsed on the Writ, or annexed thereto, in the nature of a Postea, and returned by the Clerk of the Circuits accordingly.

5. That the Clerk of this Court shall not, in any case, sign final Judgment, unless the Writ be on file in his office; and in every Memorandum of Judgment, there shall be reference made to such Writ so on file.

MICHAELMAS TERM, 5TH WILLIAM. IV.—1834.

Special Bail.

1. ORDERED, That it shall be deemed irregular to put in Bail before a Commissioner, in any parish or city in the Province, in which one or more of the Judges of this Court may reside, unless at times when such Judge or Judges may be absent from their place of residence; and further, that always, during the sitting of the Court in Term time, it shall be irregular to put in Bail before a Commis-

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(*g*) See Act 4 W. 4, c. 41, post Section 2, title "Summary Practice."

(*h*) By rule 2, Hilary T., 7 W. 4, the Plaintiff is allowed thirty days after the term to file the writ, in all cases, and it may be filed afterwards by a Judge's order. If the entry is not made in due time the cause will be considered out of Court.—*Muldoon* v. *Beveridge*, 2 Kerr 532.

(*i*) By rule of Mich. T., 2 Vict., a copy of the plea may be used.

sioner, in the Parish of Fredericton, in the County of York; and that no Judge do receive any Bail-piece, transmitted to him, in which the Bail may have been entered contrary to this Rule.

Sheriffs Fees.

2. In order to secure to Sheriffs the proper emoluments of their office, It is Ordered, That, after the first day of Hilary Term next, no costs for the service or return of any Writ or Process, be taxed or allowed in any bill of costs, without the production of such Writ or Process, with the return thereof, signed by the Sheriff or his Deputy, and the fees for the service and return, marked thereupon by such Sheriff or Deputy. (*k*)

New Trials.

3. It is Ordered, That in future, the Attorney for the party intending to move for a new trial, (*l*) or for setting aside a verdict, shall cause to be delivered to the Judge before whom the cause was

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(*k*) In addition to this rule it is declared by the Act 6 W. 4, c. 1, s. 11, that no persons except the high sheriffs, respectively, and their deputies shall charge or be allowed to receive any fee or reward for the service of any writ or process issued from the Supreme Court, or any of the Courts of Common Pleas, nor shall any fee for the service of any such writ or process be allowed or taxed in any case, unless such service has been made by the sheriff or some one of his deputies of the county in which the writ or process shall have been served, or by some person specially authorised by the sheriff to make the particular service, and that it shall be the duty of every Attorney issuing process from any of the said Courts, to put the same into the hands of the sheriff or one of his deputies, to be served, unless the service is intended to be entirely gratuitous. Section 12 enacts, that the Attorney or Attornies issuing any writ or process whose name or names is or are indorsed on such writ or process, shall in all cases be considered the employer of the sheriff serving any such writ or process, and as such, liable to the sheriff for his legal fees for serving or executing the same, provided that nothing in this act shall extend to defeat the Plaintiff's liability to the sheriff for the service of any such writ or process. Under this act it has been held that a person serving processes directed to the sheriff, but without any authority from him, cannot maintain any action for his services against the Attorney who employs him.—*Herrington* v. *Lugrin*, 1 Kerr 109. See also *Kavanagh* v. *Phelon*, Ibid 472.

(*l*) It is not intended here to state all the particular instances in which the Court has granted or refused new trials, but merely to endeavour to point out some of the leading principles by which it is governed in questions of this nature.

And 1st. When the Defendant has been guilty of negligence, a new trial will not in general be granted. Thus where a cause was tried out of its order, in the absence of the Defendant's Counsel, in consequence of several causes standing on the docket before it, having been put off by consent to a future day, a new trial was refused; the Court saying that it was the duty of the Attorney and Counsel in a cause to attend the Court till the cause was disposed of.—*Bowes* v. *Sutherland*, 2 Kerr 1, see also *Doherty* v. *Hogan*, Ibid 492. So, where a cause was tried as undefended in consequence of a letter written to the Defendant by his Attorney, giving instructions about the defence, not having been received till after the trial, through a mistake in the Post Office, a new trial was refused; it appearing that the letter could not have reached the Defendant till after the Court had opened.—*Smiley* v. *Winslow*, Ibid 349. And even where the Defendant's absence was accidental a new trial was refused, except upon terms of paying money into Court, he not having used due diligence in preparing for trial or getting to Court.—*Gibbs* v. *Steadman*, Ibid 406.

2d. If there has been any improper conduct on the part of the jury a new trial will be granted; as if either of the parties speak with the jury respecting the suit after they retire from the bar, or furnish them with food or drink.—*Trefathen* v. *Carman*, Chip. MS., 109. But the mere circumstance of the jury separating after the charge and before the verdict, will not invalidate

tried, a note in writing specifying the name of the cause, the time and place of the trial, and the general grounds of the intended motion; (*m*) such note in writing to be delivered to the Judge in causes tried in vacation, on or before the first day of the next ensuing term.

MICHAELMAS TERM, 6TH WILLIAM IV.—1835.

Nisi Prius Sittings. (*n*)

1. IT IS ORDERED, That there shall be sittings of Nisi Prius for the County of York, after the respective terms of this Court, on the following days in each and every year, that is to say: Sittings after Hilary Term, on the third Tuesday in February; Sittings after Trinity Term, on the fourth Tuesday in June; Sittings after

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the verdict, if there has been no tampering with them.—*Lymburn* v. *De Veber*, Ibid 70. Affidavits of the jurymen stating that they had received evidence after having retired from the bar, cannot be received to impeach their verdict.—The *Attorney General* v. *Boyer*, Ibid 26. If the jury give a verdict contrary to law, a new trial will be granted if the principle is important, though the damages are small.—*French* v. *Hodgin*, Ibid 178. And if the Jury persevere in giving a verdict contrary to law, the Court will order as many new trials as it thinks proper.—*Estabrooks* v. *Orser*, 1 Kerr 57, *Connell* v. *Miller*, 2 Kerr 116.

3d. In actions for assault and battery, new trials will seldom be granted for excessive damages.—*Wilson* v. *Saunders*, Chip. MS., 144. The same rule applies in actions of trespass to real property.—*Hadden* v. *White*, 2 Kerr 634; in actions on the case for malicious arrest, *Wentworth* v. *Hallett*, Ibid 560; and actions for criminal conversation, *Montgomery* v. *McLeod*, Bert. R., 375. So, in an action for assault, if the injury is but trifling, and the verdict is for the defendant.—*Moore* v. *Ogden*, 1 Kerr 278. Neither will a new trial be granted for imaginary damages.—*Wilson* v. *Eills*, Bert. R. 325. But in an action for written slander, where the words were clearly libellous, and a verdict was found for the Defendant, a new trial was granted, though the Judge had left the question of libel open to the jury, without expressing his own opinion upon the writing.—*Andrews* v. *Wilson*, 3 Kerr 86.

4th. Where the evidence is obscure, and it is doubtful whether justice has been done by the verdict, a new trial will be granted on payment of costs.—*Fiddes* v. *Henderson*, Chip. MS., 19, *Bull* v. *McCready*, 2 Kerr 228. So, where the verdict appeared to be the result of a compromise, and was inconsistent with the position of either party.—*Keys* v. *Flinn*, Bert. R. 125, *Connell* v. *Miller*, 2 Kerr 116. But the absence of a material witness is not a ground for a new trial; for the party might have applied to the Judge to put off the trial, or withdrawn the record.—*Flaherty* v. *McLardy*, Mich. T., 1846. The case of *Shillito* v. *Theed*, 6 Bing 753, in which a contrary rule of practice is stated, was not considered correct by this Court. It is to be remarked that the report of that case is very short, and no reason is given for the decision; the case of *Turquand* v. *Dawson*, 1 C. M. & R., 709, where the absence of a witness was occasioned by the fraud of the Defendant's Attorney, is also directly opposed to it. If a new trial is granted to a Defendant on payment of costs, and the Plaintiff proceeds to trial before they are paid, he will have no remedy for such costs, whatever may be the event of the second trial.—*Farrer* v. *DeFlinn*, 8 Jur. 779. The costs of the first trial ought to be paid immediately after taxation and demand of payment, otherwise the rule for a new trial will be discharged.—Ibid, *Champion* v. *Griffiths*, 1 Dowl., N. S. 319, *Turner* v. *Gilbert*, Mich. T., 1846. Where the Plaintiff died after the verdict, it was made part of the rule for a new trial that the subsequent verdict should be entered up as of the assizes before the Plaintiff's death.—*Miller* v. *Dawson*, Chip. MS., 176.

(*m*) This notice is necessary though points have been reserved at the trial.—*Flaherty* v. *Sayre*, Bert. R. 88. In cases tried at the sittings for the County of York, thirty days' notice to the opposite party is necessary.—Mich. T., 1 Vict., Rule 10.

(*n*) See Act 5 W. IV., c. 37.

Michaelmas Term, on the fourth Tuesday in October. The said respective Sittings to continue for so long a time, as in the opinion of the Judge holding the same, may be necessary for the dispatch of the business depending.

2. ORDERED, That the Sheriff of the County of York do summon and return Grand Jurors and Petit Jurors, to attend at the several Sittings in that County, now appointed or hereafter to be appointed, in like manner as has been heretofore accustomed with regard to the terms of this Court; and that hereafter no Jurors be summoned to attend at the Terms, without special order.

3. IT IS ORDERED, That all general rules of this Court, which relate to the entering of causes, the filing of Nisi Prius Records, (*o*) or other proceedings at Nisi Prius, shall apply to, and be in force at, the Nisi Prius Sittings in the County of York.

4. IT IS ORDERED, That in all actions, in which the issue is made up and the *Venire Facias Juratores* is awarded, as of the last return day, that is to say, the second Saturday after the first Tuesday, in any term, such Writ of *Venire Facias Juratores* may be awarded, and made returnable forthwith.

Crown and Special Paper.

5. IT IS ORDERED, That the matters contained in the Crown Paper and Special Paper, respectively, shall come on to be argued on the *second day* (*p*) in each term, any former rule to the contrary notwithstanding.

New Trials.

6. IT IS ORDERED, That no motion for a new trial shall be made after the first Saturday in any term.

Assessment of Damages.

7. IT IS ORDERED, That in all cases, where application shall be made to a Judge in vacation after judgment by default, to make inquiry or assessment, under the Act of Assembly 5 William 4, c. 37, s. 9, there shall be produced to the Judge a certificate or memorandum, of the day on which interlocutory judgment was signed, or judgment by default entered, signed by the Clerk of the Pleas or his deputy; and that no such inquiry or assessment shall be made, unless such certificate or memorandum be so produced.

(*o*) See Rule of Hilary T., 7 Geo. 4, ante page 14, and post rule 7 Hilary T., 6 W. 4.

(*p*) After the motion paper and Record trial docket, see Rule 1, Hilary T., 6 W. 4, and Trinity T., 9 Vict., post.

Mesne Process.

8. It is Ordered, That every mesne process, in any action, shall contain the names of all the Defendants, if more than one, in the action.

Subpœna.

9. It is Ordered, That the names of any number of Witnesses may be put in one Writ of Subpœna. (*q*)

Ejectment.

10. It is Ordered, That in all actions of ejectment, the notice to appear may be for any return day specifically, but when the notice to appear is for the term generally, the day of appearance shall be the first day of the term. (*r*)

11. It is Ordered, That in all actions of ejectment, there shall be fourteen days exclusive between the day of serving the declaration (*s*) and the day of appearance, whether the person served with

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(*q*) An attachment against a witness for contempt in not attending on a subpœna, must be moved for at the first term after the contempt was committed.—*Doe* v. *Meally*, Bert. R. 121. If the witness was in custody of the sheriff at the time the subpœna is served upon him, an attachment will not be granted against him for not obeying it.—*Reg.* v. *Wetmore*, Ibid 244. In order to obtain an attachment against a witness for not attending to give evidence on a trial, it is not indispensably necessary to show that he was called on his subpœna, if it appears clearly from the affidavits in support of the application, that he did not attend the trial, and has wilfully disobeyed the process.—*Todd* v. *Emly*, 7 Jurist 496, *Gough* v. *Miller*, 8 Jurist 758, s. c. 2 Dowl. & L. 23. If the witness on being served with the subpœna does not object to the amount of conduct money, but offers to bear his own expences, he cannot avail himself of the insufficiency of the amount tendered, as an answer to the motion for an attachment. —*Gough* v. *Miller*, *supra*. It is no excuse for disobeying a subpœna, that the witness was in the employ of a manufacturer, who had left him in charge of the work, directing him not to leave it at any time; and that if he had left it, the property would have been damaged.—Ibid. Where the witness attended in court in obedience to the subpœna, but was absent through negligence when the cause was called on, and the record was in consequence withdrawn, a rule for an attachment was discharged without costs, there appearing to have been no wilful contempt.—*Chapman* v. *Davis*, 3 M. & G. 609. It is necessary, in order to bring a witness into contempt for not obeying a subpœna, that the original writ should have been shewn him at the time of serving the copy.—*Smith* v. *Truscott*, 1 Dowl. & L. 530, *Pitcher* v. *King*, 2 do., 755, s. c. 9 Jurist 348. Where a subpœna was served upon an Attorney's clerk, while he was engaged in court winding up a cause which had just been concluded, and which stood next but one before that in which he was required to attend as a witness, it was doubted whether this was such a service as would subject him to an attachment.—Ibid. A subpœna tested in vacation is void, and a witness upon whom it has been served is not liable to an action for not obeying it.—*Edgell* v. *Curling*, 9 Jurist 111.

(*r*) See also Rule of Trinity T., 6 W. 4, post.

(*s*) Service on the wife of the tenant at his dwelling house, is sufficient to entitle the Plaintiff to a rule for judgment *nisi*, against the casual ejector.—*Doe d. Peabody* v. *Roe*, Bert. R. 547. But a service upon any other member of the tenant's family, though upon the premises, is not sufficient, unless it appears that the declaration came to the tenant's knowledge.—*Den d. Trye* v. *Fen*, 1 Kerr 458. Service of a declaration by reading it in a loud voice, and passing a copy under the door of the dwelling house, the tenant being in the house at the time and refusing to open the door or listen to the explanation of the service, is sufficient.—*Doe d. Beatty* v. *Roe*, 2 Kerr 159. In ejectment by a landlord for non-payment of rent, under the Act 50 George III., c. 21, where half a year's rent is in arrear, and no sufficient distress found on the premises, the affidavit of service of the declaration should state the name of the tenant from whom the rent is due.—*Doe d. White* v. *Roe*, Ibid 360.

the declaration lives within the County where the Court sits or not, any former Rule to the contrary notwithstanding.

Awards and Warrants of Attorney.

12. It is Ordered, That when a rule to shew cause is obtained to set aside an Award or Warrant of Attorney, or a judgment entered upon an Award or Warrant of Attorney, the several objections, intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.

Admission of Barristers.

13. It is Ordered, That any Attorney, who, on his being admitted an Attorney, was a Graduate of any College, may be called to the Bar after the expiration of one year from the time of his admission as an Attorney.

HILARY TERM, 6TH WILLIAM IV.—1836.

Motion Paper.

1. It is Ordered, That in future the Clerk of the Pleas do keep a paper, to be called the Motion Paper, in which shall be entered all motions of which notice may have been given, such entries to be made on or before the first day of each term, and to stand in the said paper in the order in which they may be made, and the matters contained in such Motion Paper shall come on to be heard on the second day of the term, before the Special Paper is gone into.

2. It is Ordered, That if notice of any motion, and a copy of the affidavit or affidavits, on which it is intended to be grounded, shall be served on the opposite party, his Attorney or Agent, as the case may be, fourteen days before the term at which the motion is intended to be made, a rule absolute may be made in the first instance, if the Court shall see fit, and in all such cases the cause shall be entered on the Motion Paper.

Judgment as in case of Non-Suit.

3. It is Ordered, That no motion shall be made for Judgment, as in case of a non-suit, pursuant to the Statute, 14 Geo. 2, c. 17, without notice having been first given thereof to the Plaintiff, his Attorney or Agent, as the case may be, together with a copy of the affidavit on which the same is grounded, at least fourteen days

before the term at which such motion is intended to be made, and without entering the same on the Motion Paper. (*t*)

4. It is Ordered, That on motion made in open Court pursuant to the said entry, and on due proof of the service of notice (*u*) and copy of affidavit as directed by the preceding rule, the Defendant shall be entitled to a rule absolute for Judgment as in case of a non-suit, (*v*) unless the Court on just cause (*w*) and reasonable terms shall allow a further time for the trial of the issue, or unless the Court should think fit to enlarge the time for shewing cause to the next term.

(*t*) See *Harris* v. *Beaumont*, 2 Kerr 172.

(*u*) Where the Plaintiff's Attorney was out of the Province, service of a notice by putting it under the door of his office, and leaving a copy where he had lodged while in the Province, and serving a copy on the Counsel in the cause, was held sufficient.—*Wheelock* v. *Alden*, 2 Kerr 172.

(*v*) There is no limit in point of time for a Defendant to apply for judgment as in case of a nonsuit, nor is a term's notice necessary if four terms have elapsed without any proceedings. *Scoullar* v. *Payson*, Chip. MS. 515. Where the Plaintiff has once proceeded to trial and the verdict has been set aside, judgment as in case of a nonsuit will not be granted for not proceeding to a new trial. The Defendant may in such case take the cause down to trial by proviso.—*Turner* v. *Crane*, Ibid 110. So, if the Plaintiff has once taken the cause down to the assizes and it has been made a remanet, the Defendant cannot have judgment as in case of a nonsuit for not going to trial according to a subsequent notice.—*Bennett* v. *Stockford*, 1 Kerr 300, or where no new notice has been given, for not going to trial within the time required by the practice of the Court.—*Gilbert* v. *Dunham*, 2 Kerr 361. Where the Plaintiff, after giving notice of trial, was induced by the Defendant to refer the cause to arbitration, a motion for judgment as in case of a nonsuit, was refused, with costs.—*McDonald* v. *McIntyre*, Bert. R. 280. So, where a cause was entered for trial and postponed till a future circuit on terms of paying costs of the day.—*Gilbert* v. *Dunham*, 2 Kerr 9. Where the Plaintiff had become bankrupt after issue joined, and an assignee was appointed, to whom notice of the state of the cause had been given, judgment as in case of non-suit was granted for not going to trial according to notice.—*Hammond* v. *Wheeler*, 2 Kerr 569. The statute does not extend to a case where the Plaintiff could not be non-suited if he had gone to trial, as in a case of trial by the record.—*Kelly* v. *Coughlan*, 3 Kerr 104. Where issue is joined in vacation it refers to the next subsequent and not the preceding term, although joined as of the preceding term; therefore in such a case, judgment as in case of a nonsuit for not going to trial according to the practice of the Court, cannot be moved for till two terms have elapsed after issue joined.—*McDonald* v. *Rider*, Ibid 645, *McClelan* v. *McClelan*, Mich. T. 1846. If demurrers to certain of the Defendant's pleas are pending, and the Plaintiff gives notice of trial of the issues in fact, but does not try pursuant to his notice, the Defendant is entitled to costs of the day, but not to judgment as in case of nonsuit.—*Milton* v. *Griffiths*, 1 Dowl., N. S. 769.

(*w*) An affidavit stating the absence of a material witness and the belief of the deponent that the testimony would be procured at the next circuit, is not sufficient to oppose a motion for judgment as in case of a nonsuit; it ought to be shewn that some effort was made to procure the attendance of the witness, or what prospect there is of his attending the next circuit.—*Mitchell* v. *Cuppage*, Bert. R. 277. The Plaintiff's reasons for not going to trial ought to be shewn, and that he intends to proceed in the suit.—*Katham* v. *Hawkes*, 1 Kerr 535. The temporary mental derangement of a witness is a sufficient cause for discharging the rule for judgment as in case of a nonsuit, on giving a peremptory undertaking and paying costs of the day, it appearing that the witness had subsequently recovered.—*Sangster* v. *Saunders*, Bert. R. 278. So, the absence of a material witness from the Province, during the sitting of the Court.—*Kirk* v. *Payne*, 1 Kerr 525. An affidavit of the Plaintiff stating that the record was withdrawn, "because he was advised by his Counsel that the evidence of B. was necessary and material, that B. *now* resides in Boston, and he hoped to be able to procure his testimony at the next circuit," was considered a sufficient excuse.—*Desmond* v. *Yeomans*, 3 Kerr 71. So, the absence of material documentary evidence which belonged to a person who was willing to produce it, but could not procure it in time for the trial, is sufficient.—*Doe* v. *King*, Ibid 72.

Non Pros.

5. It is Ordered, That no Judgment of Non Pros shall be signed for want of a declaration, replication, or other subsequent pleading, until ten days next after a demand thereof shall have been made in writing upon the Plaintiff, his Attorney, or Agent, as the case may be. (*x*)

Demurrer Books.

6. It is Ordered, That Demurrer Books (*y*) be delivered to the Judges on or before the first day of the term at which the Demurrer is to be argued, the books for the Chief Justice and senior Puisne Judge to be prepared and delivered by the Plaintiff's Attorney, and the books for the two junior Judges by the Defendant's Attorney: and that the same rule do also apply to other cases in which paper books are required by the practice of the Court to be delivered to the Judges.

Bills of Particulars.

7. It is Ordered, That a copy of the Bill of Particulars of the Plaintiff's demand, and also of the Defendant's set off (if any) shall be filed by the Plaintiff's Attorney, with every record of Nisi Prius, at the time of entering the same.

Judge's Summons.

8. It is Ordered, That it shall not be necessary to issue more

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The absence of a material witness in a distant part of the Province, who was unable to attend the trial without serious loss, greatly disproportioned to the amount in question, was considered a sufficient ground for discharging the rule, where no notice of trial had been given.—*Scovil* v. *Eaton*, Ibid 73.

A peremptory undertaking to try a cause, will not be enlarged because the Plaintiff was advised by Counsel at the circuit that the declaration should be amended.—*Marshall* v. *Winslow*, Chip. MS. 539; nor because a witness who resided in town was not in Court when the cause was called on.—*Doe* v. *Wiswell*, Bert. R. 127. The Plaintiff must shew that he has used all reasonable and ordinary means to fulfil the undertaking; an affidavit stating that certain documentary evidence was necessary to make out the Plaintiff's case, which he thought was in his possession, but on search, found that he had given it to a person who had gone to England, is not sufficient.—*McDonald* v. *Thompson*, 2 Kerr 700. A peremptory undertaking will not be discharged on account of the Defendant having gone out of the jurisdiction of the Court.—*Leslie* v. *Rae*, Bert. R. 32. Judgment, for not proceeding to trial at the Sittings according to a peremptory undertaking, cannot be moved for until the term succeeding the Sittings at which the Plaintiff undertook to try the cause.—*Groves* v. *Sisson*, 1 Kerr 102. It is not necessary to give notice of such a motion, and if notice is given, and copies of affidavits served, the Defendant is not entitled to the costs of those proceedings.—*O'Regan* v. *Robinson*, Mich. T., 1846.

Where suspicion attaches on the Defendant of having been instrumental in keeping a material witness for the Plaintiff, out of the way of being served with a subpœna, a peremptory undertaking will be enlarged.—*Robertson* v. *Crandall*, 1 Kerr 56. And where the Defendant had given notice of trial by proviso, which he afterwards countermanded when it was too late for the Plaintiff to give notice, the peremptory undertaking was enlarged, the Plaintiff appearing to have been misled by the Defendant's notice.—*Gilbert* v. *Gooden*, 2 Kerr 374.

(*x*) See Ante p. 2, note (*k*), and post rule 13, Hilary T., 2 Vict.

(*y*) See rule 3, Trinity T., 3 Vict., Mich. T., 9 Vict., and Hilary T., 9 Vict.

that one summons for attendance before a Judge upon the same matter, and the party taking out such summons, shall, if the Judge see fit, be entitled to an order on the return of the summons, unless cause is shewn to the contrary.

TRINITY TERM, 6TH WILLIAM IV.—1836.

Ejectment.

IT IS ORDERED, That the notice to appear in Ejectment, shall not be made in future for the return day in the second week of the term; but for the term generally, or the Tuesday or Saturday in the first week.

HILARY TERM, 7TH WILLIAM IV.—1837.

Agents.

1. WHEREAS it is deemed improper that any clerk in the Office of the Clerk of the Pleas of this Court should act as an agent of any Attorney with or without any remuneration or gratuity, It is ordered, That henceforth no Attorney of this Court do employ any such clerk as his agent in any suit or matter pending in this Court, or in the transaction of any business in the office either of the Clerk of the Crown, or Clerk of the Pleas; and that the Clerk of the Pleas do not allow or suffer any clerk or other person employed in his office to act as such agent under any pretence whatsoever.

Filing Entry Dockets, &c.

2. IT IS ORDERED, That from and after this present Hilary Term, every Attorney of this Court enter the return and file the Writ or Process (*z*) in all actions which have not at or before such return been settled or discontinued, and make and file with the Clerk a docket of all such returns and rules, on or before the last return day of the term at which such Writs are returnable, or within thirty days thereafter; and that the Clerk do not in future receive or file any docket, or enter any such rule after the said thirty days, without the special order of the Court or a Judge, to be made on affidavit or affidavits, properly accounting for the delay.

(*z*) If the cause is not entered in due time it will be considered out of Court, and if the action is bailable, the bail will be discharged on application.—*Muldoon* v. *Beveridge*, 2 Kerr 532.

Examining Witnesses upon Interrogatories.

3. It is Ordered, That the party applying for the examination of a witness or witnesses de bene esse, under the Act 26 Geo. III., c. 20, or for an order for such examination, or for the issuing a commission, under the Act 5 William IV., c. 34, do state in the affidavit or affidavits upon which such application is founded, the nature of the action, the venue, and the state of the pleadings or proceedings at the time of such application; also the name of the opposite Attorney or agent: and do also, whenever time will permit, give notice of such application, together with a copy of the affidavit or affidavits, to such Attorney or agent. (*a*)

Warrants of Attorney.

4. It is Ordered, That no judgment be signed upon any Warrant authorising any Attorney to confess judgment without such Warrant being delivered to, and filed by the Clerk.

5. It is Ordered, That every Attorney of this Court who shall prepare any Warrant of Attorney to confess any judgment which is to be subject to any defeazance, do cause such defeazance to be written on the same paper or parchment on which the Warrant of Attorney shall be written, or cause a memorandum in writing to be made on such Warrant, containing the substance and effect of such defeazance. (*b*)

6. It is Ordered, That no Sheriff, Bailiff, or Sheriff's Officer, shall presume to exact or take from any person or persons being in his custody (*c*) by arrest, any Warrant to confess judgment, but in

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(*a*) The application should not in general be made till after issue joined, for till then, it cannot be positively decided whether the witness is material or not.—*Mondel* v. *Steele*, 8 M. & W. 300, *s.* c. 9 Dowl. 812. Though perhaps it might be granted before issue joined, where it is clear what the issue must be.—*Chit. Arch.*, 8th ed. 315. The name of the witness should generally be stated.—*Gunter* v. *McTear*, 1 M. & W. 201. But it was recently held at Chambers, by Carter J., in the case of *Furlong* v. *Akerley*, on the authority of *Scott* v. *VanSandau*, 8 Jur. 1114, that the affidavit to obtain a summons need not state the name of the witness. In *Scott* v. *VanSandau*, it was made part of the order that the names of the witnesses should be furnished to the opposite party ten days before the commission issued. In *Coul* v. *Kinnersley*, 8 Jur. 364, *s.* c. 6 M. & G. 981, a commission was allowed to issue, though the names of none of the witnesses were stated, the Defendant being an executor and paying the amount claimed into Court: and in *Hillyer* v. *Cronk*, Chip. MS. 3, an order was made for a commission to examine witnesses in New York, without the names of the witnesses being stated. The affidavit in support of the application need not state the nature of the evidence the witness is expected to give.—*Strachan* v. *Green*, 9 Jur. 584.

(*b*) The omission of a defeazance is not a ground for setting aside a judgment entered up on a warrant of Attorney.—*Lunt* v. *Eslabrooke*, 3 Kerr 144.

(*c*) Where a prisoner agreed to execute a Warrant of Attorney to the Plaintiff for the express purpose of being released from confinement, whereupon the gaoler discharged him from the room in which he had been confined, and he went into another room in the gaol and executed the Warrant of Attorney; it was held that he was substantially in custody, and that the presence of an Attorney was necessary.—*Ledden* v. *Hanson*, 1 Kerr 90; but where the Warrant of Attorney was executed in pursuance of a promise made by the Defendant while he was under arrest, he having been actually discharged from the arrest before executing it, and not being then in any confinement; the presence of an Attorney was considered unnecessary.—*Scoullar* v. *Grass*, Ibid 527.

the presence of an Attorney for the Defendant, which Attorney shall then subscribe his name thereto; and that no Attorney do acknowledge or enter any judgment by color of any Warrant given by any Defendant being under arrest, otherwise than is as aforesaid.

MICHAELMAS TERM, 1st VICTORIA.—1837.

Admission of Attornies.

WHEREAS it is expedient, that every person desirous of being admitted as an Attorney of this Court, should, before such admission, be examined as to his fitness and capacity to act as such Attorney, It is Ordered, That the Judges of this Court, together with four Barristers of not less than five years standing, to be for that purpose appointed by rule of Court in Hilary Term in every year, or any two of them, whereof a Judge to be one, shall be competent to conduct the examination of any person who may have made application for admission as an Attorney of this Court in the form hereafter mentioned; and that from and after the last day of next Hilary Term, subject to such appeal as hereafter mentioned, no person shall be admitted to be sworn as an Attorney of this Court without the production of a certificate signed by such examiners, testifying his fitness and capacity to act as an Attorney.

2. IT IS ORDERED, That the said examination shall be held at such times and places respectively, and under such regulations as the Judges, or any three of them, may from time to time appoint.

3. That in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission, by petition in writing to the Judges; which application shall be heard by not less than three of the Judges, at such time and place as they may appoint.

4. That every person who may desire to be admitted an Attorney, shall, on or before the Thursday in the first week of the term immediately preceding that at which he shall propose to be admitted, make application by Petition to the Court, in the form hereunto annexed, or to the like effect, which petition shall be accompanied by the requisite certificates of the age, moral character, and service (*d*) of the applicant; and the certificate of moral character shall be full, positive and explicit, and shall contain particular testimonials to the

(*d*) See ante page 12, rule 1, Hilary Term, 4 Geo. IV., and post rule 2, Trinity T., 5 Vict.

sober and temperate habits of the applicant, and the Court, if satisfied with the certificates, will, during such term, make order for the examination of such applicant.

5. That the foregoing rules touching examination, shall extend to persons who may apply for admission upon certificates from any other part of Her Majesty's dominions, as well as to persons who may have pursued their studies in this Province; and any person coming from any other part of Her Majesty's dominions shall produce a certificate from the Court in which he may have become a practitioner, or one of the Judges thereof, that he has conducted himself with credit and reputation since his admission there. (*e*)

6. That no Attorney of this Court who shall have been absent from the Province, or have discontinued the practice of the Law for the space of five years together, shall hereafter be permitted to commence or resume practice as an Attorney until he be re-admitted and re-sworn.

7. That every Attorney who may desire to be re-admitted, shall apply by petition to the Court, stating therein the place or places in which he may have resided, and the business, professsion or employment in which he may have been engaged or concerned since his first admission; which petition shall be verified by the affidavit of the petitioner, and shall be presented to the Court on or before the Thursday in the first week of the term, immediately preceding that at which he may desire to be re-admitted.

8. That every applicant for re-admission shall be examined as to his fitness and capacity to act as an Attorney, in the same manner as if applying for a first admission, unless the Court shall see fit in any case to dispense with such examination, and shall make order accordingly.

9. That from and after the present Michaelmas Term, no Attorney of any other part of Her Majesty's Dominions shall be admitted as an Attorney of this Court, unless he shall have entered as a Student with one of the Attornies of this Court, having the rank of Barrister, and resident and practising in the Province, and shall have continued as such Student for one year; the entry of every such Student to be registered with the Clerk, as in the case of other Students; and a certificate of such year's study from the Barrister with whom the same may have been performed shall be one of the testimonials necessary for the admission of such applicant.

(*e*) See rule 2, Hilary Term, 4 Geo. IV., ante page 12, and post rule 9 of this term.

Form of Petition for Admission as an Attorney.

To the Honorable the Chief Justice, and Justices of the Supreme Court.

The Petition of A. B. Humbly Sheweth,

That your petitioner was born in on [*state the place and day of birth*], as by the accompanying certificate (*or* affidavit) will appear. That on he entered as a Student in the office of C. D., Esquire, a Barrister of this Court, at in this Province, and has continued as such from that time hitherto; during which time he has not absented himself without the permission of the said C. D., nor been engaged in any other profession, business or employment.

[*If the applicant have studied part of the time with any other Barrister, or been absent without permission, or engaged in any other profession, business or employment, since commencing his studies, he must state fully the reasons therefor, the particular time and length of such other study, or absence, or engagements in other pursuits, together with such other particulars as he may think advisable, explanatory of his conduct. If the applicant have not studied in this Province, he must state the particular grounds on which he applies for admission, the place or places in which he may have resided and practised since his admission by any other Court; and if he have been engaged in any other profession, business or employment, he must state the particulars of the same, with any other matters explanatory of his conduct and pursuits as he may deem necessary or advisable.* *]

That your petitioner is at present resident at and is desirous of being admitted an Attorney of this Honorable Court at the ensuing Term, and prays that your Honors will make such order touching his examination or admission as by the rules of the Court are required, or as to your Honors may seem meet. Dated the day of, 18 .

* If the petitioner's full time of study has not expired at the time of application, he must further state his intention to continue a Student in the Barrister's office until such time expires, and will be required to produce an additional certificate to that effect at the ensuing term.

New Trials.

10. WHEREAS it is desirable, that arguments on rules for new trials or the like, made in causes tried at the Sittings for the County of York, should be heard and disposed of more speedily than can be done under the present practice of the Court: It is Ordered, That in future any party intending, after trial had at the said Sittings, to move the Court for a rule to shew cause why a new trial should not be granted, or for any rule of a like description, do give notice

to the opposite party of such his intention, together with a note in writing, specifying the general grounds of the intended motion, thirty days before the ensuing term, (*f*) and that rules nisi granted on such motions be made returnable in the same term, unless the Court should see fit, with the consent of parties, or for other good reason, to extend the time for shewing cause to the ensuing term.

TRINITY TERM, 1st VICTORIA.—1838.

Judgment in Debt.

IT IS ORDERED, That the entry of the judgment on the record, in actions of debt, where the amount to be recovered is ascertained and assessed by the Court, under the Act of Assembly, 7 W. IV., c. 14, s. 6, shall be in the following form, or of the like tenor and effect, viz.:

"And the said A. B. *(the Plaintiff)* prays that the amount to be recovered in this action, may be ascertained and assessed by the Court here, according to the form of the Act of Assembly, in such case made and provided; and thereupon it is suggested and proved, and manifestly appears to the Court here, that the said A. B. ought to recover for his debt in this action, the sum of £———: therefore it is considered that the said A. B. do recover against the said C. D. *(the Defendant)* the said sum of £———, for his debt, so ascertained and assessed by the Court here, and also, &c., *(proceed with the entry in regard to costs, in the usual form,)* and the said C. D. in mercy, &c.

MICHAELMAS TERM, 2d VICTORIA.—1838.

Summary Actions.

ORDERED, That in future, in Summary Actions tried at Nisi Prius, a copy of the plea, instead of the original plea, may be filed in the Court of Nisi Prius as a part of the record. (*g*)

(*f*) This notice is necessary, though points have been reserved at the trial.—*Turner v. Hammond*, 2 Kerr 536.

(*g*) See Rules of Trinity T., 5 W. 4, ante page 21.

Proceedings against Prisoners.

1. It is Ordered, That from and after the last day of this term, in all cases where a Prisoner is or shall be taken, detained or charged in custody by mesne process thereafter returnable, issuing out of this Court, and the Plaintiff shall not cause a Declaration against such Prisoner to be delivered to such Prisoner, or to the Sheriff in whose custody such Prisoner is or shall be detained or charged, within three calendar months after the return of the Process by virtue whereof such Prisoner is or shall be taken, detained, or charged in custody; and cause an affidavit to be made and filed with the Clerk of this Court, of the delivery of such Declaration, and of the time when, and the person to whom the same was delivered, before the last day of the term next after the delivery of such Declaration, the Prisoner shall be discharged out of custody by writ of *supersedeas* to be granted by this Court, or one of the Judges thereof, upon filing common bail; unless upon notice given to the Plaintiff's Attorney, good cause shall be shewn to the contrary; and in case of a commitment or render in discharge of bail, after the return of process, and before a Declaration delivered, unless the Plaintiff shall cause a Declaration to be delivered, and an affidavit thereof made and filed; before the end of the term next after such commitment or render shall be made, and due notice of such render given, the prisoner shall be discharged out of custody by writ of *supersedeas* to be granted as aforesaid, upon filing common bail, unless upon notice given to the Plaintiff's Attorney good cause shall be shewn to the contrary.

2. That on every Declaration so to be delivered against a prisoner as aforesaid, a rule to appear and plead shall be indorsed according to the form following, that is to say, "The Defendant, C. D., is to appear and plead hereto at the suit of the Plaintiff, A. B., within twenty days after service of this Declaration; otherwise judgment will be entered against him by default."

G. H., Plaintiff's Attorney.

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And that judgment shall not be entered against such Defendant by default until the expiration of the said rule.

3. That the Sheriff who shall have received a copy of a Declaration against any prisoner in his custody, shall indorse thereon the time of his so receiving the same, and shall forthwith deliver the same to the said prisoner, and shall also enter in a book to be by

him kept for that purpose, the time of receiving such Declaration, and of delivering the same to the prisoner.

4. That where the Plaintiff declares against the prisoner, it shall not be necessary to make more than two copies of the Declaration, of which one shall be served, and the other filed with an affidavit of service, and a copy of the Rule to appear and plead indorsed thereon.

5. That upon application made by the Plaintiff, before the time at which the Defendant may be supersedable, and good and sufficient cause shewn by affidavit, further time to declare may be given by rule of Court or order of a Judge.

6. That upon every application for a *supersedeas* for want of declaring in due time, in addition to the certificate of the Sheriff that no Declaration has been delivered to him for the prisoner, there shall be an affidavit of the Defendant, that he has not been served with such declaration.

7. That unless the Plaintiff shall proceed to trial or final judgment within three terms next after the delivery or filing of Declaration, if by the course of this Court the Plaintiff can so proceed; of which three terms, the term wherein such Declaration shall be delivered shall be taken to be one; or if by the course of the Court the Plaintiff cannot so proceed to trial or final judgment within the time above limited; then unless the Plaintiff shall proceed to trial or final judgment as soon after as by the course of this Court he may so proceed, the prisoner shall be discharged out of custody by writ of *supersedeas* to be granted as aforesaid, upon filing common bail, unless upon notice given to the Plaintiff's Attorney good cause shall be shewn to the contrary.

8. That in all cases after final judgment obtained against a prisoner, unless the Plaintiff shall cause such prisoner to be charged in execution, within three calendar months next after the day on which such final judgment shall be signed—in case no writ of error shall be depending, nor injunction be obtained for stay of proceedings; and if any writ of error shall be depending or injunction be obtained, then within three calendar months next after judgment shall be affirmed, the writ of error be nonprossed or discontinued, or the injunction dissolved; the prisoner shall be discharged out of custody by *supersedeas* to be granted as aforesaid, unless upon notice given to the Plaintiff's Attorney, good cause shall be shewn to the contrary.

9. That after trial had, unless the Plaintiff do proceed to have his judgment entered up and signed as soon as by the course and prac-

tice of this Court he may so do, or within one calendar month thereafter, in case no such injunction shall be obtained or order made for stay of proceedings; and if any such injunction shall be obtained, or order made, then within one calendar month after such injunction shall be dissolved or order discharged, the prisoner shall be discharged out of custody, in like manner as in the last preceding rule is provided.

10. That in case of a render in discharge of bail after final judgment obtained, unless the Plaintiff shall cause the Defendant to be charged in execution within three calendar months next after such render and due notice thereof given; and in case of render after trial and before judgment, unless the Plaintiff do proceed to have his judgment entered up and signed within the time limited by the last preceding rule, or within one calendar month after such render and due notice thereof, the prisoner shall be entitled to his discharge in manner aforesaid, unless good cause be shewn to the contrary.

11. That no treaty or agreement shall be sufficient cause to prevent any prisoner's having the benefit of a *supersedeas*, unless the same be in writing, signed by the prisoner or his Attorney, or some person duly authorised by such prisoner. (*h*)

Writ of Scire Facias under Act 26, Geo. III., c. 24.

12. ORDERED, That the Writ of *Scire Facias* to be issued under the Act of Assembly, 26 Geo. III., c. 24, shall be in the form following, or to that effect; adding in the body of the same any special matter which in particular cases may be deemed requisite.

Victoria, &c. To the Sheriff of Greeting.

Whereas A. B., lately in our Court before us at Fredericton, impleaded C. D. and E. F. in a plea of , (the said C. D. having been duly taken and brought into Court by virtue of process issued in the said suit against the said C. D. and E. F., and the said E. F. not having been taken and brought into Court by virtue of such process) and did afterwards by the judgment of the same Court recover as well against the said E. F. as the said C. D., [*state the recovery*] in the same manner as if they had both been taken and brought into Court, pursuant to the Act of Assembly in such case made and provided, whereof the said C. D. and E. F. are convicted as by the record and proceedings thereof still remaining in our same Court manifestly appear.

And now on behalf of the said A. B. in our same Court, we are

(*h*) An agreement between the parties that no advantage should be taken of the omission to charge the Defendant in execution, cannot affect his sureties in a limit bond unless made with their privity; therefore if before his escape the Defendant had become supersedeable, the sureties are entitled to be discharged.—*Gordon* v. *French*, 2 Kerr 610.

informed that although judgment be thereupon given, yet satisfaction of the [debt and] damages aforesaid still remains to be made to him; and he is desirous of executing an Execution for such [debt and] damages against the body, or the lands or goods, the sole property of the said E. F., whereof the said A. B. hath humbly besought us to provide him a proper remedy in this behalf: And we being willing that what is just in this behalf should be done, command you that by honest and lawful men of your Bailiwick, you make known to the said E. F., that he be before us at Fredericton, on to shew if he has or knows of any thing to say for himself, why the said A. B. ought not to have execution for the [debt and] damages aforesaid, to be executed against the body or the lands or goods, the sole property of him, the said E. F., according to the force, form and effect of the said recovery, and pursuant to the said Act of Assembly in such case made and provided, if it shall seem expedient for him so to do; and further to do and receive what our said Court before us shall then and there consider of him in this behalf: and have you there the names of those by whom you shall so make known to him, and this Writ. Witness, &c.

Judgments by Default and Non-Pros.

13. ORDERED, That in future where the Defendant in any action shall plead one or more special pleas, and serve copies on the Plaintiff's Attorney, with rule to reply in twenty days, the Plaintiff shall file and deliver his replication in twenty days from the time of such service of plea and rule, and in default thereof the Defendant shall be entitled to judgment of *non-pros*, a replication being first demanded after the said twenty days; and in like manner twenty days shall be allowed for every subsequent pleading, and the opposite party shall be entitled to judgment by default or *non-pros*, as the case may be, for not rejoining, surrejoining, &c., a rule to rejoin, surrejoin, &c., being served and demand made as aforesaid, unless the Court or a Judge shall think proper to allow further time. Provided that no such judgment of *non-pros* or default shall be signed until ten days after demand of replication, rejoinder, &c. (i)

14. That all such rules to reply, rejoin, surrejoin, &c., may be taken out in vacation and entered as of the preceding term, the Attorney delivering to the Clerk a præcipe for such rule.

TRINITY TERM, 2D VICTORIA.—1839.

Payment of Money into Court.

1. WHEREAS by an Act passed in the first year of Her Majesty's

(i) See Rule 5, Hilary T., 6 W. 4, ante page 26.

reign, intituled "An Act for the further amendment of the Law," it is enacted "that it shall and may be lawful for the Defendant in all personal actions (*k*) depending or to be brought in the Supreme Court of this Province, (except actions for assault and battery, (*l*) false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or debauching of the Plaintiff's daughter or servant,) by leave of the said Court or a Judge of such Court, (*m*) to pay into the said Court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs, and the form of pleading, as the said Court, or any three of the Judges thereof, shall, by any rules or orders by them to be from time to time made, order and direct."

ORDERED, That when money is paid into Court under the said Act, such payment shall be pleaded, and as near as may be in the the following form, *mutatis mutandis*:—

"C. D. } And the said Defendant comes by E. F., his Attorney,"
ats. } (*or* "in person, &c.") and says (*or in case it be pleaded*
A. B. } *as to part only, add* "as to —— being part of the sum in the Declaration, or —— Count of the Declaration mentioned," *or* as to the residue of the sum of ——) that the Plaintiff ought not

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(*k*) In Replevin the Defendant may pay money into Court as to part of the distress, and avow as to the residue.—*Lambert* v. *Hepworth*, 2 Q. B. 729.

(*l*) This means an assault upon the Plaintiff or his wife: if the assault is upon a person in whose service the Plaintiff has an interest, as his child or servant, the case is not within the exception of the statute, and the Defendant may pay money into Court.—*Newton* v. *Holford*, 9 Jurist 334.

(*m*) In 3 Chit. Gen. Pr. 690, it is recommended, in applying to a Judge for leave to pay money into Court under the English Act 3 & 4 W. 4, c. 42, s. 21, (of which this is a copy) to make an affidavit of the facts, and take out a summons, to be served as in ordinary occasions, and that at the time of hearing, such affidavit and a copy of the declaration should be produced and the object of the application concisely stated. The practice will also be found in Chit. Arch., 6th ed., 1015—1027, but it may be useful to refer to some of the more recent cases shewing the effect of the payment.

If it is paid in on the whole of a special declaration, or on the special counts, it admits the contract as declared on, and all the breaches on which it is paid in, and the only question to be determined is the amount of damages.—*Wright* v. *Goddard*, 8 A. & E. 144. But where the Plaintiff declared on a contract for a certain salary, alleging the amount under a videlicet, and stating as a breach, that the Defendant had discharged him without a notice agreed upon, and without a proportionable part of the salary: it was held, that as the amount of salary was not material in itself, and the Plaintiff would not, if the contract had been denied, have been bound to prove it as laid, the Defendant did not admit it by paying money into Court. —*Cooper* v. *Blick*, 2 Q. B. 915. And in *Goff* v. *Harris*, 5 M. & G. 573, where the Plaintiff declared in debt for rent on a demise, with a count for fixtures sold, and claimed by his particulars £5 5*s*. for rent, and £12 for fixtures; it was held that a payment of £11 5*s*. into Court generally, was no admission of the Defendant's liability for the fixtures, to a greater amount than had been paid in. In *Charles* v. *Branker*, 11 M. & W. 743, the declaration contained a special count charging the defendants as partners, and also the indebitatus counts: it was held that a payment of money into Court on the latter counts was no admission of the partnership alleged in the former. Neither is a payment into Court on the indebitatus counts, an admission of any liability beyond the sum paid in, however special the particulars of demand may be.—*Stevenson* v. *Mayor &c., of Berwick*, 1 Q. B. 154; see also *Hingham* v. *Robins*, 7 Dowl. 352.

further to maintain his action, because the Defendant now brings into Court the sum of —— ready to be paid to the Plaintiff, and the Defendant further says that the Plaintiff has not sustained damages (*or in actions of debt* "that he is not indebted to the Plaintiff") to a greater amount than the said sum of &c., in respect to the cause of action in the Declaration mentioned," (*or* "in the introductory part of the plea mentioned) and this he, the Defendant, is ready to verify, wherefore he prays judgment, if the Plaintiff ought further to maintain his action thereof against him;" and no other plea shall be pleaded to the said action, or to so much thereof as the said plea of payment into Court is applicable.

2. It is Ordered, That upon a rule or Judge's order being made for paying money into Court under the said Act, the money shall be paid to the Clerk at the time of filing the plea, together with his poundage thereon, and the Clerk shall make a minute of such payment in the margin of the plea, and shall also give a memorandum of such payment to be delivered with the copy of the plea to the Plaintiff's Attorney; which sum shall be paid out to the Plaintiff's Attorney on demand.

3. It is Ordered, That the Plaintiff, after delivery of a plea of payment of money into Court, shall be at liberty to reply to the same, by accepting the sum so paid into Court in full satisfaction and discharge of the cause of action, in respect of which it has been paid in, and he shall be at liberty in that case to tax his costs of suit, (*n*) and in case of non-payment thereof within ten days, to sign judgment for his costs of suit; or the Plaintiff may reply "that he has sustained damages" (*or* "that the Defendant was and is (*o*) indebted to him" *as the case may be*) to a greater amount than the said sum; and in the event of an issue thereon being found for the Defendant, the Defendant shall be entitled to judgment and his cost of suit: Provided that if the sum of money paid into Court in any action not summary would have been recoverable under the summary form, the Plaintiff, if he take the money out of Court in discharge of the action, shall not be entitled to more than summary costs, unless he obtain the order of the Court or a Judge for the larger costs, upon good cause shewn therefor.

(*n*) The Plaintiff is entitled to tax costs under this rule only when the money is accepted in satisfaction of the whole demand; not where there are other issues on which the parties are proceeding to trial.—*Canty* v. *Gyll*, 4 M. & G. 907.

(*o*) A replication to a plea of payment into Court, that the Defendant was indebted to a larger amount, omitting "and is" is bad on special demurrer.—*Faithful* v. *Ashley*, 1 Q. B. 183.

Interlocutory Judgment.

1. It is Ordered, That Interlocutory Judgment shall not be signed in any case for want of appearance until the process with the requisite Affidavit of service, and (where the case requires) the order of the Court or Judge for perfecting such service, shall be filed.

Service of Process.

2. It is Ordered, That from and after the first day of Michaelmas term next, when service of Process is effected at the usual place of abode of the Defendant, pursuant to the Act 7 W. IV, c. 14, s. 1. the Affidavit of such service shall be in the following form, or to that effect, in order to entitle the Plaintiff to an order for perfecting such service.

Form of Affidavit.

A. B. *(name, residence and addition of Deponent)* maketh oath and saith, that he, this deponent, did on the day of deliver a true copy of the annexed Writ or Process, at the house of C. D., the Defendant, named in such Writ or Process, *(or the house of any other person as the case may be,)* situate in the Parish of in the County of , unto E. F., the wife of such Defendant, *(or* to G. H. an adult person residing in the said house, and known to this deponent as a member or inmate of the family of such Defendant) and this deponent further saith, that the said house was at the time of such delivery the usual place of abode of such Defendant, and that the said copy of the said Process was accompanied with an English notice* in writing to the Defendant, of the intent and meaning of the service of such Process, pursuant to the Statute in such case made and provided; and this deponent further saith, that at the time of making such service of the said Process, the said Defendant was not, as this deponent verily believes, without the limits of the said County."

* The clause as to the notice may be omitted in the service of Summary Writs.

Demurrer.

3. It is further Ordered, That where a general Demurrer shall hereafter be put in to any Declaration or other pleading, the party putting in the same shall deliver at the same time to the opposite party a statement or minute of the grounds of such Demurrer; and if the opposite party intend to rely on any defects in the previous pleading, he shall deliver with the joinder in Demurrer a statement or minute of such alleged defects; and such particulars shall be entered in the margin of the books delivered to the Judges. This regulation to extend

also to cases of Special Demurrer where other grounds are intended to be relied on, than those specifically set out. (*p*)

Trial by Record.

4. It is further Ordered, That in any case of trial by the Record, (*q*) it shall be sufficient for the party to make up and deliver to the Chief Justice one paper book, instead of delivering books to all the Judges, unless the Court should otherwise order in any particular case.

Agents.

5. It is further Ordered, That henceforth no Attorney of this Court do employ any Student in the Office of a Barrister of this Court, as his Agent in any suit or matter pending in this Court, or in the transaction of any business before a Judge, or in the Office either of the Clerk of the Crown or the Clerk of the Pleas; and that no Barrister of this Court do suffer any one of his Students to act as the Agent of any other Attorney. Provided that this rule shall not extend to prevent the employment by a Barrister, who may himself be the Agent of any Attorney, of any Student in his Office in the professional business of such Attorney.

Practice at Chambers.

6. The Judges will in future expect, that in the Assessment of Damages in vacation, as well as in other matters brought before them out of Court, where the parties do not appear in person, they be attended by a Barrister or Attorney of the Court; or where this cannot conveniently be done, that the Clerk or Student employed to attend on behalf of any Attorney, be of competent experience, skill and knowledge of the business entrusted to him.

MICHAELMAS TERM, 4TH VICTORIA.—1840.

Replevin Bonds.

Whereas the Justices of the Supreme Court, or any three of them, are authorised and required by the Act of Assembly, 3 Victoria, c. 63, intituled "An Act further to regulate proceedings in Replevin by allowing damages in certain cases to the Defendant," to frame and prescribe suitable and proper forms for the Replevin Bonds

(*p*) See post, rules of Mich. and Hilary T., 9 Vict.
(*q*) See post, rule Trinity T., 9 Vict.

hereafter to be taken, and for the entering of any verdict or judgment pursuant to the said Act, such forms from the time of the said Act taking effect, to be observed and complied with in the same manner as if the same were in the Act specified and contained, and such forms to be applicable to the Inferior Court of Common Pleas as well as the Supreme Court. Provided that nothing in the said Act contained, shall extend or be construed to extend to affect any proceedings in any action of Replevin commenced before the said Act goes into operation: It is Ordered, That upon and after the first day of January, 1841, being the time appointed for the said Act to commence and take effect, the following forms framed pursuant to the said Act shall be used, with such alterations as the description of the Court, the Officer to whom the Writ is directed, the number and character of the parties or the circumstances of the case may render necessary; but that any variance not being matter of substance shall not affect the validity of the Bonds or entries.

No. 1.—*Replevin Bond.* (r)

KNOW ALL MEN BY THESE PRESENTS, That we *(name and additions of Plaintiff and his sureties)* are jointly and severally held and firmly bound unto Esquire, Sheriff of the County of *(or City and County as the case may be)* in the sum of *(double the value of the goods to be replevied)* of lawful money of New Brunswick, to be paid to the said , his certain Attorney, Executors, Administrators or Assigns; for which payment to be well and truly made, we bind ourselves and each of us, our and each and every of our Heirs, Executors and Administrators, firmly by these Presents, sealed with our Seals. Dated the day of in the year of the reign of our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c., and in the year of our Lord one thousand eight hundred and .

The Condition of this Obligation is such, That if the above bounden *(Plaintiff)* do appear before our said Lady the Queen, at Fredericton, on *(the return day of the Writ of Replevin)* and do then and there prosecute his suit with effect and without delay against *(the Defendant)* for taking and unjustly detaining his goods and chattels, to-wit: *(here specify the goods to be replevied)* and do make a return of the said goods and chattels, if a return of the same shall be adjudged, and do pay all such damages as may be awarded to the said *(Defendant)* pursuant to the Act of Assembly, made and passed in the third year of Her Majesty's reign, intituled "An Act further to regulate proceedings in

(r) If the Bond is not in this form it is bad.—*Pollok* v. *Gardner*, 2 Kerr 655.

Replevin, by allowing damages in certain cases to the Defendant; then this Obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of }

If the Writ be issued out of any Inferior Court of Common Pleas, the condition of the Bond will be as follows:—

"The condition of this Obligation is such, that if the above bounden (*the Plaintiff*) do appear before the Justices of the Inferior Court of Common Pleas for the said County of at on (*as specified in the Writ, or* before the Recorder of the said City of Saint John at the next Inferior Court of Common Pleas, to be holden for the said City and County at the said City on, &c.,) then (*conclude as in the foregoing form.*)

No. 2.—Verdict on Postea where Damages are awarded to the Defendant.

(*Commence in the usual form*). Say upon their oaths, that (*stating the negative or affirmative of the pleading which concludes to the Country, according as it makes for the Defendant*) in manner and form as the said hath "complained against him" *or* "in pleading alleged," and they assess the damages of the said Defendant by reason of the premises to pursuant to the Act of Assembly in such case made and provided, besides his costs and charges, &c., (*as in the usual form.*)

No. 3.—Entry of Judgment on the above.

Therefore it is considered, that the said Plaintiff take nothing by his suit, but that the said Defendant do go thereof without day, &c., and that he have a return of the said goods and chattles, to hold to him irreplevisable for ever. And it is further considered, that the said Defendant do recover against the said Plaintiff his said damages, costs and charges, by the Jurors aforesaid in form aforesaid assessed, and also for his said costs and charges by the Court of our said Lady the Queen, now here (*or in the Inferior Court* "by the Justices here") adjudged of increase to the Defendant, according to the form of the Statute in such case made and provided; which said damages, costs and charges, in the whole amount to , and that the said Defendant have execution thereof.

No. 4.—Entry of Verdict on Postea where the value of the goods is assessed by the Jury.

(*Commence as in form No. 2.*) In manner and form as the said hath complained against him, (*or* in pleading alleged,) and at

the prayer of the said Defendant they further say upon their oaths aforesaid, that the said goods and chattels at the time of the replevying thereof, were worth according to the true value thereof, which they award to the said Defendant in damages according to the form of the Act of Assembly in such case made and provided; and they assess the Defendant's other damages by reason of the premises to pursuant to the said Act, besides his costs and charges, &c., (*as in the usual form.*)

No. 5.—Entry of Judgment on the above.

Therefore it is considered, that the said Plaintiff take nothing by his suit, but that the said Defendant do go thereof without day, &c. And it is further considered, that the said Defendant do recover against the said Plaintiff the said sum of being the value of the goods and chattels aforesaid by the Jury in form aforesaid assessed; and also for his said other damages, costs and charges, by the Court of our said Lady the Queen, now here (*or in the Inferior Court* "by the Justices here") adjudged of increase to the said Defendant, according to the form of the Statute in such case made and provided; which said damages, costs and charges, in the whole amount to , and that the said Defendant have execution thereof.

Admission of Barristers.

2. It is Ordered, That any Attorney who may before his admission have been an Attorney of some other part of Her Majesty's Dominions, and who shall have been a Student in this Province for one year pursuant to the ninth Rule of Michaelmas Term, 1st Victoria, may be called to the Bar after the expiration of one year from the time of his admission as an Attorney of this Court.

Admission of Attornies.

3. It is Ordered, That the admission and enrollment of Attornies may take place on the Thursday in the first week of the Term, if there is no sufficient objection to the applicant.

HILARY TERM, 4TH VICTORIA.—1841.

Ex-Sheriffs.

Ordered, That from and after the last day of this term, when any Sheriff, before his going out of office, shall arrest any Defendant, and a *Cepi Corpus* shall be returned, he shall and may within the

time allowed by Law, be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office, before any such rule shall be granted.

TRINITY TERM, 5TH VICTORIA.—1842.

Demand of Pleas.

1. ORDERED, That where the Attornies for the respective parties reside in different counties, the Defendant's Attorney shall be allowed seven days after demand of plea, wherein to file the plea, and serve the opposite Attorney with a copy thereof, unless the demand be accompanied by a direction to deliver a copy of the plea to some person resident in the same place in which the Defendant's Attorney resides; in which case such copy of plea must be delivered within twenty-four hours, according to the present practice, and the plea forthwith transmitted to the Clerk for filing.

Graduates' Certificates.

2. IT IS ORDERED, That Students, applying for examination after four years' study, on the ground of being Graduates of some College, do, in addition to the certificates now required, produce certificates from the President, Vice President, or some resident Professor of the College, stating the particular period during which their Collegiate studies have been pursued.

HILARY TERM, 6TH VICTORIA.—1843.

Delivery of Pleas.

ORDERED, That in future copies of all pleas shall be delivered to the Plaintiff's Attorney within the time allowed for pleading; otherwise the Plaintiff shall be at liberty (demand of plea being duly made) to sign interlocutory judgment; and that it shall not be necessary to search for a plea before such signing, after the expiration of the rule to plead.

TRINITY TERM, 6TH VICTORIA.—1843.

Admission of Students.

1. WHEREAS it is expedient that there should be an examination of persons who may hereafter desire to enter upon the study of the

Law, in order to their admission as Attornies of this Court, It is Ordered, That such and so many Barristers as may for that purpose from time to time be appointed by rule of Court, or any two of them shall be competent to conduct the examination of any person who may have made application to be admitted a Student; and in order to such examination, application shall be made by petition to this Court by such person, stating his age, place of birth, and present residence; the name and place of residence of his father or guardian, and the several branches of education in which he may have been instructed; and that proper certificates as to character and habits shall accompany every such petition; and this Court will thereupon make such order for the examination or otherwise, as may appear necessary and proper.

2. That no entry shall be made in the Clerk's book of any Student, nor shall he be deemed to have commenced his study of the Law with any Barrister, until he produce the certificate of the examiners before whom his examination may be had, testifying his fitness and capacity.

3. That in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply, by petition, to the Judges, who will make such order thereupon as the case may in their opinion require.

4. That every Student who may be transferred from one Barrister to another, during the progress of his studies, shall forthwith deliver to the Clerk a memorandum of such transfer, accompanied by a certificate of the Barrister whose office he may be desirous of leaving; or in case of his death, absence, or refusal to grant such certificate, the certificate of the Barrister to whose office he is transferred, of the cause and reason of such transfer.

5. That the aforegoing rules shall not extend to persons who may already have been admitted as Attornies in any other part of Her Majesty's Dominions; but that such persons, before being registered as Students under the ninth Rule of Michaelmas Term, 1st Victoria, shall apply, by petition, to the Court, accompanied by the requisite certificates; and the Court will make order thereupon.

6. That if any person, who may, after his commencing to study the Law, have discontinued the same, shall be desirous of resuming his studies, he shall apply, by petition, to the Court for that purpose, who will make such order thereupon in regard to the time of his previous study, as may appear meet; otherwise the time of such former study shall not be allowed to such Student.

MICHAELMAS TERM, 7TH VICTORIA.—1843.

Pleas in Abatement. (*s*)

ORDERED, That no plea in abatement shall be filed after the expiration of the rule to plead.

MICHAELMAS TERM, 8TH VICTORIA.—1844.

Security for Costs.

1. ORDERED, That the rule of Trinity Term, 30 George III., be rescinded, and that in future where security for costs is ordered, such security shall be given in the sum of forty pounds in all cases, except in summary; and that in summary cases, security shall be given in the sum of twenty pounds. (*t*)

(*s*) See post Sect. II. title "Abatement."

(*t*) Before applying to a Judge at Chambers, a demand of security should be made on the Plaintiff's Attorney, and the affidavit should shew such previous request and refusal, or no stay of proceedings will be granted.—3 Chit. G. Pr., 635. But the demand may be by post. —*Abbot* v. *Ledden*, Bert. R. 33. The affidavit in support of the summons or rule should state positively that the Plaintiff is out of the jurisdiction of the Court: stating it, "as deponent is informed and believes," is not sufficient; and the application being discharged on account of a defective affidavit, cannot be renewed upon an amended one.—*Joynes* v. *Collinson*, 13 M. & W. 558. The application should be made at the earliest opportunity after appearance and justification of bail, and before any further proceedings by the Defendant; but a demand of particulars is not such a step in the cause as will prevent the Defendant from obtaining the security.—*Johnson* v. *Glazier*, Chip. MS. 56. If the application is not made till after the Defendant has pleaded, his affidavit must state that at the time of pleading he did not know of the Plaintiff's absence.—Ibid. If the Plaintiff goes out of the jurisdiction after issue joined, the application must be made at the earliest opportunity after knowledge of his absence.— *Gibbs* v. *De Veber*, Bert. R. 78. In *Vance* v. *Campbell*, 1 Kerr 163, security for costs, without a stay of proceedings, was granted after issue joined and notice of trial given, though the Defendant knew of the Plaintiff's absence before receiving the declaration, and might have applied sooner to a Judge at Chambers. But this was because the practice of making such applications at Chambers had not then been of long continuance in the Province.

If security for costs with a stay of proceedings is obtained in a bailable action, the bail will be discharged unless the Plaintiff proceeds in a reasonable time.—*Hill* v. *Rind*, Bert. R. 281. Where one of the obligors in a bond given for security of costs is a necessary witness in the cause he may be rendered competent, by the Plaintiff paying the Clerk of Nisi Prius at the trial the amount of the penalty of the bond.—*Fraser* v. *Harding*, 3 Kerr 94. If the Defendant will not accept the security offered, it may be approved of by the Clerk.—Chit. Arch. 7th ed., 1018. For this purpose get an appointment from the Clerk of a time for approving of the security, and serve a copy on the Defendant's Attorney with the names of the securities: at the time appointed, attend the Clerk with an affidavit to prove the sufficiency of the security offered, and if it is approved of, he will make an indorsement to that effect on the bond, which may then be delivered to the Defendant's Attorney.

The following form of Bond for securing costs, with some slight alterations, is taken from Chitty's Forms, 570:—

Know all Men by these Presents, that we [*the common form of a joint and several bond.*]

Whereas a certain action hath been lately commenced, and is now depending in Her Majesty's Supreme Court at Fredericton, wherein —— is Plaintiff, and the above named —— is Defendant, and by reason of the said Plaintiff's residing out of the jurisdiction of the said Court, the said Defendant has applied to the said Plaintiff (*or* obtained an order for the said

Side-Bar Rules.

2. It is Ordered, That no side-bar rule shall be taken out for the return of any writ after six months from the day on which such writ is made returnable; and that after such six months, motion be made in open Court, or the order of a Judge obtained, before any such rule do issue. (*u*)

TRINITY TERM, 8th VICTORIA.—1845.

Consent Rule.

Ordered, That in every action of ejectment, when any person or persons shall apply to be made Defendant or Defendants in such action, and be allowed to enter into a special consent rule to admit lease and entry, but not ouster, unless an actual ouster of the lessor of the Plaintiff by him or them should be proved, on the ground that the defence to the action will involve a question of joint tenancy or tenancy in common; the affidavit on which such application is founded shall state the person or persons with whom the party so applying, claims to be joint tenant or tenant in common, and that he is advised and believes that he is joint tenant or tenant in common, with such person or persons.

MICHAELMAS TERM, 9th VICTORIA.—1845.

Demurrer Books.

Ordered, That if either party make default in the delivery of the demurrer books, as required by the rule of Hilary Term, 6 Wm. IV., the other party who has complied with the rule, may move for judgment without having delivered books to all the Judges.

Plaintiff) to give security for the costs in the said cause, in case the said Plaintiff shall be non-suit, discontinue, or a verdict be given for the said Defendant. And whereas the said (*obligors*) have agreed to enter into the above written bond as security for the payment of such costs of the said Defendant, with such condition as is hereinafter contained. Now therefore the condition of the above written bond or obligation is such, that if the above bounden (*obligors*) or either of them, their, or either of their heirs, executors, or administrators shall, and do well and truly pay, or cause to be paid unto the said (*defendant*) or his executors, administrators or assigns, such costs as the said (*Plaintiff*) shall in due course of Law be liable to pay, in case he shall discontinue, become nonsuit, or a verdict shall pass against him in the said action, such costs to be first taxed by the Master in the usual manner, then the above obligation to be void, otherwise to be and remain in full force and virtue.

(*u*) The affidavit on which the motion is made, should state the nature of the writ.—*Sands v. Bell*, Mich. T., 1846.

HILARY TERM, 9TH VICTORIA.—1846.

Demurrers and Special Cases.

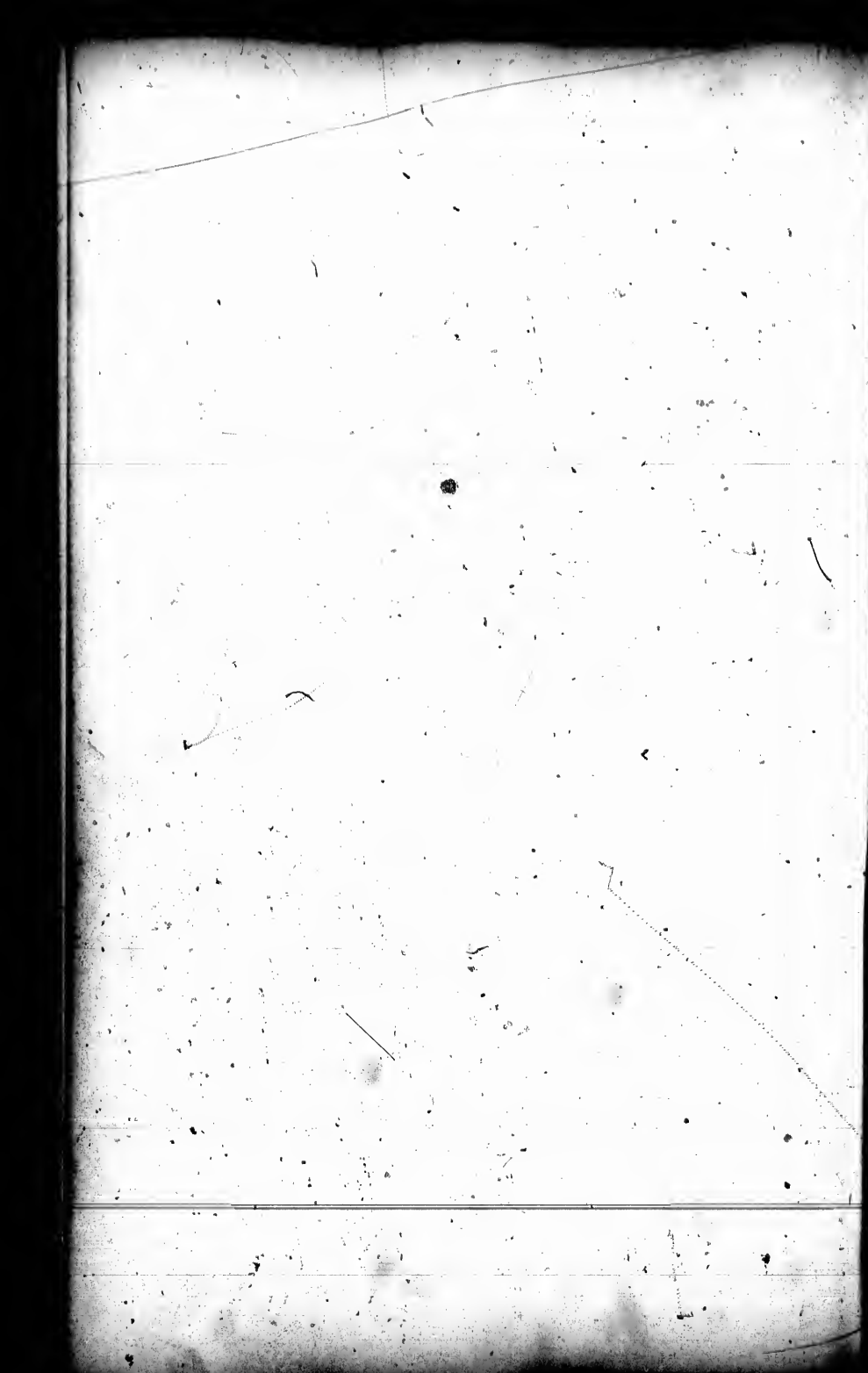
ORDERED, That twenty days from the delivery of a copy of any demurrer, shall be allowed to the opposite party to join in demurrer, and furnish a note of objections to the previous pleading, (if any) agreeably to the rule of Trinity Term, 3d Victoria; (*v*) on failure of which, the joinder in demurrer may be added by the party demurring, in making up the demurrer book; and no copy of such demurrer book need be served on the opposite Attorney, nor shall any motion or rule for a concilium be required; but demurrers, as well as special cases and special verdicts, shall be entered for argument at the request of either party, of which notice shall be given to the opposite Attorney eight days before the term at which such entry is made.

TRINITY TERM, 9TH VICTORIA.—1846.

Trial by Record.

ORDERED, That in future all cases of trial by the record be entered upon a separate paper, to be called the "Record Trial Docket," which shall be taken up immediately after the motion paper is concluded; the entries to be made in open Court on the first day of each term, and to stand in the Docket in the order in which they may be made, unless the Court should otherwise direct; and that eight days' notice be given of all such trials by the record.

(*v*) Ante page 41.



SECTION II.

STATUTES

RELATING TO THE

PRACTICE IN THE SUPREME COURT.

ABATEMENT

6th William IV., Cap. 51.

Sec. 5. Be it Enacted, That if any defendant or defendants in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the Act of Parliament, 21st James I., (intituled "An Act for limitation of actions, and for avoiding suits at Law,") or this Act, be maintained against the other person or persons named in such plea, or any of them; the issue joined on such plea shall be found against the party pleading the same.

7th William IV., Cap. 14.

15. That no plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in *any Court* in this Province, unless it shall be stated in such plea that such person is resident within the Province, and unless the place of residence (*a*) of such person shall be stated with convenient certainty in an affidavit verifying such plea. (*b*)

(*a*) The word "residence" means the house or domicil of the party, and the statute is complied with if the affidavit states him to be resident at a place which was really his house, though he was not actually there, having left the country for a short time.—*Lambe* v. *Smyth*, 10 Jurist, 394.

(*b*) Where the affidavit stated the supposed residence of the omitted party at the time of making the affidavit, but upon inquiry there, it was discovered that the house was shut up, and it could not be ascertained where the party was living, the plea was set aside, and the Plaintiff allowed to sign judgment.—*Wheatley* v. *Golney*, 9 Dowl. 1019. It seems it might have been treated as a nullity.—*Garratt* v. *Hooper*, 1 Dowl. 29. As to the time of pleading this plea, see ante p. 42.

16. That in all cases in which after such plea in abatement the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person: provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

17. That no plea in abatement for a misnomer shall be allowed in any personal action; but that in all cases in which a misnomer would but for this Act have been by law pleadable in abatement in such actions, (*c*) the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name upon a Judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the Judge shall think fit.

ADMINISTRATOR.

(*See* "*Costs.*" *Section* 23.).

AMENDMENT. (*d*)

9th and 10th Geo. IV., Cap. 1.

Sec. 1. WHEREAS great expence is often incurred, and delay or failure of justice takes place at trials by reason of variances between

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(*c*) See Tidd's Pr. 8th ed. 687.

(*d*) The decisions upon the English Acts 9 Geo. 4, c. 15, and 3 & 4 W. 4, c. 42, s. 23, from which this and the following Act is copied, are stated in Chit. Arch. 7th ed. 280—5. A reference to some of the later cases will be found in the notes below.

writings produced in evidence, and the recital or setting forth thereof upon the record or pleadings on which the trial is had, in matters not material to the merits of the case, and such record or pleadings cannot now in any case be amended at the trial, and in some cases cannot be amended at any time; for remedy thereof, Be it Enacted; That it shall and may be lawful for *every Court of Record* holding plea in civil actions, any Judge sitting at Nisi Prius, and Court of Oyer and Terminer and General Gaol Delivery within this Province, if such Court or Judge shall see fit so to do, to cause the record or pleading on which any trial may be pending before any such Judge or Court in any civil action, or in any indictment or information for any misdemeanor, (*e*) when any variance shall appear between any matter in writing (*f*) or in print produced in evidence, and the recital and setting forth thereof upon the record or pleading whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court, on payment of such costs (if any) to the other party, as such Judge or Court shall think necessary; and thereupon the trial shall proceed as if no such variance had appeared: and in case such trial should be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned together with the record, and thereupon the papers, rolls and other records of the Court from which such records issued shall be amended accordingly.

7th William IV., Cap. 14.

Sec. 7. WHEREAS great expence is often incurred, and delay or failure of justice takes place at trials by reason of variances as to some particular or particulars, between the proof and the record or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence, and the record: And whereas it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause; Be it therefore enacted, That it shall be lawful for the Supreme Court or any Judge thereof sitting at Nisi Prius or any Inferior Court of Common Pleas, if such Court or Judge shall see fit so to do,

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(*e*) The discretion of the Judges, as to amending in Criminal cases, ought to be exercised very sparingly.—Per Patterson J., *Rex* v. *Cooke*, 7 C. & P. 559, and per Coleridge J., *Reg* v. *Hewins*, 9 C. & P. 789.

(*f*) Under this act, a declaration on a guarantee may be amended at the trial by striking out words which are not supported by the guarantee.—*Smith* v. *Brandram*, 2 M. & G. 244. So, on the trial of an issue on nul tiel record, a variance between the pleadings and the record produced may be amended.—*Hopkins* v. *Francis*, 13 M. & W. 668.

to cause the record, writ or document on which any trial may be pending before any such Court or Judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a mandamus in the Supreme Court, when any variance shall appear between the proof and the recital or setting forth on the record, writ or document on which the trial is proceeding, of any contract, custom, prescription, name or other matter in any particular or particulars in the judgment of such Court or Judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence, to be forthwith amended by some officer of the Court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such Court or Judge shall think reasonable; (*g*) and in case such variance shall be in some

(*g*) In *Beckett* v. *Dutton*, 7 M. & W. 157, the declaration stated a note for £250 made by the Defendant, dated 9th Nov. 1838, payable to the Plaintiff or order on demand; the proof was of a joint and several note for £250, made by the Defendant and his wife, dated 5th Nov. 1837, payable 12 months after date; it was held to be amendable under this act. Where in an action for slander, the words were proved to have been spoken in the Welsh language, but were of the same meaning as the English words stated in the declaration, Coleridge J. allowed the declaration to be amended at the trial by inserting the Welsh words, and directed the trial to be postponed till the next day, on terms of the Plaintiff paying the costs of the day and depositing a sum of money with the officer of the Court for those costs, subject to taxation.—*Jenkins* v. *Phillips*, 9 C. & P. 766. And where the words in the declaration were "S. has got himself into trouble, he is out on bail for £100, and he is to be tried" &c.—The words proved were "S. has got himself into trouble &c., and *I have heard* he is to be tried" &c; it was held that the declaration might be amended under this section, or that a special indorsement might be made on the record under the following section.—*Smith* v. *Knowelden*, 2 M. & G. 561. So, where the declaration stated that the Plaintiff gave the Defendant money to be invested in Government annuities, and the evidence was that the money was to be invested in Government securities; it was held that the Judge had power to amend under this act.—*Gurford* v. *Bayley*, 3 M. & G. 781. It is no objection against an amendment, that it may affect the amount of damages, provided that it cannot affect the line of defence.—Ibid.

A declaration in ejectment may be amended at Nisi Prius by altering the day of the demise.—*Doe* v. *Hall*, 5 M. & G. 795, s. c. 3 Dowl. N. S. 49; and this, although the ejectment is for a forfeiture.—*Doe* v. *Leach*, 3 M. & G. 229. But if the year of the demise is omitted it is not a variance amendable at the trial under this Act.—*Doe* v. *Heather*, 8 M. & W. 158.—In trespass, the Defendant pleaded that there was a public highway "lying close to and adjoining" the locus in quo, and that by reason of the Plaintiff's obstructing the way, the Defendant was compelled to go over the close in question. The Plaintiff traversed that there was a highway &c.; it was held that the plea and replication might be amended at the trial, by substituting the words "running through," for "running by and lying close to and adjoining".—*Nalder* v. *Batts*, 1 Dowl. & L. 700. The amendment must be made during the trial, and before verdict.—*Brashier* v. *Jackson*, 6 M. & W. 549, *Doe* v. *Long*, 9 C. & P. 777. But if the amendment will have the effect of introducing on the record a new contract, a new breach or a new state of facts, it is not authorised by the act.—*Brashier* v. *Jackson*, supra, *Boucher* v. *Murray*, 8 Jur. 618, *David* v. *Preece*, 5 Q. B. 440; and per Coleridge J. the act applies only to a variance between some matter stated on the record, and the proof of that matter at the trial. Where the Plaintiff had obtained from a Judge at Chambers, an order for leave to amend a declaration on payment of costs, but had not made the amendment, Pollock C. B. refused to allow the declaration to be amended at the trial under this Act.—*Geeckie* v. *Monck*, 1 C. & K. 555.

The act does not extend to the amendment of omissions in pleading.—*Bye* v. *Bower*, 1 Car. & M. 262. And in *Atkinson* v. *Raleigh*, 3 Q. B. 79, it was doubted whether a Judge had power to make an amendment which would have the effect of defeating a motion in arrest of judgment, or for judgment, non obstante veredicto.

particular or particulars in the judgment of such Court or Judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution or defence, then such Court or Judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such Court or Judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be endorsed on the postea or the [illegible] as the case may be, and returned together with the record [illegible] and thereupon such papers, rolls and other records as it may [illegible] sary to amend, shall be amended accordingly: provided [illegible] shall be lawful for any party who is dissatisfied with the decis[illegible] any Judge of the Supreme Co[illegible] at Nisi Prius respecting his allowance of any such amendment, to apply to the Court in banc for a new trial upon that ground, and in case such Court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet. (*h*)

8. That the said Court or Judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said Court or the Court from which the record has issued shall if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

ARBITRATION.

7th William IV, Cap. 14.

Sec. 27. WHEREAS it is expedient to render references to Arbi-

(*h*) If the Judge refuses leave to amend, his decision is final and the party has no remedy, therefore in case of doubt it is advisable in general to allow the amendment.—3 Chit. G. Pr. 923, *Jenkins* v. *Phillips*, 9 C. & P. 768.

tration in actions depending in the Supreme Court, more effectual, Be it enacted, That the power and authority of any arbitrator or arbitrators appointed by or in pursuance of any rule of Court, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought in the said Supreme Court, shall not be revocable by any party to such reference without the leave of the Court, or by leave of a Judge upon good cause shewn therefor; and the arbitrator or arbitrators shall and may and are hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference. (*i*)

28. That when any reference shall have been made by any such rule or order as aforesaid, it shall be lawful for the Court or for any Judge thereof, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators before whom the attendance is required, shall also be served either together with or after the service of such rule or order: Provided always that every person whose attendance shall be so required, shall be entitled to the like conduct money, and payment of expences, as for and upon attendance at any trial: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order.

29. That when in any rule or order of reference it shall be ordered or agreed, that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrators, or any one of them, and he or they are hereby authorised and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

(i) See *Lloyd* v. *Hoskins*, 1 Kerr 132.

26th George III, Cap. 25.

Sec. 1. For the more effectual preventing frivolous and vexatious arrests, Be it enacted that no person shall be held to special bail upon any process issuing out of the Supreme Court, where the cause of action shall not amount to the sum of ten pounds or upwards, nor out of any Inferior Court within this Province, where the cause of action shall not amount to upwards of five pounds. (*k*) And that in all suits brought for a less sum, the defendant shall be served with a copy of the process within the jurisdiction of the Court issuing such process, in manner as hath heretofore been accustomed, and if such defendant or defendants shall not appear at the return of such process or within twenty days after such return, it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made before any Judge of the Court out of which such process shall issue, or before any Commissioner authorised to take affidavits to be read in the Supreme Court and filed in the proper Court, of the personal service of such process as aforesaid, to enter a common appearance or file common bail for the defendant or defendants, and to proceed thereon as if such defendant or defendants had entered his, her or their appearance, or filed common bail. (*l*)

2. That in all cases where the plaintiff or plaintiffs' cause of action shall amount to the sum of ten pounds or five pounds, or upwards as aforesaid, affidavit shall be made and filed of such cause of action, (*m*) which affidavit may be made before any Judge of the Court from which such process shall issue, or before any Commissioner appointed to take affidavits to be read in the Supreme Court, or else before the officer who shall issue such process, or his deputy, if such suit shall be brought therein: And in all cases when the plaintiff or plaintiffs shall reside without this Province in any of His Majesty's Plantations, before any Judge of the Supreme or Superior Court in such Plantation: (*n*) and the sum or sums specified in such affidavit, shall be

(*k*) The words of this act are "forty shillings or upwards," but by 42 Geo. 3, c. 7, s. 1, it was enacted that no Defendant should be held to bail in the Inferior Court or Mayor's Court of the City of St. John, unless the Plaintiff's cause of action amounted to *upwards of Five Pounds*. This sum is stated in the text for convenience.

(*l*) See rule 8 Easter T., 25 Geo. 3, ante p. 3, and Easter T., 26 Geo. 3, ante p. 6.

(*m*) Where the cause of action sounds in damages, and the damages are unliquidated, the Defendant cannot be held to bail without a Judge's order. In *Ford* v. *Ladd*, Mich. T. 1846, where the contract between the parties was, that in consideration of the delivery of a horse by the Plaintiff to the Defendant, the Defendant promised to deliver the Plaintiff within a certain time, three clocks of the value of £7 10 each, the Court doubted whether the Defendant could be held to bail without a Judge's order; but at all events they considered the common affidavit for goods sold, insufficient, and the bail were discharged.

(*n*) See ante page 5, note (u).

indorsed on the back of such writ or process, for which sum or sums so indorsed, the Sheriff or other officer to whom such writ or process shall be directed, shall take bail, and for no more. But if any writ or process shall issue for the sum of ten pounds, or five pounds or upwards, as aforesaid, and no affidavit or indorsement shall be made as aforesaid, the plaintiff or plaintiffs shall not proceed to arrest the body of the defendant or defendants, but shall proceed in like manner, as is by this Act directed, in cases where the cause of action does not amount to the sum of ten pounds, or five pounds or upwards, as aforesaid.

ASSESSMENT OF DAMAGES.

26*th George III., Cap.* 21.

BE IT ENACTED, That in all actions on the case wherein judgment is suffered by default, the Justices in the Court wherein such judgment is given, may assess the damages at the next succeeding term, and give final judgment for the sum so assessed, unless the defendant in such cause should apply for a jury of inquiry, in which case the Sheriff is to proceed to ascertain the damages as has been heretofore practised.

8*th George IV., Cap.* 4.

WHEREAS much inconvenience and expence is incurred in actions brought upon bonds or on penalties for the non-performance of covenants and agreements contained in any indentures, deeds, or other writings, in consequence of the laws now in force, requiring the damages on breaches assigned or suggested on the record in all cases to be assessed after judgments upon demurrer, or by confession or default, by juries for that purpose to be summoned; and whereas it is considered that in many of the said cases the damages may be assessed by the Court in which such actions are brought, which will much lessen the expence and inconvenience of such proceedings: Be it therefore enacted, That in all actions in any of His Majesty's Courts of Record in this Province, upon any bond or bonds conditioned for the payment of money by instalments, or for the performance of agreements or awards where such agreements or awards are expressed only for the payment of any sum or sums of money; and in all actions for any penal sums for non-performance of any covenants or agreements in any indenture, deed or writing contained, where such covenants or agreements are only for the pay-

ment of monies, in which judgment shall be given for the plaintiff or plaintiffs, upon demurrer or by confession, or *nil dicit*; the truth of all breaches assigned or suggested on the record may be inquired of, and the damages thereupon assessed by the Court without the intervention of a jury; the costs and charges of such proceeding to be borne by the defendant or defendants: which inquiry and assessment shall be entered upon the record, and execution may be thereupon taken out for the damages so assessed, together with costs of suit, in like manner as if such damages had been assessed by a jury in the manner heretofore accustomed.

2. That in each case such judgment shall, as now accustomed, remain, continue, and be as a further security to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any condition or covenant in the said bond, indenture, deed or writing contained; upon which the plaintiff or plaintiffs may have a *Scire Facias* upon the said judgment against the defendant or against his heir, terretenants, or his executors or administrators suggesting such other breach or breaches, and to summon him or them respectively to shew cause why execution shall not be had, or awarded upon the said judgment; and if no appearance be entered by the defendant or defendants upon such *Scire Facias*, the Courts in which such actions have been brought, are respectively authorised and empowered to assess such further damages, and to award execution for such damages, together with the costs and charges of such proceeding in manner as hereinbefore directed; and so, in case of any further breaches, a further assignment or suggestion may be made, and the like proceedings may be had as hereinbefore directed.

3. Provided nevertheless that nothing in this Act contained, shall extend or be construed to prevent the defendant or defendants from having a jury summoned to assess the damages upon the breaches assigned, in the manner heretofore accustomed, provided he, she or they give notice to the plaintiff of such wish or intention, within ten days after judgment is signed in the action, or such *Scire Facias* served: and provided also that the Court in which such action is brought, shall have full power to order and direct the damages to be assessed by a jury, in any case where the same may appear proper or expedient, and to award execution thereupon in manner by this act directed.

5th William IV., Cap. 37.

Sec. 9. That in all actions in the Supreme Court, in which the Court is or may be authorised by law after judgment by default, to inquire of the truth of any matters, or to assess the damages or the

amount to be recovered in the action without the intervention of a jury, such inquiry and assessment may be made by a Judge of the said Court in vacation; (*o*) and upon the production of such assessment signed by such Judge, it shall be lawful for the Clerk of the Pleas to tax the costs and to sign judgment, whereupon execution may be issued forthwith: Provided always that no such inquiry or assessment shall be made in vacation until the expiration of twenty days after the day on which the judgment by default shall have been entered: Provided also that the defendant in any such action may, upon due application therefor, have such inquiry and assessment made by a jury; and that the Judge who may be applied to in vacation to make such inquiry or assessment, shall have power to order the same to be made by a jury, in like manner as is now the law and practice in cases before the Court in banc.

7th William IV., Cap. 14.

Sec. 6. That in all actions of debt, the amount to be recovered in case of judgment by default, or on demurrer, shall be ascertained and assessed either by the Court or a jury, before judgment is signed; and that the provisions of the Acts 26th Geo. III., c. 21, and 5th William IV., c. 37, s. 9, shall extend and be construed to apply to actions of covenant for the payment of any certain sum or sums of money, and to actions of debt; and that as well in such actions, as in actions on the case where judgment is given for the plaintiff on demurrer, the damages may be assessed in the same manner as in cases where the judgment is by default: Provided always that nothing herein contained shall extend to actions upon bonds conditioned for the payment of a single sum of money not by instalments.

21. That upon all debts or sums certain, payable at a certain time, or otherwise, the jury on the trial of any issue, or on any inquisition of damages, or the Court or Judge upon any assessment of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand, until the time of payment: Provided that interest shall be payable in all cases in which it is now payable by law.

(*o*) Where an account had been assessed by a Judge at Chambers after judgment by default, but the affidavit on which it was made did not support all the items of the account, the Court reduced the assessment to the amount warranted by the affidavit.—*Scoullar* v. *Webb*, 1 Kerr 520.

22. That the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act.

BAIL.

4th George IV., Cap. 17.

Sec. 1. BE IT ENACTED, That the defendant in all actions in the Supreme Court, when at large, may, in the several Counties where no Judge of the Supreme Court resides, *(or in the absence of a Judge from the County, by* 9 *and* 10 *Geo. IV., c.* 11,) surrender himself or herself, or be surrendered by his or her bail before any Commissioner for taking bail in the said Court, and the said Commissioners are hereby authorised to make out the surrender and committitur, and to take the affidavit of the service of notice thereof on the plaintiff's Attorney, in manner and form as the Judges of the said Court may or used to do; and upon the delivery of such defendant by such Commissioner, to the Sheriff of such County, he shall be charged in law with the custody of the said defendant, and give his certificate thereof, and upon producing the said certificate and affidavit to the proper officer, an exoneretur shall be by him entered on the bail-piece.

2. That when the defendant is already in custody of any Sheriff in some County where no Judge of the Supreme Court resides, *(or in the absence of any Judge from the county, by* 9 *and* 10 *Geo. IV., c.* 11,) at the suit of another plaintiff, in a different action, or otherwise, it shall be lawful for any of the said Commissioners for such County, upon application of such defendant's bail, to surrender him or her; or upon the application of such defendant, by his or her Attorney, to surrender himself or herself, and upon the certificate of such Sheriff that such defendant is actually in his custody in an action, or for a certain cause, to be set forth in the said certificate, to take and make out the surrender and committitur of the said defendant in the same manner as the Judges of the Court may do when such defendant is brought up before them by Habeas Corpus; and upon the delivery of such committitur to the said Sheriff, he shall be charged in law with the custody of the said defendant in such action, and give his certificate thereof, and the Justices of the said Court

may, upon the reading of such Sheriff's certificate, and the requisite affidavit of notice of such render and commitment, on the plaintiff's Attorney, unless cause be shewn to the contrary during the term succeeding such render and notice, in that behalf, order an exoneretur to be entered on the bail-piece.

6th William IV., Cap. 11.

Sec. 22. That any debtor having the liberty of the gaol limits, under the provisions of this Act, may render himself, or be rendered by his sureties, or one of them, to close custody in the gaol in discharge of the limit bond, in like manner as a principal may render himself or be rendered in discharge of his bail in cases of special bail, and upon such render being made, the obligation of the said bond shall become void.

7th William IV., Cap. 14.

Sec. 4. That a defendant who shall have been held to bail upon any mesne process issued out of the Supreme Court in this Province, may be rendered in discharge of his bail, to the common gaol of any county in which he may be; and the render to such county gaol shall be effected in manner following, (that is to say,) the defendant or his bail, or one of them, shall, for the purpose of such render, obtain an order of a Judge of the said Court, and shall lodge such order with the gaoler of such gaol to which render may be made, and a notice in writing of the lodgment of such order, and of the defendant's being actually in custody of such gaoler by virtue of such order, signed by the defendant or the bail, or either of them, or by the Attorney of either of them, shall be delivered to the plaintiff's Attorney, (*p*) and the Sheriff of such County shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such: Provided always, that in any County in which there may not be a Judge of the said Court at the time of any render so to be made, an order for such render may be obtained from any Commissioner for taking bail in such Court for such County, which order such Commissioner is hereby authorised in such case to grant.

4. That a defendant who shall hereafter be in custody of any Sheriff by virtue of any legal process, may be rendered in discharge of his bail in any action depending in the Supreme Court, in the manner hereinbefore provided for a render in discharge of bail; and

(*p*) The render is complete though the Defendant be taken from the Sheriff's custody, before notice of the render is given to the Plaintiff's Attorney. *Ratchford* v. *Giles*, 1 Kerr 459. See also rule 10 Hilary T. 2 W. 4, ante p. 19.

such Sheriff shall, on such render, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such.

CIRCUIT COURTS.

4th Victoria, Cap. 2.

Sec. 2. BE IT ENACTED, That it is and shall be lawful for the presiding Judge at any Circuit Court, or Court of Nisi Prius, as well as any Court of Oyer and Terminer and General Gaol Delivery, to adjourn the same to any future day, whenever such adjournment may seem to him necessary or proper, in order to the finishing of the business before any such Court or Courts, notwithstanding any term of the Supreme Court may intervene between the time of adjournment, and that to which such adjournment may be made: Provided that no such adjourned Court of Oyer and Terminer and General Gaol Delivery shall extend beyond the time to which such Courts are limited in and by the Commission or Letters Patent, under which the same are held.

5. That no witness, in any civil cause for trial at any such adjourned Court, shall be liable to be proceeded against in any manner for non-attendance, unless duly served with a subpœna to attend at such adjourned Court, and his expences thereupon duly paid or tendered in the usual manner.

6. That in all causes which may stand for trial at any such adjourned Court, the Nisi Prius record, Jury process and Postea, shall be deemed, taken and dealt with in all respects as if the same were expressed to be returnable at the term of the Supreme Court next following such adjourned Court: Provided that no new notice of trial shall be necessary in any such cause, and that no new cause shall be entered for trial at any such adjourned Court.

CORPORATIONS.

6th William IV., Cap. 33.

Sec. 6. BE IT ENACTED, That from and after the passing of this Act, the proceeding by original against any Corporation shall be abolished, and the first process in every action to be brought against

any Corporation, shall be by writ of summons, (*q*) according to the form or to the effect following, that is to say :—

"William the Fourth, &c. To the Sheriff of ———, Greeting: We command you that you summon *(here insert the name of the Corporation)* that they be before, &c., on, &c., to answer A. B. of a plea *(as the case may be)* and have there then this Writ. Witness, &c."

And every such writ of summons may be served on the Mayor, President or other head officer, or on the Secretary, Clerk, Treasurer or Cashier of such Corporation.

7th William IV., Cap. 14.

Sec. 2. That if any writ of summons shall be sued out against any Corporation, and such Corporation should not cause an appearance to be entered at the return of such writ, or within twenty days after such return, in every such case it shall be lawful for the plaintiff in the action, upon affidavit being made and filed in the proper Court of the due service of such writ, to enter an appearance for such Corporation, and to proceed thereupon in like manner as in personal actions against individuals. (*r*)

COSTS.

4th William IV., Cap. 41.

Sec. 8. BE IT ENACTED, That if the plaintiff proceed according to the ordinary practice of the Court in any case in which the proceedings ought to be summary, he shall not be entitled in any such case to more costs than if he had proceeded in a summary manner, unless he obtains the order of the Court or Judge for the larger costs upon good cause shewn therefor. (*s*)

(*q*) A corporation may be proceeded against in a summary manner; and if the Plaintiff proceeds according to the ordinary practice in cases where the proceedings ought to be summary, he will only be entitled to summary costs.—*O'Connor* v. *New Brunswick Land Company*, 1 Kerr 276.

(*r*) See rule 8 Easter T., 25 Geo. 3, ante p. 3, and Easter T. 26 Geo. 3, ante p. 6.

(*s*) Where the action was brought on a note for £22 payable partly in timber and partly in money, and before the action was brought the Defendant had delivered the Plaintiff an ox whereby the debt was reduced to £14, the Plaintiff was allowed full costs, there being no indorsement of the value of the ox, upon the note, nor any distinct proof that it was intended as a payment in lieu of the timber.—*Holland* v. *Close*, Bert. R. 344. And where, in an action on a promissory note for £30, but which was reduced by payment indorsed before action brought to about £18, the Defendant gave a confession for £50, he was held to be estopped from disputing the Plaintiff's right to full costs, though the sum really due and for which execu-

¶ 77. That in any action brought in any other than a Justice's Court for any debt, if the plaintiff do not recover more than £5 he shall not be entitled to any costs (*t*) whatever, unless he obtain an order of the Court or Judge before whom the cause was tried for entering up judgment (*u*) for costs upon the ground of the demand having been reduced by set off, (*v*) or upon resonable cause (*w*) shewn to such Court or Judge for bringing the action in such other Court; and in case of any such action being brought in the Supreme Court, and the plaintiff recovering a less sum than £5, if the Judge before whom the cause shall be tried shall think fit to certify that there was no reasonable cause for the plaintiff bringing such action in that Court, the defendant shall be entitled to costs, to be recovered by attachment, but no such attachment shall be awarded for more than the overplus in which such costs may exceed the amount of the debt or damages recovered by the plaintiff in such suit; and such costs, or so much as will be sufficient to cover the same, shall go in satisfaction of such judgment.

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tion was to issue was less than £20.—*Foster* v. *Brown*, 1 Kerr 200. But where an Attorney sued for a debt of £17 and the Defendant gave a *cognovit* in which he confessed the damages at £50, and agreed that if he made default in payment of £17 with costs by a certain day, the Plaintiff might enter up judgment for £17, it was held to be substantially a confession for £17, and that the Plaintiff was only entitled to summary costs.—*Harding* v. *Parker*, 1 Kerr 7.

Where important questions are involved in the suit, the Court or a Judge may make an order for full costs, though the Plaintiff might have proceeded according to the summary practice.—*Coombes* v. *Caldwell*, 1 Kerr 127. The application should be made to the Judge who tried the cause, and if the grounds appear in the evidence on the trial, the order may be made *ex parte*; but if it is founded wholly or partially on matters brought forward by affidavit, the Defendant should have notice.—Ibid.

The verdict is considered as *prima facie* evidence of the amount for which the action is brought.—*Dickenson* v. *Balloch*, Bert. R. 24, *McIlraney* v. *Wiswell*, Ibid. 67.

(*t*) In *Bennett* v. *Morse*, 2 Kerr 624, it was held that if a Defendant allows damages to be assessed and final judgment signed for a debt over £5, it is too late for him to apply to deprive the Plaintiff of costs, on the ground that a payment had been made before action brought, whereby the debt was reduced below £5, the fact of that payment being denied by the Plaintiff. But had it been clearly shewn that the debt was less than £5 at the time the action was brought, it is difficult to see why the Defendant should be compelled to pay more than the costs allowed in a Justice's Court, because he did not plead, or what would have pleaded, so long as this Court had jurisdiction.—In such a case it is the duty of the Plaintiff to bring his action in a Justice's Court, and if he does not, he has no right to receive the aid of this Court to enable him to contravene the policy of the law.—*Williston* v. *Walsh*, 2 Kerr 181.

(*u*) In *Burns* v. *Chapman*, 3 Kerr 192, where an award was made in favor of the Plaintiff for £2 4*s.* on a reference by a Judge's order which directed that the costs should abide the event of the award, and that judgment should be entered up for the successful party, without directing in what manner it was to be entered up; it was held that as no judgment could be entered up on the award, the case was not within the act, and no order for costs could be made.

(*v*) It must be clearly shewn that the Plaintiff's demand has been reduced by actual payment, particularly if the Defendant has treated his claim as a set off, by giving a notice of set off.—*Doyle* v. *Dougan*, 1 Kerr 161, *Douglas* v. *Hanson*, Bert. R. 121; and if the Defendant's Counsel in his address to the jury, claims a balance in favor of the Defendant, under a notice of set off, it seems he will not afterwards be allowed to consider his claim as a payment.—*McRae* v. *McBeath*, Mich. T. 1848.

(*w*) See *Coombes* v. *Caldwell*, supra.

Sec. 23. That in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall [illegible] Court in which such action is brought shall otherwise [illegible] liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner. (x)

24. That where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action, shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, (y) unless in the case of a trial the Judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

(x) An administrator will not be relieved from costs under this act, where he applies, not on matters appearing at the trial, but on affidavits which are sufficiently answered.—*Thompson* v. *Allanshaw*, 1 Kerr 209. It seems that the act only extends to cases in which administrators were exempt from payment of costs before the act passed.—Ibid.

(y) One of several Defendants who is acquitted on the trial, cannot enter up a separate judgment for his costs, under this act; the award of such Defendant's costs should be entered upon the Plaintiff's judgment roll.—*McLaughlin* v. *Wilson*, 2 Kerr 626. And where the same Attorney appeared for all the Defendants, and the Defendant against whom the verdict was found, employed the Attorney and conducted the defence, and it was not shewn that the acquitted Defendants had incurred any costs, or that the Defendant against whom the verdict was found had incurred any further costs in their defence, than if he had been the sole Defendant, an application for leave to make an entry on the roll to enable the acquitted Defendants to recover their costs was refused, where a delay not satisfactorily accounted for, of nearly a year from the time of signing judgment had occurred.—Ibid. 3 Kerr 105. But in *Norman* v. *Climenson*, 4 M. & G. 243, where three Defendants appeared by the same Attorney, and pleaded jointly, and at the trial one of them was acquitted; it was held that the acquitted Defendant was, in the absence of special circumstances, entitled to a third part of the costs of the joint defence.

In *Dickenson* v. *Ketchum*, Bert. R. 63, where in an action of replevin for several quantities of timber, the Defendant pleaded non cepit as to parts of the timber, and property in himself as to other parts, and some of the issues were found for the Plaintiff and some for the Defendant, it was held that each party was entitled to the costs on the issues determined in his favor. And in *Stephenson* v. *Milliken*, 1 Kerr 56, where in replevin, the Defendant pleaded non cepit, and property, and a verdict was found for the Defendant on the first issue and for the Plaintiff on the second, it was held that the Defendant was entitled to the general costs of the cause, and was liable to pay the costs of the issue found against him. Where a Defendant pleads the general issue and several special pleas which are involved in the general issue, and the Defendant succeeds on the general issue, but the special pleas are found for the Plaintiff, the Plaintiff is entitled to the costs so much of the general issue as is involved in the special pleas, and the general issue is to be construed distributively for the purpose of taxing costs.—*Nicholson* v. *Dyson*, 11 M. & W. 548. See also *Daniel* v. *Barry*, 4 Q. B. 59, *Hazlewood* v. *Bach*, 9 M. & W. 1. But where in an action for libel, the declaration contained five counts, all for the same libellous publication, but the first count, on which there was a verdict for the Plaintiff, covered the whole cause of action, and there was no finding on the other counts; it was held that the plaintiff was only entitled to costs on the first count, and that neither party was entitled to the costs of those counts on which there was no verdict.—*Andrews* v. *Wilson*, 3 Kerr 127.

25. That where any *nolle prosequi* shall have been entered upon any count or as to part of any declaration, the defendant shall be entitled to and have judgment for and recover his reasonable costs in that behalf.

26. That in all writs of *Scire Facias* the plaintiff obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default as well as upon a judgment after plea pleaded or demurrer joined; and that where judgment shall be given either for or against a plaintiff, or for or against a defendant in any demurrer joined in any action whatever, the party in whose favor such judgment shall be given shall also have judgment to recover his costs in that behalf. (*z*)

DEPOSITIONS.

26th George III., Cap. 20.

Sec. 1. BE IT ENACTED, That when it shall happen that any of the witnesses which shall be judged necessary to be produced on the trial of any cause between party and party, shall be infirm, aged, or otherwise unable to travel, or when any such witness or evidence is obliged to leave the Province, it shall be lawful for any one of the Judges of the Court where the cause is to be tried, after declaration filed, on due notice given to the adverse party to be present, if he sees fit, to take the deposition of such infirm or aged person, or person unable to travel or who is obliged to leave the Province; and such depositions so taken and certified under the hand and seal of the said Judge, and sealed up and directed to such Court, shall be received as legal evidence in such cause; and also when the title to land shall be in question, in all future causes between the same parties or persons holding under them, for the same land.

2. Provided that proof be made on oath, that due notice was given to the adverse party of the time and place of taking such depositions.

(*z*) It has been held under this Act, that if judgment is given for a Defendant on a demurrer not going to the whole cause of action, he is not entitled to costs.—*McLaughlin* v. *Wilson*, 6 Kerr 105. It seems doubtful whether the construction here given to this Act carries out the intention of the Legislature, for if, as was here decided, its operation is not to be more extensive than the 8 & 9 W. 3, c. 11, it was useless to enact it: but a different view of the Act appears to be taken in 3 Chit. G. Pr. 703, and Jervis' New Rules 207, note (*x*). See also *Williams* v. *Wines*, 9 Jur. 809.

3. That if such witnesses shall, at the time of the trial, be in the Province, or able to travel, they shall be required to give their testimony *viva voce* at such trial, in the same manner as if such depositions had not been taken.

4. That all benefit of exceptions to the credit of such deponents shall be reserved in the same manner as on producing witnesses for examination *viva voce*, at the trial.

5th William IV., Cap. 34.

Sec. 1. That it shall be lawful for the Supreme Court and the several Judges thereof, in any action depending in such Court, upon application (*a*) of any of the parties to such suit, to order the examination on oath upon interrogatories or otherwise, before a Judge of the Court, or any other person or persons to be named in such order, of any witnesses within this Province; or to order a commission to issue under the seal of the said Court for the examination of witnesses on oath, at any place or places out of this Province, by interrogatories or otherwise, and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the Province as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just.

2. That when any rule or order shall be made for the examination of witnesses within this Province by the authority of this Act, it shall be lawful for the Court or any Judge thereof, in and by the first rule or order to be made in the matter or any subsequent rule or order, to command the attendance of any person to be named in such rule or order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of Court, and proceedings may be thereupon had by attachment, (the Judge's order being made a rule of Court before or at the time of the application for attachment,) if, in addition to the service of the rule or order, an appointment of the time and place of attendance, in obedience thereto, signed by the Judge or person or persons appointed to take the examination, or by one or more of such persons, shall be also served together with or after the service

(a) See rule 3 Hilary T., 7 W. 4 ante p. 20, and Chitty's Forms 112 to 118 for the forms of proceedings under this act.

of such rule or order: Provided that the service of every such rule, order, or appointment, shall be by shewing to the person whose attendance is required, the original paper under the hand of the Judge or person issuing the same, and by delivering to such person a copy thereof, or a ticket containing the substance thereof; and that every person whose attendance shall be so required shall be entitled to the like conduct money and payment for expences as upon attendance at a trial: provided also that no person shall be compelled to produce under any such rule or order any writing or other document that he would not be compellable to produce at a trial of the cause.

3. That it shall be lawful for any Sheriff, gaoler, or other officer, having the custody of any prisoner, to take such prisoner for examination, under the authority of this Act, by virtue of a Writ of Habeas Corpus to be issued for that purpose; which writ shall and may be issued by the Court or Judge under such circumstances, and in such manner as such Court or Judge may now by law issue the Writ of Habeas Corpus ad testificandum.

4. That it shall be lawful for every person authorised to take the examination of witnesses by any rule, order, or commission, made or issued in pursuance of this Act, and they are hereby authorised and required to take such examinations upon the oath of the witnesses, or affirmation, in cases allowed by law instead of oath, to be administered by any person so authorised, or by the Judge of such Court.

5. That it shall be lawful for any persons to be named in any such rule or order for taking any examination in pursuance thereof, and they are hereby required to make, if need be, a special report to the Court, touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the Court is hereby authorised to institute such proceedings and make such orders upon such report as justice may require, and as may be instituted and made in any case of contempt of the Court.

6. That the costs of every rule or order to be made for the examination of witnesses, under any commission or otherwise, by virtue of this Act, and of the proceedings thereupon, shall be costs in the cause, (*b*) unless otherwise directed by the Judge making such

(*b*) The costs of the commission will not be allowed if the witness has, since the execution of it, returned to the Province and been examined at the trial; though the depositions have also been read in evidence by consent.—*Andrews* v. *Wilson*, 3 Kerr 127. Neither will such costs be allowed if the depositions are not used at the trial.—*Curling* v. *Robertson*, 2 Dowl. & L. 307.

It is discretionary with the Court whether they will allow the expences of a witness coming from a foreign country to give evidence in a cause, or only the costs of a commission. In *Boyd* v. *Sharkey*, Hilary T. 1844, the costs of a witness coming from Boston to give evidence in a cause, were allowed. See also *McAlpine* v. *Coles*, 2 Dowl. 299.

rule or order, or by the Judge before whom the cause may be tried, or by the Court.

7. That no examination or deposition to be taken by virtue of this Act shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge on proof by affidavit or *viva voce*, that the examinant or deponent is out of the Province, or dead, or unable from sickness or other infirmity to attend the trial; in all or any of which cases, the examinations or depositions certified under the hand of the Judge, Commissioner, or other persons taking the same, shall, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions: (c) Provided that such examinations or depositions shall be closed up under the seal of the Judge, Commissioner, or person taking the same, and addressed to the Supreme Court, and shall not be opened before the trial, without consent of the parties to the suit.

DISCHARGE OF DEBTORS.

6th William IV., Cap. 41.

Sec. 15. WHEREAS it is expedient that creditors may have power to discharge debtors without losing the benefit of judgment obtained against such debtors; Be it therefore enacted, That it shall and may be lawful for any creditor or creditors, at whose suit any debtor or debtors is, are, or shall be in prison, and taken or charged in execution for any sum of money, by writing signed by such creditor or creditors, or by one of them, for and in behalf of himself or herself and the others of them, (being complainants in the same action,) to signify or declare his, her, or their consent to the discharge of such debtor or debtors from the prison in which he, she, or they is, are, or shall be confined in execution at the suit of such creditor or creditors, without losing the benefit of the judgment upon which such execution

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(c) Depositions taken abroad under a commission and returned with the commission are admissible in evidence without proof that the commissioner has taken the oath prescribed by the commission. The Court will presume that this has been done, nothing appearing to the contrary.—*Wilmot* v. *Haws*, 1 Kerr 351. Neither is it a sufficient ground for suppressing the depositions of a witness taken *de bene esse* before a Judge, that he had held communication relative to the suit with one of the parties during an adjournment of the examination, notwithstanding a caution to the contrary, given him by the Judge.—*Doe* v. *Kellor*, 2 Kerr 643. But where one of the terms of an order for a commission, was that the names of the witnesses should be furnished to the Defendant a certain number of days before the examination, it was held that the omission of this, rendered their depositions inadmissible.—*Scott* v. *VanSenden*, 8 Jur. 1114.

issued, except as is hereinafter provided; and that notwithstanding the discharge of any debtor or debtors in pursuance of such consent as aforesaid, the judgment upon which such debtor or debtors was or were taken or charged in execution, shall continue and remain in full force to all intents and purposes, except as is hereinafter provided; and it shall be lawful for such creditor or creditors, at any time, to take out execution on every such judgment against the lands, tenements, hereditaments, goods and chattels of such debtor or debtors, or any of them, (other than and except the necessary apparel and bedding of him, her or them, or his, her or their families, and the necessary tools of his, her or their trade or occupation, not exceeding the value of fifteen pounds in the whole,) or to bring an action or actions on every such judgment, or to bring any action or use any remedy for the recovery of his, her, or their demand against any other person or persons liable to satisfy the same, in such and the same manner as such creditor or creditors could or might have had or done, in case such debtor or debtors had never been taken or charged in execution upon such judgment: Provided always, that no debtor or debtors who shall be discharged in pursuance of this Act, shall at any time afterwards be taken or charged in execution, or convicted upon any judgment hereinbefore declared to continue and remain in full force, or in any action which may be brought on any such judgment; and that no proceeding by *fieri facias*, action or otherwise, shall be had against any bail in the action on which such judgment was obtained.

16. That the executors and administrators of any such creditor as aforesaid, shall and may consent to the discharge of any debtor or debtors to their testator or intestate in such and the same manner, and with the same advantages and consequences in all respects as such creditors, if living, might or could have done in pursuance of this Act; and such executors and administrators respectively shall not by reason of any such discharge, in pursuance of this Act, be deemed guilty of *devastavit*, or be chargeable with the debt due from the person or persons so discharged.

17. That every Sheriff, gaoler or keeper, in whose prison, gaol or custody any debtor or debtors is, are, or shall be confined or detained in execution, shall, and every of them is hereby required within twenty-four hours next after such consent in writing of any creditor or creditors, as hereinbefore mentioned, shall have been produced to, and left with such Sheriff, gaoler or keeper, or his deputy or agent, at such prison or gaol, (the hand writing or mark of such creditor or creditors to such consent in writing being duly proved by affidavit of some credible person to be thereunto annexed, and to be sworn before one of the Judges of the Court out of which the execution

against such debtor or debtors issued, or a Commissioner duly authorised to take affidavits in the County where such debtor or debtors shall be confined,) to discharge and set at liberty the debtor or debtors to whose discharge such consent shall be signified or declared as aforesaid, if he, she, or they are in custody only upon the execution issued at the suit of the creditor or creditors signifying and declaring such consent.

DOCKETS.

8th George IV., Cap. 7.

Sec. 2. BE IT ENACTED, That the Clerk of the Pleas in the Supreme Court, shall make and put in an alphabetical docket (*d*) by the defendants' names, a particular of all judgments entered in the Court, which shall contain the names of the plaintiffs and defendants, and the debt, damages, and costs recovered thereby, and in what County the actions were laid, the time of signing judgment and the number of the roll; that the said docket shall be fairly put and kept in a book in the said Clerk's office, to be searched and viewed by all persons at reasonable times, paying the legal fees for a search: and that in order to the making of such docket, every Attorney of the Court, on taking in the judgment roll, shall deliver to the Clerk a docket paper or entry, containing all the particulars aforesaid, except the time of signing judgment and the number of the roll.

3. That no judgment not so docketed and entered, shall in any manner affect or bind any lands, tenements, or real estate, nor shall any execution or other process issue on any judgment not so docketed and entered.

GENERAL ASSEMBLY.

8th George IV., Cap. 2.

Sec. 1. WHEREAS the mode of proceeding against persons having privilege of the General Assembly, by distringas, is extremely dilatory and expensive; Be it enacted, That when any summons shall be sued

(*d*) The Court will presume that the Clerk as a public officer, has done his duty in docketing judgments; therefore it is not necessary for a person claiming property under a Sheriff's deed, to prove that fact.—*Doe* v. *Hatfield*, 1 Kerr 417.

out against any Member of His Majesty's Council, a Member of the House of Assembly, or other person having privilege of the General Assembly, if the defendant or defendants shall not appear at the return of the summons, or within twenty days after such return, in every such case it shall be lawful for the plaintiff or plaintiffs, upon affidavit being made and filed in the proper Court, of the personal service (*e*) of such summons, to enter an appearance or appearances for the defendants, and to proceed thereon as if such defendant or defendants had entered his or their appearance.

2. Provided nevertheless that nothing in this Act contained shall extend or be construed to subject any person whatsoever, entitled to the privilege of the General Assembly, to be arrested, restrained or imprisoned during the term of such privilege: but that every such person shall continue to be exempt therefrom, in like manner as if this Act had not been made.

INITIALS.

7th William IV., Cap. 14.

Sec. 18. BE IT ENACTED, That in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such person by the same initial letter or letters or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

INQUIRY, WRIT OF

(See "*Assessment.*")

INTERPLEADER. (*f*)

5th Victoria, Cap. 21.

Sec. 1. WHEREAS it often happens that a person sued at law for the

(*e*) See 7 W. 4, c. 14, s. 1, post title "Service of Writs."

(*f*) The practice and decisions upon this Act, will be found in Chit. Arch. 6th ed. 1041-1064: the more recent cases are referred to in the notes below.

recovery of money or goods wherein he has no interest, and which are also claimed by some third party, has no means of relieving himself from such adverse claims, but by a suit in equity against the plaintiff and such third party, usually called a Bill of Interpleader, which is attended with expence and delay; for remedy whereof, Be it enacted, That upon application made by or on behalf of any defendant in any action of Assumpsit, Debt, Detinue, Trespass or Trover, depending in the Supreme Court, such application being made after declaration and before plea (*g*) by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party (*h*) who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court or any Judge thereof may order or direct; it shall be lawful for the Court or any Judge thereof, to make rules and orders, calling upon such third party to appear and state the nature and particulars of his claim, and maintain or relinquish his claim; and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the con-

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(*g*) The affidavit should shew that the application is made before plea pleaded; but the objection may be waived, or the affidavit amended.—*Frost* v. *Heywood*, 2 Dowl. N. S. 801.

(*h*) Where the Defendant has entered into a contract with the Plaintiff, or incurred a personal liability to either of the contending parties, the case is not within the Act: as where a Defendant is sued on a contract made by him with the Plaintiff, an executor de son tort, for the purchase of goods, and a third party claims payment as administrator.—*James* v. *Pritchard*, 7 M. & W. 216. See also *Patorni* v. *Campbell*, 12 M. & W. 277. Nor where work is done under a contract, and an action is brought for the amount of it by one party, but another claims to be entitled to be paid for it; for the Defendant ought to know with whom he contracted.—*Turner* v. *Mayor &c. of Kendal*, 13 M. & W. 171. And where the purchaser of goods is sued by the seller for their price, and in trover by a third party who claims them, he is not entitled to relief under this Act.—*Slaney* v. *Sidney*, 9 Jur. 995. But it is otherwise in cases of bankruptcy and insolvency, where the party comes to the Court to help him out of an uncertainty which he cannot avoid: as where the assignee of a bankrupt factor sued for goods sold by the bankrupt to the Defendant, and a third party claimed the proceeds, as having been the consignor of the goods, the Defendant was held entitled to the benefit of the Act.—*Johnson* v. *Shaw*, 4 M. & G. 916. The provisions of the Act do not apply to cases where the Crown is interested.—*Candy* v. *Maugham*, 6 M. & G. 710. In *Roach* v. *Wright*, 8 M. & W. 155, it was doubted whether the Act applied where the claim was merely of an equitable nature. But where the Plaintiff sued for money deposited by her with the Defendants, and they were afterwards served with a notice from a third party, that the Plaintiff was since married to him, and that they should not pay the money to her, and the Plaintiff disputed the marriage; the case was held to be within the Act.—*Crellin* v. *Leyland*, 6 Jur. 733.

Where money is paid into Court to abide the event of an issue, the application by the successful party to obtain the payment of the money out of Court, must be made in the original action, and not in the issue.—*Levi* v. *Coyle*, 2 Dowl. N. S. 932.

sent of the plaintiff and such third party, their Counsel or Attornies, to dispose of the merits of their claims and determine the same in a summary manner, (*i*) and to make such other rules and orders therein as to costs, (*k*) and all other matters, as may appear to be just and reasonable.

2. That the judgment in any action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from, or under them.

3. That if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from or under him to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators, saving nevertheless, the right of such third party against the plaintiff, and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable. (*l*)

4. That every order to be made in pursuance of this Act by a single Judge not sitting in open Court, shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge.

5. That if upon application to a Judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court, and thereupon the Court shall and may hear

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(*i*) Though an order made by a Judge is bad as a proceeding under this Act, still if the parties agreed to be bound by the decision of the Judge, his order would be good as an award, and binding on the parties.—*Harrison* v. *Wright*, 13 M. & W. 816.

(*k*) Where an issue was directed between the claimant and the execution creditor, to try whether five horses or any of them were the property of the claimant when taken in execution; the jury found that two of the horses only belonged to the claimant. The Court gave neither party the general costs of the issue nor the costs of the rule, but gave to each, such portion of the costs as applied to the part on which he had succeeded, and allowed the claimant his costs of the application.—*Lewis* v. *Holding*, 2 M. & G. 875. When the claimant of goods taken on execution, fails upon an issue directed to try the validity of the claim, he must pay the costs of the application and of the subsequent proceedings.—*Melville* v. *Smark*, 3 M. & G. 57. No costs are allowed in matters arising out of motions under this act, until the termination of the proceedings, therefore the Defendant is not entitled to costs of the day for not going to trial.—*Hood* v. *Bradbury*, 6 M. & G. 981. A party made Defendant under an Interpleader rule, is entitled to security for costs, if the Plaintiff resides abroad.—*Benazech* v. *Bessett*, 1 C. B. 313.

(*l*) The Court has no power under this section, to award costs against a claimant who does not appear to maintain his claim: in such case the Plaintiff and Defendant must each pay their own costs.—*Murdoch* v. *Taylor*, 6 Bing. N. C. 283.

and dispose of the same in the same manner as if the proceedings had originally commenced by rule of Court instead of the order of a Judge.

6. And whereas difficulties sometimes arise in the execution of Process against goods and chattels, issued by or under the authority of the said Court, by reason of claims made to such goods and chattels by persons not being the parties against whom such process has issued, (*m*) whereby Sheriffs and other officers are exposed to the hazard and expence of actions, and it is reasonable to afford relief and protection in such cases to such Sheriffs and other officers; Be it therefore enacted, That when any such claim shall be made (*n*) to any goods or chattels taken or intended to be taken in execution under any process issued out of the Supreme Court, or to the proceeds or value thereof, it shall and may be lawful to and for the Court, upon application of such Sheriff or other officer made before or after the return of such process, and as well before as after any action brought (*o*) against such Sheriff or other officer, to call before them by rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise for adjustment of such claims and the relief and protection of the Sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court.

7. That all rules, orders, matters and decisions, to be made and done in pursuance of this Act, except only the affidavits to be filed, may, together with the declaration in the cause, (if any) be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements or hereditaments; and in case any costs shall not be paid within fifteen days after notice of taxation,

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(*m*) Where goods were seized under an execution against the Defendant who alleged that he held them only as a trustee, and disputed the seizure, the Sheriff was held entitled to relief under this section.—*Fenwick* v. *Laycock*, 2 Q. B. 108

(*n*) A notice of a fiat in bankruptcy issued against the Defendant, is not a sufficient claim to entitle the Sheriff to apply for relief.—*Tarleton* v. *Dumelow*, 5 Bing. N. C. 110.

(*o*) Where a Sheriff had seized a horse under an execution, and the person claiming the horse brought an action of trespass against the Sheriff, who applied for relief under this Act; the Court instead of directing an issue, ordered that the action should proceed, and that the execution creditor's name should be substituted for that of the Sheriff: for if an issue had been directed, the costs already incurred in the action against the Sheriff would have been thrown away.—*Brown* v. *Ludham*, 6 M. & G. 169.

and amount thereof given to the party ordered to pay the same, his agent or Attorney, execution may issue for the same by *Fieri Facias* or *Capias ad satisfaciendum* adapted to the case, together with the costs of such entry and of the execution; and such writ and writs may bear teste on the day of issuing the same, whether in the term or vacation, and the Sheriff or other officer executing any such writ shall be entitled to the same fees and no more as upon any similar writ grounded upon a judgment of the Court.

JOINT DEBTORS.

26th George III., Cap. 24.

WHEREAS creditors are often put to great trouble and difficulty in recovering debts due from joint partners, the proceedings to outlawry against persons who cannot be taken by process, not being in use in this Province, and doubts have arisen whether any one joint partner is now compellable to answer for the partnership debts unless all are brought into Court, which many times cannot be done; for remedy whereof, Be it enacted, That all persons that now are, or hereafter shall be jointly indebted to any other person or persons whatever, for any joint contract, obligation, matter or thing whatsoever, for which remedy could or might be had at law against such debtors, in case all were or could be taken by process issued out of the Courts of this Province, shall be answerable to their creditors separately for such debts; that is to say, such creditor or creditors shall and may issue process against such joint debtors in the manner now in use, and in case any or either of such joint debtors shall be taken and brought into Court by virtue of such process, he, she or they so taken and brought into Court, shall answer to the plaintiff or plaintiffs, and in case the judgment pass for the plaintiff or plaintiffs, he or they shall have his or their judgment and execution against those that are brought into Court, and against the other joint debtors named in the process, in the same manner as if they had been all taken and brought into Court by virtue of such process: Provided always that it shall not be lawful by virtue of this Act to execute such execution against the body or the lands or goods, the sole property of any person not brought into Court, before *Scire Facias* brought against him or them on such judgment. (*p*)

(*p*) In *Berton* v. *Brown*, Chip. MS. 110, it was held that a scire facias to revive a judgment against two debtors, was a sufficient scire facias under this act to authorise an execution against

26th George III., Cap. 6.

Sec. 6. BE IT ENACTED, That upon motion made in the Supreme Court, in behalf of His Majesty, or on the motion of any prosecutor or defendant in an indictment or information for any misdemeanor, or information in the nature of a *quo warranto*, or on motion of any plaintiff or defendant in any cause depending in the said Court, the Justices are required to order a jury to be struck before the proper officer for the trial of any issue, in such manner as special juries are usually struck in the Court upon trials at bar. And in all cases the party who shall apply for a special jury shall not only pay the fees for striking the same, but shall also pay all the expences occasioned by the trial of the cause by such special jury, and shall not have any other allowance for the same upon taxation of costs, than such party would be entitled to in case the cause had been tried by a common jury, unless the Judge before whom the cause is tried, immediately after the trial, certify in open Court, (*q*) under his hand upon the back of the record, that the same was a cause proper to be tried by a special jury.

7th William IV., Cap. 14.

Sec. 31. WHEREAS the provision of the Act 26 George III., c. 6, s. 6, does not apply to cases in which the plaintiff has been non-suited, and it is expedient that the Judge should have power of certifying, as well when a plaintiff is non-suited, as when he has a verdict against him; Be it enacted, That the said provision of the said last mentioned Act, and every thing therein contained, shall apply to cases in which the plaintiff shall be non-suited as well as cases in which a verdict shall pass against him.

JURY OF VIEW.

26th George III., Cap. 6.

Sec. 5. BE IT ENACTED, That where a view shall be allowed, six

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one of them who had not been brought into Court. But since that decision a form of Scire Facias has been prescribed by rule of Hilary T. 2 Vict. ante p. 37. As to the mode of proceeding on this writ, see rule 3 Hilary T. 9 Geo. 4, ante p. 17, and post title "Scire Facias."

(*q*) In *Waggett* v. *Shaw*, 3 Camp. 316, it was held that an application for a certificate the day after the trial, was too late. See the observations of Lord Abinger in *Thompson* v. *Gibson*, 8 M. & W. 287, to the same effect.

of the jurors or more, who shall be consented to on both sides, or if they cannot agree, shall be named by the proper officer of the Court, or if need be, by a Judge; or by the Judge before whom the cause shall be brought on to trial, shall have the view, and shall be first sworn, or such of them as appear on a jury, before any drawing; and so many only shall be drawn to be added to the viewers, as shall make up the number of twelve.

LIMIT BOND.

6th William IV., Cap. 41.

Sec. 13. BE IT ENACTED, That when any person is confined in any gaol in this Province, either upon mesne process or execution, the Sheriff (*r*) in whose custody such person may be, is hereby authorised and empowered to permit such person to go about and have his liberty within the limits designated for such gaol, as provided in the twelfth section of this Act, upon a bond being given to the Sheriff by the name of his office, by such person, with two sufficient sureties to the satisfaction of the Sheriff, in double the amount of the sum for which such person shall be in confinement, upon condition thereunder written that such defendant shall not go or be at large out of such limits, or escape at any time while he has the liberty of the same as aforesaid; and the Sheriff shall be entitled to demand and receive for making such bond, five shillings and no more, and such bond shall be in the form following:—

"Know all men by these presents that we, ——— are held and firmly bound to ———, Sheriff of the County (*or* City and County) of ———, in the sum of £———, lawful money of New Brunswick, to be paid to the said Sheriff or his certain Attorney, executors, administrators or assigns, for which payment to be well and truly made, we bind ourselves and each of us by himself, for and in the whole, our and each and every of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated, &c.

Whereas the above named ———, Sheriff as aforesaid, hath given permission to the above bounden ———, a person confined in the gaol of the County (*or* City and County) above mentioned, to go about and have his liberty within the limits of such gaol: Now the

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(r) It has been held under this Act that where the writ is directed to, and the arrest is made by the Coroner, he has the same authority as the Sheriff to take a limit bond. *Earle* v. *De Veber*, 1 Kerr 348.

condition of the above obligation is such, that if the said ——— shall not go or be at large out of the said limits of such gaol, or escape at any time while he has the liberty of the same as aforesaid, then this obligation is to be void; otherwise to remain in full force and virtue."

Which said bond the said Sheriff or his deputy, at the request of the plaintiff in such suit, or his Attorney, shall assign to the said plaintiff in such action, by indorsing the same and attesting to it under his hand and seal in the presence of two or more credible witnesses; and if the said bond or assignment be forfeited, the plaintiff in such action, after such assignment made, may bring an action and sue therefor in his own name; (*s*) and the Court where the action is brought, may by rule or rules of the same Court, give such relief to the plaintiff and defendant in the original action, and to the obligors in the said bond, as is agreeable to justice and reason; and the said rule or rules of the said Court shall have the nature and effect of a defeazance to such bond. (*t*)

POSTEA.

5th William IV., Cap. 37.

. BE IT ENACTED, That in any action brought in the S[illegible] Court, in which a postea shall be returned either from the Sittings in the County of York, or from any Circuit Court in any

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(*s*) In an action by the assignee, the declaration should state the nature of the writ on which the Defendant was in custody when the bond was taken, and that the assignee was the Plaintiff in the original suit.—*Cameron* v. *Beardsley*, 2 Kerr 599. But in a summary action, those averments have been held unnecessary.—*Maxwell* v. *Roe*, Ibid. 69. The damages may be assessed by the jury in an action by the assignee, and the proper measure of damages, when the bond has been taken from a Defendant in custody on execution, is the amount of such execution.—*McKenzie* v. *Marsh*, Ibid 629. If the Defendant is rendered in discharge of his sureties in the bond, while he has the benefit of the limits, the operation of the bond ceases, and the Sheriff cannot sue upon it for a subsequent escape.—*Campbell* v. *Henan*, Bert. R. 73. So, a limit bond given by a defendant in custody on mesne process does not continue in force after his arrest on execution in the suit: the Sheriff ought to confine the Defendant within the gaol, unless a new bond is given upon the arrest under the execution.—*Gordon* v. *French*, 2 Kerr 610. Non damnificatus is not a good plea to an action on a limit bond.—*Campbell* v. *Henan*, supra.

(*t*) This provision being similar to the one respecting bail, in the statute 4 & 5 Ann, c. 16, s. 20, the decisions upon that statute will be applicable here.—See 1 Arch. Pr. 2d. ed. 99.

Where the Plaintiff agreed to discharge the Defendant out of custody on certain conditions; one of which, was the payment of all costs, in consequence of which agreement he left the limits; the Court refused to relieve the bail in an action on the limit bond, unless it appeared that the costs were paid.—*Robertson* v. *Currie*, Bert. R. 190. An agreement that no advantage should be taken of the omission to charge a prisoner in execution, cannot affect the right of his sureties to relief, unless made with their privity.—*Gordon* v. *French*, supra. The application for relief may be made after judgment is signed against the bail.—*McKenzie* v. *Marsh*, Hilary T. 1845 (not reported.)

other County, it shall be lawful for the Clerk of the Pleas, upon production of the postea signed in the margin by the officer who returns the postea, to enter a rule for judgment on the postea, and to tax the costs and sign judgment, whereupon execution may be issued forthwith: Provided always that it shall be lawful for the Judge before whom such Sittings or Circuit Co[illegible] shall be held, in any case where justice may appear so to re[illegible] upon summons or not, according to the circumsta[illegible] order the returning of the postea, and the entry and [illegible]gment to be stayed until the Court shall make order in [illegible] next succeeding term: Provided also that no rule [illegible] the postea shall be entered by the Clerk of the Pleas [illegible] Act, until the expiration of twenty days after the last day of [illegible] sitting of the Court from which the postea is returned; and in order to manifest such last day of the sitting of such Court, the officer who returns the postea shall set the same down in the margin of the postea when he signs his name thereto.

11. That every judgment to be entered by virtue of this Act, may be entered upon record as the judgment of the Court, although the Court may not be sitting on the day of the signing and entry thereof; and every execution issued by virtue of this Act, shall and may bear teste on the day of issuing thereof; and such judgment and execution shall be as valid and effectual as if the same had been signed, entered of record and issued according to the course of the common law. (*u*)

12. Provided always that it shall be lawful for the party entitled to any judgment under this Act, to postpone the signing thereof: Provided also that notwithstanding any judgment signed and entered of record, or execution issued by virtue of this Act, it shall be lawful for the Court to order such judgment to be vacated, and execution to be stayed or set aside, and to enter an arrest of judgment or grant a new trial, or new writ of inquiry, or a new assessment of damages, or of the amount to be recovered, as justice may appear to require; and thereupon the party affected by such writ of execution, shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the Court may think fit to direct.

(*u*) An execution tested on the day it is issued, in vacation, upon a judgment entered up as of the preceding term, although irregular, is not a nullity since this Act.—*Power* v. *Johnson*, 2 Kerr 43.—If judgment is signed in term, it cannot be done till after the expiration of the four day rule, in order to give the opposite party an opportunity of moving for a new trial, or in arrest of judgment.—*Hatton* v. *Flaherty*, Bert. R. 129. This rule is considered as entered on the first day of term, though not actually done till afterwards; therefore a judgment signed on the same day that the rule is actually entered, is not irregular, if the four days, computing from the first day of the term, have expired.—*Frink* v. *Platt*, 1 Kerr 666.

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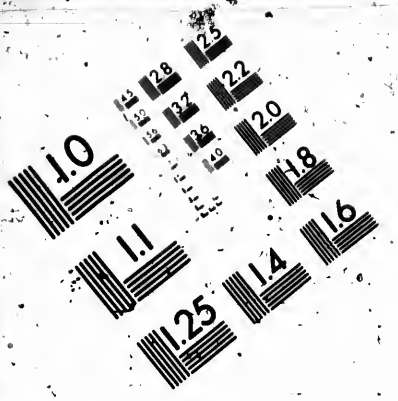

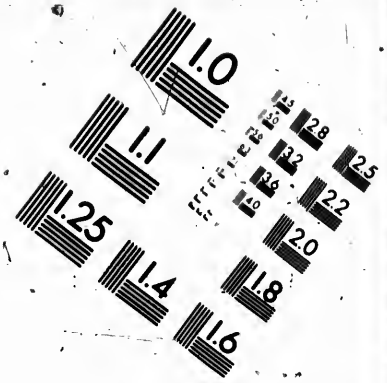

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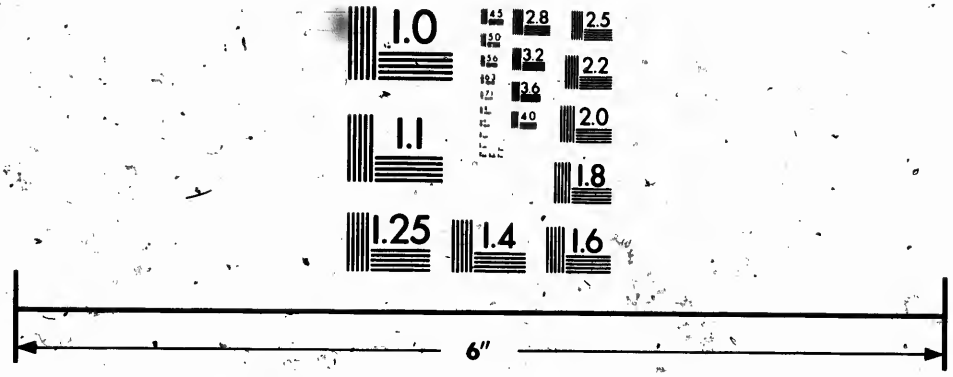

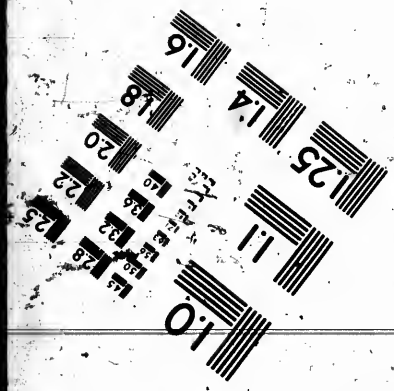

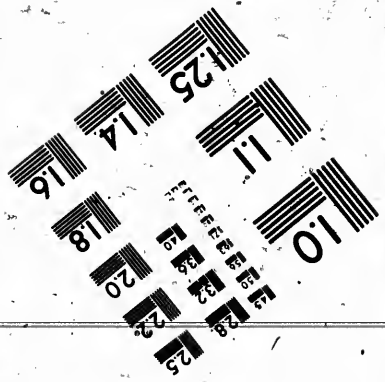

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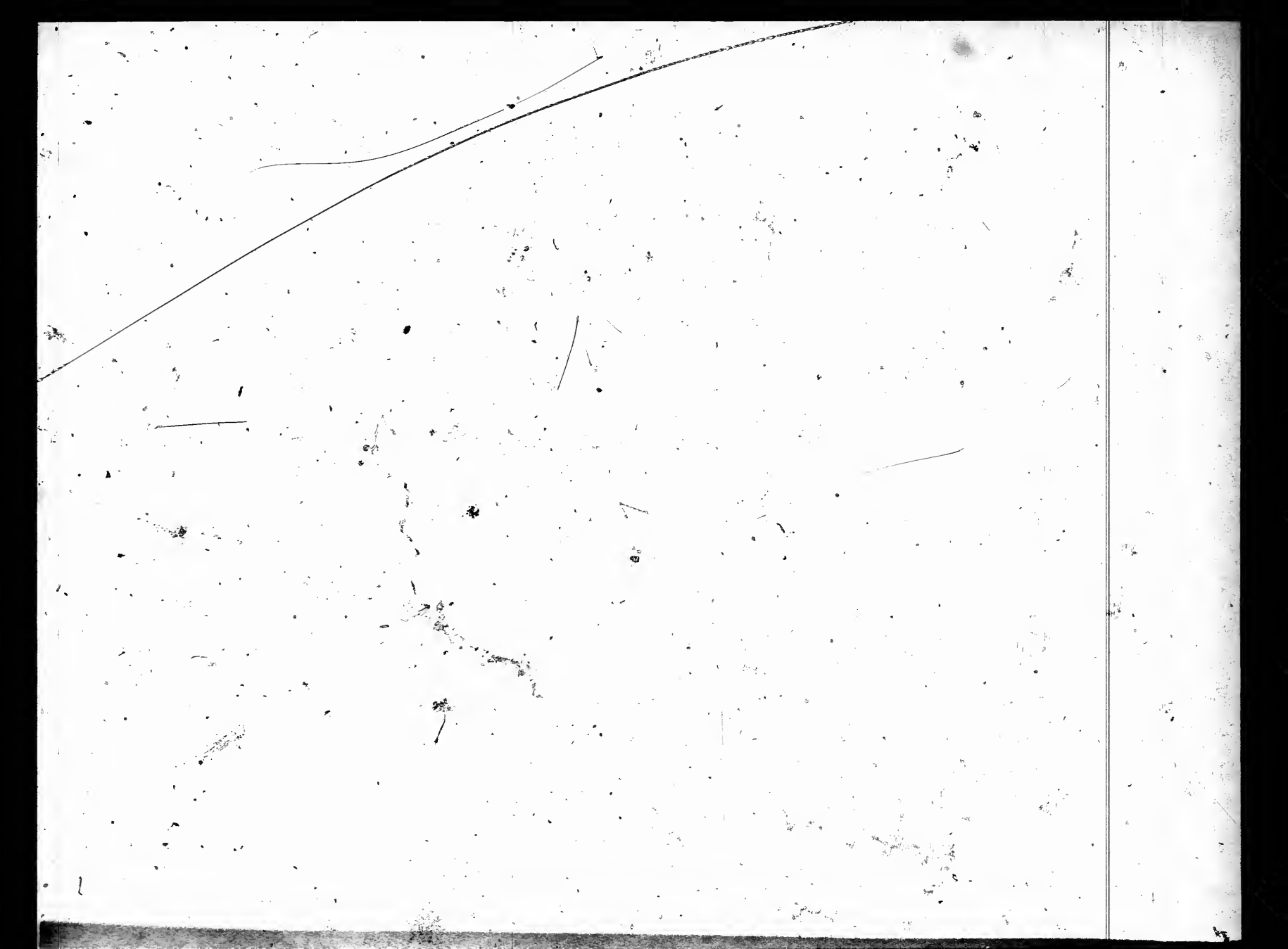

1st Victoria, Cap. 13.

Sec. 1. WHEREAS it is expedient to amend the provisions of the tenth section of the Act 5 William IV., c. 37, in the following manner; Be it enacted, That in any case in which a reference to arbitration shall be made at Nisi Prius, and it shall be ordered that the award of the arbitrators shall be returned on the postea as the verdict of a jury, and the award shall be filed with the officer who returns the postea after the last day of the sitting of the Court, such officer shall set down in the margin thereof the day on which such award shall be so filed with him instead of the last day of the sitting of the Court; and no rule for judgment on the postea shall be entered until the expiration of twenty days after the day so set down, and any Judge of the said Court in any such case in which justice may appear so to require, may either upon summons or not, according to the circumstances of the case, order the returning of the postea and the entry and signing of judgment to be stayed until the Court shall make order in the matter at the next succeeding term.

REPLEVIN.

4th William IV., Cap. 38.

Sec. 2. BE IT ENACTED, in order to prevent vexatious replevins in all cases, That all Sheriffs and other officers having the execution and return of writs of replevin, may and shall, in executing every writ of replevin as well in cases of distress for rent as in all other cases whatsoever in which the action of replevin will lie, (*v*) take, in the name of the High Sheriff of the County for the time being, from the plaintiff and two respectable persons as sureties, a bond in double the value of the goods replevied or seized under such writ of replevin, (such value to be ascertained by the oath of one or more credible

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(*v*) The owner of the inheritance may maintain replevin for timber and wood wrongfully cut and taken away from his land.—*Lyons* v. *Gorum*, Chip. MS. 140. It lies also by a pawnee against a pawnor for a wrongful taking of the goods pledged.—*Gibson* v. *Boyd*, 1 Kerr 150. But replevin only lies against the person who is actually or constructively the taker of the goods.—*Groves* v. *Griffiths*, Chip. MS. 469. Nor can the goods mentioned in the writ be taken, unless they are found in the possession of the Defendant named in the writ.—*Wiggins* v. *Garrison*, Bert. R. 17.

On the plea of *non cepit*, proof that the Defendant had the goods at the place alleged in the declaration, is sufficient to entitle the Plaintiff to recover, without any proof of a wrongful taking.—*McLeod* v. *McMillan*, 3 Kerr 64.

A writ of replevin will not be set aside on a summary motion as being improperly issued, except in a clear case. Thus where there was some property and possession in the Plaintiff, and evidence to connect the Defendant with the taking, the Court refused to interfere.—*Clif* v. *Gunter*, 2 Kerr 493.

witness or witnesses not interested in the goods replevied or seized by the Sheriff or other officer under such writ of replevin, which oath the person executing such writ of replevin is hereby authorized and required to administer,) and conditioned *(see form of bond and condition, under the Act* 3 *Victoria, c.* 63, *ante page* 43*)* before any deliverance be made of the distress or goods replevied; and that the Sheriff or other officer taking such bond, or his successor, shall, at the request and cost of the avowant or person making conusance in cases of distress, assign such bond to the avowant or person as aforesaid, and in all other cases in actions of replevin, at the request, cost and charges of the defendant, his executors, administrators, or assigns, in such action of replevin, assign such bond to the said defendant or defendants, his or their executors or administrators, by indorsement on the back of such bond, and attesting it under his hand and seal, in the presence of two or more witnesses; and if the bond so taken and assigned be forfeited, the person or persons to whom the Sheriff or other officer taking such bond by virtue of the provisions of this Act, shall assign the same, may bring an action and recover thereon in his own name; and the Court wherein such action shall be brought, may, by a rule of the same Court, give such relief to the parties upon such bond as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeazance to such bond.

3. That in all actions of replevin, whether in cases of distress or otherwise, if the defendant or defendants in such action by himself, his Attorney, or agent, shall, within forty-eight hours after the seizure of the property under any writ of replevin, give notice to the Sheriff or other officer executing the same, that he or they claim an absolute or special property in the goods seized under the said writ, then the said Sheriff shall not deliver the said property to the said plaintiff, but shall immediately return the said writ of replevin with the claim of property indorsed thereon, to the Attorney who issued the same; upon which shall be immediately issued by the said plaintiff the writ *de proprietate probanda*, under which the said Sheriff shall summon a jury as soon as may be, at some convenient time and place, to try such claim, *(w)* giving each party six days previous notice thereof, unless they both consent to an earlier day; and in case such jury shall find such claim good, then the said Sheriff's power,

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(w) A witness attending before a Sheriff's jury in proceedings under a writ *de proprietate probanda*, is privileged from arrest, and if he be arrested and give a bail bond, the Court on motion will order it to be cancelled.—*Burke* v. *Sutherland*, 1 Kerr 166. But if the witness waive his privilege at the time he is arrested, an application to discharge him out of custody on the ground of his privilege, will be dismissed with costs. *Gillespie* v. *Fogarty*, Ibid. 162.

under the said writ of replevin, shall be at an end, (x) and the said Sheriff shall forthwith return the goods seized, to the defendant: and the plaintiff, in such case, if he be not satisfied with the verdict given on such claim of property, may resort to his action of trespass or trover: but if such jury find the property in the plaintiff, then the said Sheriff shall replevy and deliver the said goods to the plaintiff: which said writ and inquisition shall be returned by the Sheriff to the Attorney who issued the writ, who is hereby required forthwith to file the same in the office of the Court in which such action was commenced: Provided always that nothing herein contained shall prevent the defendant from appearing to such action and pleading property, in the Court out of which such writ issued, or to which it may be removed.

3d Victoria, Cap. 63.

Sec. 1. That if upon the trial of any issue respecting the property in any action of replevin, or of any other issue which, upon the same being found in his favor, will entitle the defendant to judgment for the return of the goods and chattels replevied, or any part thereof, the jury shall find such issue in favor of the defendant; such jury may, if they shall think fit, give damages to the defendant, and the defendant may enter up his judgment (y) thereupon with such damages and the costs of suit, and may issue execution for such damages and costs in like manner as he now may for the costs of suit only.

2. That in all cases where the property may not have been already restored to the defendant, the jury on the trial of any such issue as aforesaid, may, at the instance and request of the defendant in whose favor such issue may be found, award to such defendant the value of the goods and chattels in damages; and in such case it shall be so specifically stated in the rendering of their verdict: and the defendant shall be thereupon entitled to enter up his judgment for the recovery of such damages, and to issue execution thereupon, instead of entering up judgment *de retorno habendo* as heretofore accustomed; and upon the award of such value in damages and judgment thereupon, the defendant's right and interest in such goods and chattels shall become vested in the plaintiff.

3. That all obligors in replevin bonds to be made after this Act takes effect, shall become liable and bound to the payment of any

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(x) If on a writ *de proprietate probanda* the finding is for the Defendant, the replevin suit is terminated, and the replevin bond cannot be assigned to the Defendant.—*Pollok* v. *Gardner*, 2 Kerr 655.

(y) See the forms Mich. T. 4 Vict., ante p. 44.

such damages as may be awarded to the defendant by virtue of this Act.

REVIEW.

4th William IV., Cap. 45.

¶ 78. That in all cases of judgment rendered before a Justice of the Peace in civil actions, either party thinking himself aggrieved by such judgment, may apply to a Judge of the Supreme Court for an order to remove the same for reviewal.

79. That the party intending to apply for such order shall make or cause to be made an affidavit, setting forth the substance of the testimony and proceedings before the Justice of the Peace, and the grounds upon which an allegation of error is founded; (*z*) which affidavit shall be sworn before any person authorised to take affidavits to be read in the Supreme Court.

80. That such affidavit shall, within thirty days after rendering such judgment, be presented to a Judge of the Supreme Court, and if it shall thereupon appear to such Judge that any error has been committed by the Justice of the Peace or jury, in the proceedings, verdict, or judgment, by means whereof substantial justice has not been done; or that the Justice had not jurisdiction in the cause, he shall grant his order for the removal of the cause before such Judge, at such day and place as he shall appoint, or before the Supreme Court at the next ensuing term, if the Judge shall so direct: Provided always that such Judge may in his discretion, before granting such order, require the party applying, to execute a bond to the opposite party, with or without sureties, and in such penal sum as the Judge may direct, conditioned for the payment of all damages, costs, and expences, which may be awarded by the said Supreme Court, or any one of the Judges thereof; which bond shall remain with the said Judge, and shall not be put in force without the order of the Supreme Court, or a Judge thereof.

81. That the order for removal shall, within twenty days after the same shall have been granted, be served upon the Justice by whom the judgment was rendered, together with a copy of the affidavit on which the same was allowed; and the sum of five shillings shall be

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(*z*) Proceedings in Magistrates' Courts are regulated by the same general rules as in other Courts; therefore if a party omits to take an objection on the trial before the Magistrate, he cannot afterwards avail himself of it on an application for review.—*Cormier* v. *Thibideau*, 1 Kerr 297.

paid to the Justice for his fees for making a return to the order; and no order shall be of any effect unless these requisites shall have been complied with.

82. That if the order and affidavit shall be served on the Justice before execution shall have issued; it shall stay the issuing of execution, and if the execution shall have been issued and not collected, the Justice shall grant the party requiring it a certificate of the issuing of such order, which, on being served on the constable in whose hands the execution may be, shall suspend such execution.

83. That the Justice before the return day of such order, or within fourteen days after service thereof shall make return thereto in writing, in which return he shall truly and fully answer to all the facts set forth in the affidavit on which the order was made; and such Justice shall forthwith make and transmit his return to the Judge, pursuant to the order, or deliver the same, if required, to the Attorney of the party at whose instance the same was granted, for the purpose of being forthwith transmitted to the said Judge.

84. That the Supreme Court or any Judge thereof, shall have power to compel such Justice to make or amend such return by rule or order, and by attachment, if necessary.

85. That upon the return to such order being made, the Judge shall appoint a day and place for hearing the matter, which may from time to time be adjourned as he may think fit; and notice thereof shall be given to the opposite party by service on the person or at the dwelling house, or by order of the said Judge, in presence of the party or his Attorney; and the Judge shall proceed to hear the parties, their Counsel, or Attornies, and may receive any affidavit (*a*) on either side, explanatory of the proceedings before the said Justice, and shall give judgment in the cause as the very right of the matter may appear, without regarding technical omissions, imperfections, or defects in the proceedings before the Justice, which do not affect the substantial justice of the case; and may affirm, reverse (*b*) or alter the judgment either as to debt, damages or costs in whole or in part, and may, if necessary, remit the cause to the Justice of the Peace, for the purpose of execution being issued for the amount awarded to

(*a*) It is discretionary with the Court whether they will receive affidavits for this purpose, and they are very seldom admitted.—*Buckstaff* v. *Doten*, 2 Kerr 366.

(*b*) If judgment has been illegally rendered for a Defendant in a Justice's Court, the Supreme Court may on review, not only reverse it, but award judgment for the Plaintiff for the amount sought to be recovered, where the right is clear and the facts undisputed.—*Watson* v. *Marks*, 2 Kerr 694. But a judgment will not be reversed because the evidence to support the verdict is slight, and contradicted by that on the other side, if the whole case was such as the Justice was warranted in submitting to the jury for their decision.—*Lee* v. *Breen*, Ibid. 323.

either party on such review of the proceedings, or may direct the payment of such money to be enforced by attachment: Provided always, that the Judge by whom such order may have been granted, may at any time before his final determination of the matter, adjourn the same for hearing before the Supreme Court at the next ensuing or any subsequent term thereof; and in that case the cause may be brought on for argument before the said Court, and judgment shall be rendered by the Court in the same manner and to the like effect as if heard and determined before a single Judge; and the Court may remit the same to the Justice of the Peace, or enforce the payment thereof in the same manner as before provided in the case of a determination before a single Judge: Provided always that in case of sickness or absence of the Judge by whom any order may have been so granted, the matter may be heard before any other Judge of the Supreme Court, who shall thereupon be vested with the same power and authority in the premises, as if the said order had been allowed by him.

86. That if the judgment be wholly affirmed or reversed, costs shall be awarded to the successful party; that if the judgment be affirmed in part or altered, costs may be awarded according to the discretion of the Court or Judge; the costs in all cases before a Judge to be taxed and allowed by such Judge, and in all cases before the Court, to be taxed and allowed by any of the Judges or the Clerk, as usual in other cases, and to be recovered by process of attachment.

87. That a copy of the minute of the judgment of the Supreme Court, or of a Judge thereof, upon such reviewal of any judgment of a Justice's Court, certified under the hand of a Judge by whom such judgment may be given, or of the Clerk of the Court, if given by the Court, shall in all Courts be evidence of the judgment of such Supreme Court or Judge; and a copy of any rule or order of such Court or Judge, made in any of the proceedings herein provided for, certified in like manner, shall in all Courts be evidence of such rule or order.

88. That the decision of any Judge of the Supreme Court, or of the Court upon such revision of the proceedings before a Justice of the Peace, shall be final and conclusive.

1st Victoria, Cap. 11.

Sec. 4. That in any case where a Judge of the Supreme Court may, on review, award costs to either party, in pursuance of the Act 4 W. IV., c. 45, it shall and may be lawful for such party to sue out

of the Supreme Court, a writ of attachment according to the form in the schedule hereunto annexed, or to that effect; which writ the Clerk of the said Court shall issue upon the fiat or order of a Judge: Provided always that no fiat or order for such writ shall be made by any Judge of the Supreme Court until it be made to appear to his satisfaction by affidavit that such costs have been duly demanded by the party to whom the same have been awarded, or by some person duly authorised by him to demand and receive the same, or by the Attorney of such party in the proceedings of review, and that such costs have not been paid: and the party who may issue such attachment shall be entitled to demand, receive, and levy the sum of ten shillings from the party against whom the attachment may issue, as the costs of such attachment, and of the proceedings hereinbefore directed for obtaining the same.

5. That the Sheriff or other officer by whom any such writ of attachment shall be executed, shall be entitled to, and he is hereby authorised and empowered to demand and receive from the party against whom such attachment shall issue, the like poundage and fees as in cases of execution; and that any party arrested on any such attachment, shall, on payment to the said Sheriff or other officer, of the costs specified in such attachment, together with the costs of the attachment, and the Sheriff's poundage and fees as aforesaid, be discharged from custody and arrest under such attachment; and the Sheriff or other officer shall make due return of such writ, and pay over the money received under the same to the party at whose suit or instance the said writ may have issued, or his Attorney.

Order for Review.

To N. M., Esquire, one of Her Majesty's Justices of the Peace, within the County of ———.

Whereas C. D. hath made it appear unto me, the Honorable W. C., Esquire, one of the Justices of the Supreme Court for the Province of New Brunswick, that in a cause lately pending in the Court before you, wherein A. B. was plaintiff, and the said C. D. defendant, substantial justice has not been done to the said C. D. by the judgment rendered in the said cause, and he is desirous that the said judgment and proceedings should be reviewed; I do therefore in pursuance of the Act of Assembly in such case made and provided, hereby require you to return to me forthwith, distinctly and openly, under your hand, the proceedings in the cause aforesaid, with all things touching the same, in order that right and justice may be done in the premises, and that you do answer the allegations in the affidavit of the said C. D. contained. Dated the —— day of ——, in

the year of our Lord ——, and in the —— year of Her Majesty's reign.

Order for want of Jurisdiction.

Whereas C. D. hath made it appear unto me, the Honorable W. C., Esq., one, &c., *(as before)* that he was lately impleaded by A. B. in a cause before you, for a matter not within your jurisdiction as such Justice, and he is desirous, &c., *(as in the foregoing.)*

Bond for Costs.

Know all men by these presents *(common form.)* Whereas upon the application of the above bounden C. D., an order has been made by the Honorable W. C., one of the Justices of Her Majesty's Supreme Court for the Province of New Brunswick, for removal before the said Justice *(or,* before the said Court) of the proceedings had in a cause lately pending before N. M., Esq., one of Her Majesty's Justices of the Peace for the County of ——, wherein the above named A. B. was plaintiff, and the said C. D. defendant. Now the condition of the above obligation is such, that if the said C. D. shall well and truly pay, or cause to be paid unto the said A. B., all damages, costs and expences which shall be awarded to the said A. B. by the said Supreme Court, or any one of the Judges thereof, then the above obligation to be void, otherwise to stand and remain in full force.

Writ of Attachment.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c. To our Sheriff of ——, Greeting: We command you that you attach E. F. so that you may have his body before us at Fredericton, on *(a return day in the ensuing term,)* to answer to us for a certain trespass and contempt, in not paying to C. D. the sum of —— for costs awarded to the said C. D. by ——, Esq., Chief Justice *(or* one of the Justices of our Supreme Court, *as the case may be)*, in a certain matter of review lately pending before the said Chief Justice, *(or* Justice) pursuant to the Acts of Assembly in such case made and provided; and have there then this Writ. Witness, &c. *(To be tested in the name of the Chief Justice, on the day, whether in term or vacation, on which the fiat or order for the writ bears date.)*

By order of the Chief Justice *(or,* Mr. Justice ——.)

SHORE.

NOTE.—In case the Sheriff be a party, the writ to be directed to the Coroner, as in other cases.

2d William IV., Cap. 20.

Sec. 1. Be it Enacted, That the proceeding by two *nihils* returned, and also that of summoning by summoners, on writs of *Scire Facias*, shall be abolished. (*c*)

2. That writs of *Scire Facias* may be directed to the Sheriff of any County within the Province, whether or not it be the County in which the Court sits, or in which the venue is laid, and may be served in any County, although directed to the Sheriff of another County.

3. That when the defendant or defendants in writs of *Scire Facias* can be found within the Province, or have a known place of abode therein, such writs shall be served by delivering a copy of the writ to each defendant, or leaving such copy at the defendant's place of abode, with the wife or an adult member of the family, or a person having the care of the house of such defendant, which service shall be proved by affidavit made and filed: Provided that in cases where the service is not personal, it shall not be deemed good service, without the order of the Court or a Judge of the Court from which the writ has issued, upon reading the affidavit of service.

4. That when any defendant cannot be found within the Province, and has not a known place of abode therein, writs of *Scire Facias* may be served by delivering a copy of the writ to any known agent of such defendant, or to any person having charge of any property real or personal, of such defendant, or being jointly interested in any property, real or personal, of such defendant, within the Province; and such service shall be deemed good service, when so ordered by the Court, or a Judge of the Court from which the writ has issued, upon affidavit of such service, and upon its being also made to appear upon affidavit, to the satisfaction of such Court or Judge, that the defendant cannot be found, and has no known place of abode within the Province.

5. That good service of writs of *Scire Facias*, according to the provisions of this Act, shall in all cases be equivalent to a return of *Scire Feci* by the Sheriff, as heretofore practised.

6. That when it shall be made to appear upon affidavit, to the satisfaction of the Court or a Judge of the Court from which a writ

(*c*) The Crown is bound by this statute, and must proceed by service of the Scire Facias, and not by a return of two nihils as formerly.—*Reg.* v. *Hammond*, 3 Kerr 180.

of *Scire Facias* may have issued, that such writ cannot be served in any of the modes hereinbefore specified for that purpose, such Court or Judge shall, after the return and filing of the writ, direct a rule to be entered, requiring any defendant as to whom such service cannot be made, to appear to such writ within twenty days after the last publication of such rule in one or more newspapers, published in such parts of the Province as such Court or Judge shall direct; and a copy of such rule, certified by the Clerk of the Court, shall be published in such newspaper or newspapers for four weeks successively; and if an appearance to the *Scire Facias* shall not be duly entered for such defendant within the said twenty days, such proceedings may be had, as in the case of default of appearance after due service of the writ; (*d*) affidavit of the due publication of such rule, according to the tenor thereof, being first made and filed.

7th William IV., Cap. 14.

Sec. 26. That in all writs of *Scire Facias*, the plaintiff obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined.

SERVICE OF WRITS.

7th William IV., Cap. 14.

Sec. 1. BE IT ENACTED, That in case any defendant in any non-bailable writ or process, issued out of the Supreme Court, or out of any Inferior Court of Common Pleas in this Province, has a known place of abode within the jurisdiction of the Court from which such writ or process may have issued, such writ or process may be served at the usual place of abode of such defendant, by delivering a copy of the writ or process with any requisite notice to the wife of such defendant, or to an adult person residing in the house, being a member or inmate of the family of such defendant: Provided that such service shall not be deemed good service without the order of the Court out of which the writ or process issued, or a Judge thereof, upon affidavit (*e*) shewing to the satisfaction of such Court or Judge the circumstances of such service, and that the place where the writ

(*d*) See rule 3 Hilary T., 9 Geo. 4, ante p. 17.
(*e*) See the form of affidavit, rule 2 Trinity T., 3 Vict., ante p. 41.

or process was served, was at the time of such service the usual place of abode of such defendant.

SET-OFF.

26th George III., Cap. 18.

Sec. 1. WHEREAS a provision for setting mutual debts, one against the other, is highly just and reasonable at all times, and tends to prevent a multiplicity of law suits; Be it enacted, That where there are mutual debts between the plaintiff and defendant in any Court of Record in this Province; or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, (*f*) and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleading in bar, (*g*) as the nature of the case shall require; so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what occasion it became due; (*h*) or otherwise such matter shall not be allowed in evidence upon such general issue.

2. That by virtue of this Act, mutual debts (*i*) may be set against each other, either by being pleaded in bar or given in evidence on the general issue in the manner hereinbefore mentioned, notwith-

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(*f*) In an action by an administrator, a note made by the intestate, and after his death indorsed by the payee to the Defendant, cannot be pleaded as a set off; no mutuality existing between the Plaintiff's claim and the Defendant's in the lifetime of the intestate.—*Curry* v. *Hibbard*, Bert. R. 183.

(*g*) In *Dingee* v. *Stickney*, Chip. MS. 78, where there was a plea of set off "that the Plaintiff before and at the time of exhibiting his bill, was indebted to the Defendant in &c. upon a promissory note indorsed to the Defendant by" &c., and the declaration was entitled generally of Easter T. 1829, which commenced on the 5th May; it was held that a promissory note which was indorsed to the Defendant on the same 5th May, could not be given in evidence under the plea.

(*h*) The omission in a notice of set off, to state that a promissory note which is otherwise sufficiently described, has been indorsed to the Defendant, is not material, where the defect is supplied by the particulars and the Plaintiff has not been misled.—*Bugbee* v. *McDonald*, 2 Kerr 61. See also *Parsons* v. *Wilson*, 1 Dowl. N. S., 181.

(*i*) A set off may be pleaded to an action of debt on an arbitration bond, in which the breach assigned is the non-payment of a liquidated sum awarded to be paid by the Defendant to the Plaintiff: it is pleadable to the sum awarded as the debt due, and not to the penalty of the bond.—*Shaw* v. *Wilson*, Bert. R. 390. So, a Defendant may plead that the promises were made by him jointly with A., and that the Plaintiff is indebted to himself and A. in a sum of money exceeding the damages of the Plaintiff, out of which sum the Defendant and A. are willing to set off the full amount of the Plaintiff's damages.—*Stackwood* v. *Dunn*, 3 Q. B. 822. But in an action of covenant, the Defendant cannot set off a sum alleged

standing that such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is justly and truly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid. And if upon trial of the issue between the parties, the plaintiff shall become nonsuit, or the jury shall not assess damages to the plaintiff over and above the debt or sum of which notice of set-off shall have been given as aforesaid, then the plaintiff shall have no costs, but shall pay to the defendant or his Attorney, costs to be taxed. And if upon such trial it shall appear to the jury that the plaintiff is overpaid, then they shall find a verdict for the defendant, and therewith certify to the Court how much they find the plaintiff to be indebted or in arrear to the defendant more than will answer the debt or sum so set off and found due by the same verdict; and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record, and if the plaintiff refuse to pay the same, the defendant for the recovery thereof, shall have execution for the same, together with the costs of the said action.

SPECIAL CASE.

7th William IV., Cap. 14.

Sec. 20. BE IT ENACTED, That it shall be lawful for the parties in any action or information depending in the Supreme Court after issue joined, by consent, and by order of any Judge of the said

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to be due on a guarantee under seal given by the Plaintiff to the Defendant, because the damages are unliquidated.—*Williams* v. *Flight*, 2 Dowl. N. S. 11, see also *Thompson* v. *Redman*, Ib. 1028.

Where a person is employed to do work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter, not of set-off but of deduction.—*Turner* v. *Draper*, 2 M. & G. 241 So, where the Plaintiff contracted to do certain work for the Defendant, and find the materials, for a fixed sum, and the Defendant afterwards supplied a portion of the materials, which the Plaintiff used up in the work; it was held that in an action for the work, the Defendant was entitled to deduct from the damages the value of the materials supplied by him, without pleading a set off.—*Newton* v. *Forster*, 12 M. & W, 772.

Court, to state the facts of the case in the form of a special case for the opinion of the Court, and to agree that a judgment shall be entered for the plaintiff or defendant by confession or of *nolle prosequi*, immediately after the decision of the case, or otherwise, as the Court may think fit; and judgment shall be entered accordingly. (*k*)

SUMMARY PRACTICE.

4th William IV., Cap. 41.

Sec. 1. WHEREAS the present practice of proceeding in the Supreme Court, where the matter in demand is under twenty pounds in value, has been found to be attended with an expence greatly disproportioned to the amount in question; Be it therefore enacted, That the Supreme Court of Judicature in this Province is hereby empowered, in all actions of debt, covenant, assumpsit, trover and conversion, and trespass to personal property instituted in the said Court, the sum total whereof shall not exceed twenty pounds, (*l*) to proceed in a summary way by the examination of witnesses in open Court, or other legal evidence, to try the merits of such causes, wherein no dilatory plea shall be admitted, and to determine thereon according to law, and enter up judgment accordingly, unless such cause shall be put to issue by a jury; in which case such cause shall be tried according to the rules and practice of the said Court as in other cases.

2. That in the said causes the bill of complaint or declaration shall be inserted in the writ, a copy of which, with a copy of the particulars of the plaintiff's demand in cases where the defendant is entitled to the same, shall be served on the defendant or defendants (*m*) who shall, at the term to which the writ is returnable, or within

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(*k*) See the forms of proceedings in Chit. Forms 350. As to the delivery of Paper Books to the Judges, see rule 6 Hilary T., 6 W. 4, ante p. 28, and as to the entry of special cases for argument, rule of Hilary T. 9 Vict., ante p. 50.

(*l*) If a promissory note is given for a larger sum, and reduced by payments before action brought, to less than £20, the Plaintiff, in an action to recover the amount, should proceed under this Act, and may aver the payment, in the declaration, to show that it falls within the summary jurisdiction of the Court.—*Foster* v. *Brown*, 1 Kerr 200.

An Attorney of the Supreme Court cannot be proceeded against under this Act, for a demand under £20.—*Bennett* v. *Morse*, 2 Kerr 624.

(*m*) It was held by Carter J. at Chambers, Nov. 1844, in *Coy* v. *Treacy*, that the omission to serve a copy of particulars, was not a ground for setting aside the writ; but His Honor made an order to stay proceedings till the particulars were delivered to the Defendant, and the costs of the application paid.

thirty (*n*) days after, put in bail, or enter his or their appearance in the said action, and if he or they intend to defend the same, file the general issue (*o*) and give a copy thereof to the plaintiff or plaintiffs' Attorney; and the said cause shall be tried and determined by the Court or jury, according to the rules and practice of the said Court, made or to be made for such purpose; and in case the defendant or defendants shall not at the term to which the writ is returnable, or within *thirty* (*p*) days after, as aforesaid, file the general issue in the said cause, and give to the said plaintiff or plaintiffs' Attorney a copy thereof, that then judgment may be entered by default in the said cause at the next succeeding *term*, (*q*) and the Court assess the damages as has been heretofore accustomed.

3. That the Clerk of the said Court shall keep a book in which shall be entered a memorandum of all final judgments so given in every cause, whether by default or tried or determined in a summary way, either by the said Court or a jury under the provisions of this Act; a copy of which said judgment certified by the said Clerk under the seal of the Court, shall be evidence of the said judgment in all Courts within this Province.

4. That the venue in all summary actions within the meaning of this Act shall be set forth in the margin of the writ, subject to be changed by rule or order of the Court, according to the ordinary practice thereof; (*r*) and if any cause in which the venue shall be laid or changed in or to any other County than the County of York, (*s*) shall be defended and put to a jury as aforesaid, the same shall be

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(*n*) The time mentioned in this Act is twenty days, but it was enlarged to thirty days by 1 Vict., c. 13, s. 2; this period is stated in the text for convenience. Unless the Defendant pleads within thirty days, the Plaintiff may treat the plea as a nullity and refuse to receive it, though it is tendered to him before interlocutory judgment is signed, and at the same time with notice of bail, which is accepted.—*Lingley* v. *Huestis*, 2 Kerr 4.

(*o*) It was held in *Maxwell* v. *Roe*, 2 Kerr 69, on demurrer, that *nil debet* might be pleaded as the general issue under this Act, to an action of debt on a limit bond: but as this plea would have been bad if the action had not been summary,—1 Saund. 38 a, note (3), 1 Chit. Pl. 424, it is difficult to understand what defence could have been set up, if issue had been taken on the plea, without the additional notice of the special matters of defence required to be given by the third section of 5 W. 4, c. 39.

(*p*) See note (*n*).

(*q*) By Act 7, W. 4, c. 14, s. 32, judgment may be entered in vacation as an interlocutory judgment, and the damages or sum due may be assessed, and proceedings had to final judgment and execution, as in other cases.

(*r*) The venue will not be changed if the cause of action accrues partially out of the Province.—*Dempster* v. *Stewart*, 1 Kerr 103. After issue joined, and notice of trial given which is afterwards countermanded, some special reason should be shewn to induce the Court to change the venue on application of the Plaintiff: it is not sufficient that two material witnesses for the Plaintiff reside in the county to which he applies to change the venue, and one in an adjoining county.—*Commercial Bank* v. *Williston*, 2 Kerr 507.

(*s*) As to trials in the County of York, see ante p. 23.

tried at Nisi Prius in the County in or to which the venue is laid or changed, in such manner and form as the said Supreme Court, by general rule or order thereof, shall prescribe and direct.

7. That the ordinary course of practice of the Supreme Court shall regulate the proceedings in summary actions in matters not herein specially provided for, and that the Judges of that Court may from time to time establish such other rules in relation to summary actions, not repugnant to this Act, as to them may seem expedient. (*t*)

8. That if the plaintiff proceed according to the ordinary practice of the Court in any case in which, by the provisions of this Act, the proceedings ought to be summary, he shall not be entitled in any such case to more costs than if he had proceeded in a summary manner, unless he obtains the order of the Court or Judge for the larger costs, upon good cause shewn therefor. (*u*)

10. That no judgment in summary actions shall affect or bind lands; nevertheless in summary actions lands may be taken on execution, and sold under the like regulations as in other cases. (*v*)

5*th William IV., Cap.* 39.

Sec. 1. That in any summary action in the Supreme Court, wherein the plaintiff may be entitled to judgment by default, under the provisions of the Act 4 W. IV., c. 41, the Court or a Judge thereof may let in the defendant to appear and defend, in like manner and upon such terms as in actions not summary, by the practice of the said Court, may be done after interlocutory judgment; anything in the second section of the said Act to the contrary notwithstanding.

2. That in such summary actions the defendant may file a demurrer to the writ in lieu of the general issue, and give a copy thereof to the plaintiff's Attorney, which demurrer shall be in a brief and summary form, and notice in writing of the grounds thereof shall be given to the plaintiff's Attorney at the same time with such copy; and upon such demurrer, the Court shall give judgment according as the very right of the cause shall require, without regarding any imperfection,

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(*t*) See rules Trinity T., 5 W. 4, ante p. 21.

(*u*) See ante p. 64, note (*s*).

(*v*) A writ of *Fieri Facias de bonis et terris* issued upon a judgment in a summary action, binds the land from the time of the delivery of the writ to the Sheriff to be executed; and it is not necessary that any prior memorial of the judgment should be registered in the county records to prevent a conveyance of the land, made by the judgment debtor after the delivery of the *fi. fa.* to the Sheriff, taking precedence of the Sheriff's sale and conveyance.—*Doe d. Naimith v. Williston*, 2 Kerr 459.

defect or want of form in the writ: and if judgment be given for the plaintiff, the Court may proceed to assess the amount to be recovered in like manner as in case of judgment by default; and no arrest of judgment shall be allowed in such summary actions.

3. That in such summary actions, any matters in bar to the action which in actions not summary ought to be pleaded specially, may be given in evidence under the general issue; provided that notice in writing of such matters be given to the plaintiff's Attorney at the same time with the plea; and infancy or coverture of the defendant shall not in any summary action be given in evidence, unless such notice thereof be given.

7th William IV., Cap. 14.

Sec. 32. That in any summary action in the Supreme Court, wherein the plaintiff may be entitled to judgment by default, such judgment may be entered in vacation as an interlocutory judgment, and the damages or sum due may be assessed, and proceedings may be had to final judgment and execution as in other cases.

1*st Victoria, Cap.* 13.

Sec. 2. That the time for any defendant in any summary action in the Supreme Court, putting in bail or entering his or her appearance and filing the general issue, shall be and is hereby enlarged to the period of *thirty* days after the day on which the writ is returnable.

SECTION III.

STATUTES

RELATING TO THE

PRACTICE IN THE COURT OF COMMON PLEAS. (a)

JURISDICTION.

35th George III., Cap. 2.

Sec. 2. WHEREAS doubts have arisen whether the jurisdiction of the Inferior Courts of Common Pleas extended to any other causes than those in which the parties were inhabitants of the County, and where the promise was made, or other cause of action arose immediately within the County in which the suit was brought; and whereas it is advisable to extend the jurisdiction of the said Inferior Courts of Common Pleas so as that they may have cognizance of causes where the sum or thing in contest may exceed the value of fifty pounds; Be it enacted, That the jurisdiction of the said Courts respectively shall be considered to extend to all transitory actions, and all other actions arising within any other place or County, (except where the title to lands comes in question,) and shall in those cases, except as aforesaid, have a concurrent jurisdiction with the Supreme Court of this Province: and that the Justices of the Inferior Courts of Common Pleas be, and hereby are empowered to issue subpœnas for any witness or witnesses residing in any of the Counties within the said Province: and that all subpœnas so issued from the said Justices, shall be of the same validity to compel the appearance of the witness or witnesses, as if such subpœnas had been issued from the Inferior Court of Common Pleas in the County where the witness or witnesses reside.

(a) Many of the Acts contained in Section II., apply as well to proceedings in this Court as to the Supreme Court. See titles "Abatement"—"Amendment"—"Arrest"—"Assessment"—"Bail"—"Costs"—"Depositions"—"Discharge of Debtors"—"Initials"—"Joint Debtors"—"Limit Bonds"—"Replevin"—"Scire Facias"—"Service of Writs"—"Set off."

Habeas Corpus and Writ of Error.

Provided always that it shall and may be lawful to and for any defendant or defendants in any suit to be commenced in either of the said Inferior Courts of Common Pleas, in which the sum or thing in contest exceeds the sum of *ten* (*b*) pounds, to remove the same suit before it shall be determined, into the said Supreme Court by habeas corpus; and after any suit shall be determined, and the amount of the judgment shall exceed the sum of ten pounds, it shall be lawful for either party to bring a writ of error (*c*) upon the said judgment to remove the same into the said Supreme Court.

Bail.

3. That in cases where the plaintiff's cause of action shall amount to upwards of *five pounds*, (*d*) and affidavit thereof made and filed, the defendant or defendants in such suit may be held to bail as has been heretofore accustomed.

4. That in cases where the plaintiff or plaintiffs reside in any other County than that in which the suit is intended to be commenced, the affidavit to hold to bail may be made either before the Chief Justice or other Justice of the Supreme Court, or any Justice of the Common Pleas of the said County in which the same plaintiff or plaintiffs reside, or any Commissioner (*e*) appointed for taking affidavits to be read in the Supreme Court, for the same County; and in all cases the affidavit to hold to bail, may be made before the officer who issues the process, or his deputy.

Summary Jurisdiction. (f)

5. And whereas it has been found by experience that the present

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(*b*) See post, Act 42 Geo. 3, c. 7, s. 3, prohibiting the removal of causes by habeas corpus, unless the amount exceeds £20—also 5 W. 4, c. 29, s. 2.

(*c*) In *Kinnear* v. *Gallagher*, 1 Kerr 424, it was doubted whether a writ of error would lie for not awarding judgment non obstante veredicto, particularly where the Court below might have awarded a repleader; and it was held that a mistake in the entry of the warrant of Attorney on the roll, and in the incipitur of the judgment, in stating the action to be "trespass on the case," instead of "debt," could not be taken advantage of on a general assignment of errors. An application was also allowed to be made to the Court below, pending the writ of error, to amend formal errors on the record, consisting of blanks left in the roll for the return day of the venire and day of trial; and the judgment of the Court was suspended in the mean time.

(*d*) The sum mentioned in this Act was £3; but the Act 42 Geo. 3, c. 7, s. 1, enacted that no Defendant should be held to bail in any action in the Common Pleas, or Mayor's Court of St. John, unless the Plaintiff's cause of action should amount to upwards of £5. As to the affidavit and indorsement on the writ, see 26 Geo. 3, c. 25, ante p. 57.

(*e*) By the Act 5 Vict., c. 10, the Commissioners now appointed, or that hereafter may be appointed to take affidavits in the Supreme Court, are authorised to take affidavits in the several Courts of Common Pleas. But that no affidavit shall be taken by a Commissioner who is the Attorney in the cause to which it relates, except affidavits to hold to bail.

(*f*) The Courts of Common Pleas are Courts of Record in regard to summary actions as well as actions not summary.—*Wheeler* v. *Grant*, Chip. MS. 165.

mode of practice in the prosecution of suits in the said Inferior Court of Common Pleas, and the Mayor's Court of the City of Saint John, where the sum or thing in contest has not exceeded the sum of ten pounds, has been attended with an expence that does not bear a reasonable proportion to the sum or thing in contest; Be it therefore enacted, That the said Courts are hereby respectively empowered in all actions of *debt*, actions of *assumpsit*, and actions of *trover* and *conversion* brought before them, the sum total whereof shall not exceed *ten pounds* (*g*) to proceed in a summary way by the examination of witnesses in open Court, or other legal evidence, to try the merits of such causes, wherein no dilatory plea shall be admitted; and to determine therein according to law or equity, and make up judgment accordingly, unless such cause shall be put to issue by a jury; in which case such cause shall be continued to the next stated term.

Summary Practice.

6. That in the said causes the bill of complaint or declaration shall be inserted in the writ, a copy of which shall be served on the defendant or defendants, who shall, at the term to which the writ is returnable, or within *thirty* (*h*) days after, put in bail or enter his or their appearance in the said actions, and if he or they intend to defend the same, file the general issue and give a copy thereof to the said plaintiff or plaintiff's Attorney; and the said cause shall be tried and determined by the Court or jury at the next succeeding term, unless upon application made by either party, and sufficient cause shewn by affidavit, the Court may think proper to put off the trial on account of the absence of a material witness; and in case the defendant or defendants shall not at the term to which the writ is returnable, or within *thirty* (*i*) days after, as aforesaid, file the general issue in the said cause, and give to the said plaintiff or plaintiff's Attorney a copy thereof, that then judgment may be entered by default in the said cause at the next succeeding *term*, (*k*) and the Court assess the damages as has been heretofore accustomed.

(*g*) See Act 42 Geo. 3, c. 7, extending the summary jurisdiction to cases where the amount does not exceed £20.

(*h*) The time mentioned in this Act for putting in bail and pleading, was twenty days, but it was enlarged to thirty days, by Act 6 Vict., c. 33, s. 3. The enlarged time is stated in the text for convenience.

(*i*) By 6 W. 4, c. 48, s. 1, the Defendant may be let in to defend after this period. Before this Act it was imperative on the Defendant to plead within the time limited, and if he failed in doing so, the Court had no power to let him in to defend afterwards, and could be compelled by mandamus to perfect the judgment for the Plaintiff.—*Rex v. The Justices of York*, Chip. MS. 85. See also ante p. 95, note (*s*), where a similar construction was given to the Act regulating the summary practice in the Supreme Court.

(*k*) Interlocutory judgment may be signed in vacation by 6 Vict., c. 33, s. 2.

7. That a copy of the judgments so given in every cause determined in a summary way, either by the Court or jury as aforesaid, certified by the Clerk under the seal of the Court, shall be evidence of the said judgment in all Courts within this Province.

SUMMARY JURISDICTION AND PRACTICE.

42d George III., Cap. 7.

Sec. 2. That in all actions (*l*) hereafter to be brought in the said Courts, wherein the sum or matter in demand shall not exceed twenty pounds, the declaration shall be inserted in the writ, and the said Courts shall proceed thereon, in a summary way, in the same manner as is directed in and by the said Act, (35 Geo. 3, c. 2,) in matters not exceeding ten pounds; in which actions no dilatory plea shall be allowed, and no judgment shall be reversed or set aside for any circumstantial error or defect of form or pleading or rendering judgment, where substantial justice shall appear to have been done.

Habeas Corpus and Writ of Error.

Sec. 3. That no defendant or defendants in any action hereafter to be brought shall remove such action into the Supreme Court by Habeas Corpus, unless the matter in demand shall exceed twenty pounds. Provided always that either party, after judgment given, may bring a writ of error to remove such judgment into the Supreme Court.

COMMISSIONERS TO TAKE BAIL.

60th George III., Cap. 11.

Sec. 1. BE IT ENACTED, That it shall and may be lawful for the respective Inferior Courts of Common Pleas in the several Counties of this Province, to appoint Commissioners to take bail in the same Courts in such distant parts of their respective Counties, as the majority of the Justices of any of the said Courts in term assembled

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(*l*) A question has recently been raised, whether this Act extends to actions of trespass to personal property, or is confined to the actions stated in the Act 35 Geo. 3, c. 2, s. 5. It is contended that the words "to enlarge the jurisdiction," in the title of the latter Act, relate only to the amount. The cause is now before the Court for decision.

shall at any time or times see fit and necessary; and such Commissioners to take bail as aforesaid shall be appointed by the said Inferior Courts aforesaid, in the same manner as Commissioners to take bail are appointed in the Supreme Court.

JUDGMENTS.

8th George IV., Cap. 8.

Sec. 6. That no judgment of any Inferior Court, or recognizance entered into before any Inferior Court or Judge thereof, (other than such as shall be entered into in the name of His Majesty, his heirs and successors,) shall affect or bind any lands, tenements, or hereditaments within this Province, any law, usage, or custom, to the contrary notwithstanding.

ADJOURNMENT OF SITTINGS. (*m*)

5th William IV., Cap. 4.

Sec. 1. WHEREAS the Sittings of the Courts of General Sessions of the Peace, and Inferior Courts of Common Pleas in the several Counties in this Province, at which juries are summoned to attend, are sometimes found insufficient for the transaction of the business depending in the said Courts; Be it enacted, That it shall and may be lawful for the said Courts of General Sessions of the Peace and Inferior Courts of Common Pleas in the several Counties in this Province, at the terms at which juries are summoned to attend, if the Justices of the said Courts, respectively, shall deem the same expedient, to adjourn the Sittings of the said Courts, or either of them, to the week next succeeding the said terms respectively; and all causes and matters heard and determined, and all business transacted on any day during the week next succeeding the said terms respectively, pursuant to such adjournment, shall have the same and the like force and effect to all intents and purposes as if heard and determined and transacted at any time during the said terms respectively, and all parties concerned shall take due notice of such adjournment from time to time, and govern themselves

(*m*) See a similar provision in the Act 2 Vict., c. 11, relating to the Court of Common Pleas in the County of Northumberland.

accordingly. Provided always that no trials of any issues by jury shall be had at any such adjourned Sittings.

2. Provided also that the days of teste and return of all writs in the said Courts shall be and remain in each respective term, as heretofore accustomed and established.

HABEAS CORPUS AND CERTIORARI.

5th William IV., Cap. 29.

Sec. 2. That no action not summary, brought in any of the Inferior Courts of Common Pleas in this Province, or in the Mayor's Court of the City of Saint John, shall, prior to final judgment, be removed to the Supreme Court by *habeas corpus* or *certiorari*, (*n*) after issue joined or interlocutory judgment signed.

SUMMARY PRACTICE.

6th William IV., Cap. 48.

Sec. 1. That in any summary action in any of the Inferior Courts of Common Pleas within this Province, wherein the plaintiff may be entitled to judgment by default, under the provisions of the sixth section of the Act 35 George III., c. 2, the Court in which such action shall have been instituted, or any Judge thereof, may let in the defendant to appear and defend in like manner and upon such terms as in actions not summary, by the practice of the said Courts, may be done after interlocutory judgment.

Pleading.

Sec. 2. That in all summary actions in the said Courts, any matters in bar to the action, which in actions not summary ought to be pleaded specially, may be given in evidence under the general issue,

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(*n*) A certiorari will not be granted to remove a cause from the Inferior Court, on account of misdirection of the Judge, because as the charge would not appear on the return of the proceedings from the Court below, the granting of the writ would not give the party the relief he required.—*Howard* v. *Harley*, Chip. MS. 117.

The remedy in such a case would be by bill of exceptions and a writ of error thereon.—2 Inst. 426—4 Chit. G. Pr. 2.—*Strother* v. *Hutchinson*, 4 Bing. N. C. 83. As to the time of preparing the bill of exceptions; see *Reg:* v. *Rowley*, 2 Dowl. N. S. 335, 7 Jur. 42.

provided that notice in writing of such matters be given to the plaintiff's Attorney at the same time with the plea; and infancy or coverture of the defendant shall not, in any summary action in the said Courts, be given in evidence, unless such notice thereof be given; and that notice of trial shall be given as in other cases.

Costs.

Sec. 3. That if any plaintiff proceed according to the practice of the said Courts in actions not summary, in any case in which, by the provisions of the several Acts of Assembly of this Province, the proceedings ought to be summary, he shall not be entitled in any such case to more costs than if he had proceeded in a summary manner, unless he obtains the order of the Court in which such action shall be prosecuted, for larger costs, upon good cause shewn therefor. (*o*)

BAIL.

7th William IV., Cap. 14.

Sec. 5. That the provisions hereinbefore contained (*p*) in respect to rendering defendants in discharge of their bail, shall extend and apply to the several Inferior Courts of Common Pleas in this Province, with regard to actions depending in those Courts respectively; and that any Judge of any such Inferior Court of Common Pleas, or any Commissioner for taking special bail in such Courts, may make an order for the render of any defendant held to bail upon any mesne process issued out of the Court of which he is a Judge or Commissioner, to the gaol of the County for which such Court sits; and such and the like proceedings shall be had thereupon as are hereinbefore provided in regard to actions depending in the Supreme Court.

ASSESSING DAMAGES AND SIGNING JUDGMENT.

6th Victoria, Cap. 33.

Sec. 1. That in all actions in the Inferior Courts of Common Pleas in this Province in which the said Courts may be authorised by Law

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(*o*) See a similar provision in the Act regulating summary practice in the Supreme Court, ante p. 64, and the cases there referred to.

(*p*) See sections 3 and 4 of this Act ante p. 62.

after judgment by default to enquire of the truth of any matters, or to assess the damages or the amount to be recovered in the action without the intervention of a Jury; such enquiry and assessment may be made by a Judge of the said Court in vacation; and upon the production of such assessment signed by such Judge, it shall be lawful for the Clerk of such Court to tax the costs and sign judgment, whereupon execution may issue forthwith: Provided always, that no such enquiry or assessment shall be made in vacation, until the expiration of twenty days after the day on which the judgment by default shall have been entered: Provided also, that the defendant in any such action, may, upon due application therefor, have such enquiry and assessment made by a Jury, and that the Judge who may be applied to in vacation to make such enquiry or assessment, shall have power to order the same to be made by a Jury in like manner as is now the Law and practice in cases before the Court in Term.

Summary Practice.

2. That, in all Summary Actions, hereafter brought in the said Courts, a copy of the particulars of the plaintiff's demand in all cases when the defendant shall be entitled to the same, shall be annexed to the copy of the Writ to be served on the defendant in such action; and in every such summary action, wherein the plaintiff may be entitled to judgment by default, such judgment may be entered in vacation as an interlocutory judgment, and the damages or amount to be recovered may be assessed, and proceedings had to final judgment in like manner as is provided by the first section of this Act.

Appearance and Bail.

3. That the time for any defendant in any summary action in the said Courts to put in bail or enter an appearance and file the general issue, shall be and is hereby enlarged to the period of thirty days after the day on which the writ is returnable; and that in all actions not summary the time for appearance and entering bail shall also be enlarged to thirty days.

Judgment and Execution.

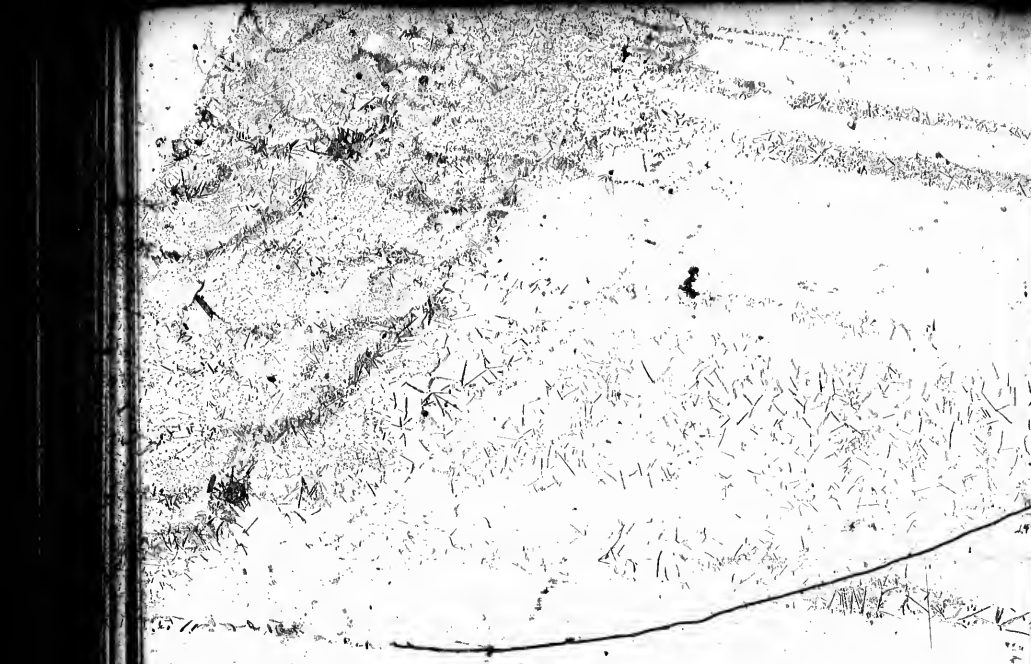
4. That every judgment (q) to be entered by virtue of this Act, may be entered as the judgment of the Court, although the Court may not then be sitting on the day of the entry and signing thereof; and every

(q) The Courts of Common Pleas have no power to grant new trials; and if they refuse to enter judgment in a case tried before them, a mandamus will be granted to compel them.—*Rex* v. *The Justices of Northumberland*, Chip. MS. 6.

Execution issued by virtue of this Act shall and may bear teste on the day of issuing thereof (if issued before the next term after judgment be so signed) and such judgment and execution shall be as valid and effectual as if the same had been entered of record, signed and issued in the ordinary course.

Signing Judgment.

5. That all final judgments entered and made up in the said Courts, whether in term or vacation, shall be signed by the Clerk of such Courts only; any law, usage or practice to the contrary thereof in any wise, notwithstanding.



SECTION IV.

GENERAL RULES OF THE COURT OF CHANCERY.

8TH JULY, 1826.

Clerks in Court.

WHEREAS the appointment of persons to be Clerks in the Court, who reside in different parts of the Province, and are remote from the place where the Sittings of the Court are held, has been the occasion of great inconvenience, and has exposed the records and papers of the Court to accident and loss; It is therefore ordered, That all the appointments heretofore made of persons as Clerks of this Court, be, and the same are hereby revoked and vacated: And it is further Ordered, that the Register of this Court be the officer in lieu of the Clerks, to transact and file all proceedings by Bill and Answer, and to have the custody of all records, papers and proceedings relating to causes in equity, and to make and sign all office copies thereof, and to enroll the decrees of the Court, and to sign and seal all writs and processes on the Equity side of the Court, and to perform all other such like services which appertained to the office of Clerks of this Court.

29TH JUNE, 1827.

Clerks in Court.

IT IS ORDERED, That all the former Clerks of this Court do forthwith deposit with the Register, all Bills, Answers, Pleas, Demurrers and other papers filed and remaining with them as such Clerks, in order to the same being filed gratis with the said Register in furtherance of the order of this Court of the eighth day of July last.

Indorsement of Bills.

1. That all Bills to be filed with the Register be indorsed with the name or firm of the complainant's solicitor or solicitors, who shall file the same, and the title of the suit be entered by the Register in a book to be by him kept for that purpose.

Subpœnas.

2. That the names of all the defendants in a suit may be included in one subpœna to appear.

3. That all subpœnas and other processes of the Court shall be sealed with a seal, to be kept by the Register, on which shall be inscribed the words "Court of Chancery."

4. That the several writs of subpœna shall be in the form mentioned at the foot of these orders, or as near as may be, with such alterations and variations as circumstances may require.

5. That it shall not be necessary to file a præcipe for the subpœna, but that on a subpœna for costs being sealed, the certificate or report shall be produced to the Register, as his authority for sealing it.

Indorsement of Subpœnas.

6. That the name or firm of the solicitor or solicitors issuing a subpœna shall be indorsed thereon.

Service of Subpœnas.

7. That the service of subpœnas shall be effected by delivering a copy of the Writ and of the indorsement thereon to the person to be served therewith, and at the same time producing and shewing the original Writ. (*a*)

8. That the time of serving any subpœnas (except for costs,) shall be limited to the last day of the term next following the term or vacation in which it issued out.

Appearance.

9. That defendants shall in all cases have thirty days to appear, from the day of service of the subpœna, exclusive of the day of service.

(*a*) If a party proceeding at law, resides out of the jurisdiction of the Court, an order may be obtained for service of a subpœna on his Attorney, where a bill has been filed for an injunction to stay the proceedings at law.—*Scovil* v. *Harris*. At the Rolls, Feb. 1844.

10. That the mode of appearance shall be by filing a note in writing of such appearance with the Register, and by giving a notice thereof to the plaintiff's Solicitor.

Pro Confesso.

11. That in case the defendant neglects to appear in due time after the service of the subpœna, on affidavit of such service and default, an order may be made that the Bill be taken *pro confesso* unless the defendant appear in twenty days from the date thereof exclusive; which order shall be inserted in the Royal Gazette at least ten days before the day limited for the appearance by the said order; and at the expiration of the time so limited, in case no appearance shall have been entered and notice given, the bill may be ordered to be taken *pro confesso*. (*b*)

Attachment.

12. That it shall in no case be necessary to issue an attachment with proclamations, or a commission of rebellion, but that in case of the return of *non est inventus* to a writ of attachment, the party may at once proceed to a Sergeant-at-Arms.

Copies of Pleadings.

13. That the solicitors of the plaintiff and defendant respectively, shall be entitled to furnish the opposite party with copies of the pleadings of which copies are required to be delivered.

Dismissing Bills.

14. That in case the plaintiff's solicitor neglect to deliver to the defendant's solicitor a copy of the bill filed, within thirty days after the appearance of the defendant shall have been put in and notice given, the defendant may move that the bill be dismissed, which may be ordered accordingly. (*c*)

Pro Confesso.

15. That the defendant shall have two calendar months, exclusively, to put in a plea, answer or demurrer, after having been served with a copy of the plaintiff's bill, without any order for such purpose, and in default of so doing on fourteen days' notice of motion given by the plaintiff and motion made in open Court, the bill may be ordered

(*b*) See 2 Vict., c. 35, s. 6.
(*c*) See 2 Vict., c. 35, s. 6.

to be taken forthwith *pro confesso*, unless the Court on special circumstances disclosed by affidavit should allow further time; in which case no such order shall be entered until the expiration of the further time allowed. (*d*)

English Practice. (*e*)

16. That in all cases where, by the English practice, a different time is allowed or prescribed for the performance of any act in town causes and country causes, and no provision is made for the same by the practice of this Court, the time for the performance of such act shall be the time allowed in country causes, without respect to residence.

Swearing to Answers, &c.

17. That all answers and pleas may be sworn before any one of the Masters in Ordinary or Extraordinary, and that all pleadings, as well as the bill, be filed with the Register and indorsed with the name or firm of the solicitor or solicitors by whom the same are filed.

Amended Answer.

18. That where, upon exceptions to any answer, it becomes necessary to put in an amended answer; in case such amended answer be not put in in due time, it shall not be necessary for the plaintiff to proceed by attachment, but he may give notice of motion that the bill be taken *pro confesso*, unless the amended answer be put in within ten days after the service of such notice; and in case the amended answer be not put in, and a copy delivered within the time, the bill may be ordered to be taken *pro confesso*.

Issue.

19. That the cause shall be considered at issue by the replication, and no subpœna to rejoin shall be necessary.

Master's Oath.

20. That the oath to be taken by the Masters in Ordinary, as examiners, shall be in the form prescribed in that behalf in the appendix to these orders, and that the same be administered in open

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(*d*) See 2 Vict., c. 35, s. 6.

(*e*) The Act 2 Vict., c. 35, s. 13, enacts that in all matters relating to the practice of this Court, not otherwise particularly provided for by Legislative enactment or the rules of this Court, the rules of practice of the High Court of Chancery in England *as now established* shall be in force, subject to the like exceptions, limitations, restrictions and rules of construction, in the application of the same, as the practice of the said High Court of Chancery in force at the time of the erection of this Province, have heretofore been; and subject to be altered by such rules as may hereafter be established in the Court of Chancery of this Province.

Court, and that the Masters so sworn do subscribe their names, together with the day and year of being so sworn, on a roll to be kept by the Register for that purpose; and that when examiners shall be specially appointed by order of the Court for taking the examinations in any cause under the provisions of the Statute of the 2d Victoria, (*f*) entitled "An Act for the improvement of the Practice in the Court of Chancery," such person may be either sworn in open Court, or before some person empowered by commission under the seal of the said Court to administer the oath, and in case the oath be administered in Court, an entry shall be made in the minutes, of the same, and a copy thereof, together with the order by which such person shall have been so appointed, shall be annexed to the copy of the examinations to be by him taken and transmitted therewith; and in case the oath shall be administered under a commission, then such commission, with a certificate indorsed thereon by the Commissioner that the oath has been duly administered, shall be annexed to the examinations and transmitted therewith, which latter oath and certificate shall be in the form prescribed in that behalf in the appendix to these orders, or as near thereto as circumstances may admit.

Witnesses.

21. That no rule to produce witnesses shall be necessary.

Interrogatories.

22. That interrogatories for the examination of witnesses be filed with one of the Masters, and copies thereof delivered to the opposite party, together with notice of the name of the Master with whom the same were filed, within thirty days after replication filed, in which interrogatories shall be specified the names of the witnesses to be examined, and the particular interrogatories to which each witness is to be interrogated.

Cross Interrogatories.

23. That the cross-examination of the witnesses may be conducted either on written interrogatories, to be filed in like manner with the Master, or by interrogatories to be proposed at the time of the examination as hereafter mentioned. And that when the former mode of proceeding is adopted the cross interrogatories shall be filed, and a copy thereof delivered to the opposite party within fourteen days after receipt of a copy of the interrogatories in chief; or in case the party intends to attend and propose cross interrogatories at the

(*f*) See 2 Vict., c. 35, s. 7.

time of the examination, then notice shall be given to the opposite party of such his intention within fourteen days after receipt of a copy of the interrogatories in chief.

Examination.

24. That within fourteen days after the expiration of the time for filing cross interrogatories, the solicitor who filed the interrogatories in chief shall obtain an appointment from the examiner, fixing the time and place of examination, which shall be served on the opposite party fourteen days, exclusive, before the day of such examination.

Subpœna ad Testificandum.

25. That any number of witnesses may be included in one subpœna *ad testificandum.*

Examination of Witnesses. (g)

26. That when the cross examination of witnesses is to be conducted by means of interrogatories proposed at the time of examination, Counsel may attend for all parties, and each cross interrogatory shall be committed to writing and submitted to the examiner, who shall then propose the same, and in such case a re-examination in like manner as the cross examination, and confined to matters arising thereout, shall be permitted to the opposite party, such interrogatories to be afterwards fairly copied, certified by the Master, and annexed to the depositions.

27. That all objections to any interrogatory shall be made at the time the same is proposed, and in such case if the party proposing the same submit to the objection, the question shall not be put, otherwise the same shall be proposed and the answer thereto taken, but at the same time the examiner is to note down the objection in connection with the deposition. He is also to note down in like manner any objection taken to the testimony of the witness, (as being hearsay for instance,) and the validity of all such objections, if persisted in, shall be decided at the hearing, at which time no objection not so made before the examiner shall be permitted.

Filing Depositions.

28. That at the expiration of fourteen days after the day appointed for the examination, the examiner shall transmit the interrogatories and depositions to the Register under seal, unless he shall be of

(g) See 2 Vict., c. 35, s. 8.

opinion that further time is necessary to take the depositions; in which case he shall defer transmitting the same so long as he may find requisite, and certify his opinion to the Court at the time of transmission.

Publication.

29. That on the depositions being filed with the Register, either party may move for publication, (on six days notice of motion being given,) which shall be directed to take place forthwith, or at such time as the Court, on sufficient cause shewn by affidavit, shall order.

Dismissing Bill.

30. That in case the plaintiff shall neglect to proceed to file interrogatories for the examination of witnesses, or to obtain an appointment to examine witnesses thereupon in due time, the defendant, on giving fourteen days' notice of motion, may move that the bill be dismissed, which shall be ordered accordingly, unless cause be shewn to the contrary.

Hearing.

31. That notice of bringing a cause on to hearing shall be served on the opposite party, and the cause set down for hearing with the Register fourteen days before the day of hearing; and where publication has been ordered, no cause shall come on to be heard until the expiration of one calendar month from the day of publication.

Subpœna to hear Judgment.

32. That no subpœna to hear judgment shall be deemed necessary.

Dismissing Cause.

33. That if the plaintiff shall set down the cause and give notice of bringing the same on to be heard, and neglect to appear at the hearing, the cause may be ordered to be dismissed.

Dismissing Bill.

34. That if the plaintiff neglect to bring on the cause to a hearing at the earliest period at which, by the practice of the Court, the same might have been heard, the defendant may obtain an order upon affidavit of the state of the cause, and of such default on the part of the plaintiff, that he may be at liberty to bring the same to hearing; and if the defendant shall thereupon serve such order, set down the cause, and give notice to the plaintiff fourteen days before the day of hearing, and the plaintiff shall not appear at the hearing, the bill may be ordered to stand dismissed.

Computation of Time.

35. That when any specified time is, by the practice of this Court, allowed or prescribed for the taking of any step in the progress of proceedings therein, it shall always be computed exclusively of the day from which such time commences.

Injunction.

36. That in every cause for an injunction to stay proceedings at Law, if the defendant do not plead, answer or demur to the plaintiff's bill within ten days after service of a copy of the plaintiff's bill, (*h*) the plaintiff shall be entitled to such injunction, as of course, upon motion. (*i*)

Sitting of the Court.

37. That at each term, such day or days shall be appointed for the sitting of the Court, during the ensuing vacation, as the Master of the Rolls shall deem proper, which shall be published in the Royal Gazette on the week next after the term.

Form of Subpœna to appear and answer.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To Greeting:

We command you, (and every of you, *where more than one defendant,*) that within thirty days after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our Court of Chancery at Fredericton, to a "Bill" (*or as the case may be,* "Information" *or* of "Revivor and Supplement," *or* "Supplemental Bill,") filed against you by
(and others *or* another,) and that you do answer concerning such things as shall then and there be alleged against you, and observe

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(*h*) The Plaintiff cannot, for the purpose of moving for the common injunction, serve a copy of the bill upon the Defendant, at the same time that the subpœna is served; but must wait till the Defendant has appeared.—*Scovil* v. *Harris*. At the Rolls, Feb. 1844.—*Fielden* v. *Ansley*. At the Rolls, March, 1844.

An answer put in before interrogatories are filed under the sixth order of the 2d August, 1842, is a nullity, and the Defendant cannot thereupon move to dissolve an injunction obtained for want of answer, though the Plaintiff has been irregular in serving a copy of the bill on the Defendant before he has appeared.—*Fielden* v. *Ansley*, supra.

(*i*) The affidavit in support of the motion, should state that the bill has been filed for an injunction.—*Scovil* v. *Harris*, supra.

what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process for contempt as the Court shall award, and of the said bill being taken against you *pro confesso*.

Witness His Excellency at Fredericton, the day of in the year of our Reign.

ROBINSON.

Form of Subpœna for Costs.

Victoria, &c.

To Greeting:

We command you (and every of you,) that you pay or cause to be paid immediately after the service of this writ, to or bearer of these presents, £ costs by our Court of Chancery at Fredericton, adjudged to be paid by you to the said under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment. Witness, &c.

ROBINSON.

Form of Subpœna to testify viva voce in Court, or to testify before the Master.

Victoria, &c.

To Greeting:

We command you and every one of you, that laying all other matters and excuses aside, you personally be and appear before His Excellency the Chancellor, (*or* before His Honor the Master of the Rolls,) at Fredericton, *or* before Mr. one of the Masters of our Court of Chancery, at his office in on the day of next, at of the clock in the forenoon, to testify the truth according to your knowledge in a certain suit now pending in our said Court of Chancery, wherein (and others *or* another,) are plaintiffs, and (and others *or* another,) are defendants, on the part of the (*in case of Subpœna duces tecum, add*, and that you then and there bring with you and produce, &c.") And hereof fail not on your peril.

Witness, &c.

ROBINSON.

Form of Examiners Oath.

You do swear that you shall well and truly execute the duties of an Examiner of this Court without favor or partiality.

So help you God.

Form of Oath where an Examiner is specially appointed in a particular cause under Statute 2d Victoria.

You do swear that you shall well and truly execute the duties of an Examiner of the Court of Chancery in a certain cause now depending therein, in which A. B. is plaintiff and C. D. defendant, without favor or partiality.

So help you God.

Form of Certificate of Commissioner, that Examiner specially appointed has been duly sworn.

I, E. F., the Commissioner named in the foregoing Commission, do hereby humbly certify that A. B. therein likewise named, was this day duly sworn on the Holy Evangelists well and truly to execute the duties of an Examiner in a cause pending in the Court of Chancery in which A. B. is plaintiff, and C. D. defendant, without favor or partiality.

Dated the day of A. D.

(Signed) E. F.

24TH JUNE, 1839.

Order for Appearance.

IT IS ORDERED by His Excellency the Chancellor, by and with the advice and consent of His Honor the Master of the Rolls, that when the defendant is not served with process, and proceedings are to be had under an Act made and passed in the forty-eighth year of the Reign of His Majesty King George the Third, (*k*) intituled "An

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(*k*) Whereas sometimes, persons have withdrawn themselves out of the limits of this Province, and thereby rendered it impracticable to serve them with Process for their appearance in the Court of Chancery of this Province; Be it enacted by the President, Council and Assembly, That if in any suit which hath been or hereafter shall be commenced in the said Court of Chancery, any Defendant or Defendants against whom any subpœna or other process shall

Act for making process in Courts of Equity effectual against persons who reside out of the Province, and cannot be served therewith," and also an Act in addition thereto, made and passed in the third year of the Reign of His late Majesty King William the Fourth, (*l*)

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issue, shall not cause his, her or their appearance to be entered upon such process within such time and in such manner as according to the rules of the Court the same ought to have been entered in case such process had been duly served, and an affidavit or affidavits shall be made to the satisfaction of the said Court, that such Defendant or Defendants is or are out of the limits of this Province, or that upon inquiry at his, her or their usual place of abode, he, she or they could not be found so as to be served with such process, and that there is full ground to believe that such Defendant or Defendants is or are gone out of the Province, or otherwise absconds to avoid being served with the process of the said Court, or that such Defendant or Defendants departed from this Province after the cause of action upon which such suit hath been or shall be commenced, accrued, and have or hath not resided within this Province for the term of twelve months next preceding the commencement of such suit; or that the Heirs, Executors or Administrators of any person dying in this Province, or of any person who shall have so absented him or herself from this Province, in cases in which such Heirs, Executors or Administrators may be made Defendant or Defendants in such suit, reside without the limits of this Province, then and in such case the said Court may make an order directing and appointing such Defendant or Defendants to appear at a certain day therein to be named, and a Copy of such order shall within fourteen days after such order made, be inserted in the Royal Gazette, published by the King's Printer in this Province, and shall continue to be inserted in the same Gazette for the space of three months thence next ensuing; and also a copy of such order shall within the time aforesaid of fourteen days, be posted in some public place in the Town or Parish in which such Defendant or Defendants last dwelt within this Province; and if such Defendant or Defendants do not appear within the time limited by such order or within such further time as the Court shall appoint, then on proof made of such publication of such order as aforesaid, the Court being satisfied of the truth thereof, may order the Plaintiff's bill to be taken pro confesso, and make such decree thereon as shall be thought just.

(*l*) Whereas it frequently happens that persons resident without the limits of the Province, are necessary parties, Defendants, in suits in the Court of Chancery, brought for the foreclosure or redemption of Mortgages on lands situate in the Province, and for other matters: And whereas doubts have arisen whether the provisions of an Act passed in the forty-eighth year of the reign of His late Majesty King George the Third, intituled, "An Act for making process in Courts of Equity effectual against persons who reside out of this Province, and cannot be served therewith," extend to persons who have never been resident within the Province; and it is deemed expedient to make further and other regulations relative to non-residents; Be it enacted, That if in any suit which hath been or hereafter shall be commenced in the said Court of Chancery, any Defendant or Defendants against whom any subpœna or other process shall issue, shall not cause his, her or their appearance to be entered upon such process, within such time and in such manner as according to the rules of the Court the same ought to have been entered, in case such process had been duly served, and it shall be made to appear, on affidavit to the satisfaction of the said Court, that such Defendant or Defendants do not reside within the Province, but have a known place of residence elsewhere, which shall be stated in the affidavit, then and in such case the said Court may make an order directing and appointing such Defendant or Defendants to appear at a certain day therein to be named; and a copy of such order shall, within fourteen days after such order made, be inserted in the Royal Gazette, published by the King's Printer in this Province, and shall continue to be inserted in the same Gazette for so long a time as the Court shall direct, not less than *three* months; and a copy of such order shall within one year next after the making of the same, be served on the Defendant or Defendants, either personally or by leaving the same at the residence of the said Defendant or Defendants with some person belonging to the family or living in the house of the said Defendant or Defendants; and if such Defendant or Defendants do not appear within the time limited by such order, or within such further time as the Court shall appoint, then, on proof made of such publication and service of such order, as aforesaid, the Court being satisfied of the truth thereof, may order the Plaintiff's bill to be taken pro confesso, and make such decree thereon as shall be thought just and proper, and may thereupon issue process to compel the performance of such decree as is in and by the said recited Act provided: Provided always, that if the Defendant or Defendants reside in the United Kingdom, or any other part of Europe, or in the West Indies, such service shall be made at least *three* calendar months before the day therein named for appearance; and if the Defendant or Defendants reside in any part of the United States of America, or in any of the British North American Colonies, such service

or either of them, in case the appearance is not entered within thirty days after the last day on which the Subpœna issued may be served, (*m*) under the eighth order of this Court of the fourth day of June instant, the like proceedings may be had as are authorised by the said Acts, or either of them, in case the appearance of the defendant be not entered within the time mentioned and prescribed in that behalf in the said Acts, or either of them, respectively.

5TH MAY, 1840.

Appointment of Guardians. (*n*)

1. That in petitions for the appointment of Guardians in

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shall be made at least *two* calendar months before the day of appearance; and if the Defendant or Defendants reside in any other part of the world, such service shall be made at least *six* calendar months before the day of appearance.

2. That proof of such service may be made by affidavit or affidavits to be taken and subscribed before any Judge of the Court of the King's Bench, Common Pleas, or Exchequer, or before the Lord Chancellor, Master of the Rolls, or Vice Chancellor, or any Master of the High Court of Chancery, or Mayor of any City, Borough, or Town corporate in England or Ireland; before any Lord of Session, or other Superior Judge, or any Provost or other Chief Magistrate of any City, Borough, or corporate Town in Scotland; before any Judge of the Supreme or Superior Court or Master of the Rolls in any British Colony; or before any Superior Court, or any Judge thereof, in the United States of America, or any other Foreign Country: Provided always, that such affidavit or affidavits, if taken in any Foreign Country, be authenticated by a certificate under the hand and seal of the British Ambassador, Envoy, Minister, Consul, or Vice Consul, and if taken within any part of the British Dominions, by a certificate under the hand and seal of some Public Notary, to the satisfaction of the said Court of Chancery.

(*m*) It should appear by the affidavit that the subpœna has been issued and not served: the mere production of the writ is not sufficient.—*Clarke* v. *Brewer*. At the Rolls, October, 1846.

(*n*) See the practice fully stated in 1 Turner's Pr. 675, 1 Grant, 421. The costs of the application will be paid out of the infant's property.—*Ex parte* v. *Maxeed*. At the Rolls, March, 1844.

The form of recognizance entered into by the Guardian, may be as follows:—

"IN CHANCERY. In the matter of A. B., an infant, C. D., of the Parish of in the County of before our Sovereign Lady Victoria, by the Grace of God, &c., in Her Court of Chancery of the said Province, personally appearing, doth acknowledge himself to owe to our said Lady the Queen, her heirs and successors, the sum of £ , of lawful money of the said Province, to be paid to our said Lady the Queen or her successors: and unless he shall so do, he is willing and agrees for himself, his heirs, executors and administrators, that the said sum of money shall be levied, recovered and received of him, and of each of them, and of all and singular, his goods and chattels, lands and tenements, wheresoever the same shall be found. Witness our Sovereign Lady Victoria, &c."

Whereas the above bounden C. D., hath been duly appointed by the master of the Rolls of the said Court of Chancery, to be the Guardian of the person and estate of the said infant A. B.; now the condition of this recognizance is such, that if the above bounden C. D. do and shall duly and annually, or oftener if thereunto required, account for all such monies or parts of the property and estate of the Infant as may from time to time come to the hands of the said C. D., and pay, apply or secure the same in such manner as the said Court already hath, or may from time to time order and direct; then this recognizance to be void, or else to remain in full force and effect.

Taken and acknowledged by the above named C. D., at my office in Fredericton, the day &c., Before me

E. F., *Master in Chancery*.

cases where a reference to a Master will be required, no particular specification and description of the Real Estate, nor specific inventory of the personal property of the Infant be inserted, but the locality of the real property and the value of both classes be generally stated.

2. That no copy of such petition be made for the use of the Judge to whom the same shall be presented, unless particularly desired.

3. That no state of facts other than is contained in the affidavits, be laid before the Master to whom the reference shall be made.

4. That the petition to confirm the Master's Report be in the form prescribed at the foot of these orders, or as near thereto as the case may admit.

5. That in cases where it is made to appear on affidavit that the whole property of the Infant does not exceed three hundred pounds, a Guardian may be appointed on the presentment of the petition, without reference, if the Judge to whom the same is presented, shall think fit so to order.

Confirming Reports.

6. That in petitions to confirm Masters' Reports, it shall, in all cases, suffice to advert shortly to the order of reference, and to state the fact and date of filing the Report, without reciting the particulars of such Report.

Petition to confirm Report.

IN CHANCERY.

In the matter of A. B., an infant.

To His Excellency the Chancellor, (*or* His Honor the Master of the Rolls.)

The humble petition of A. B., an Infant, of the age of years.

SHEWETH:

That by an order bearing date the day of A. D. , made on the Petition of your Petitioner, Esq., the Master to whom the matter of the said petition was referred, was directed to make certain enquiries respecting the age, fortune and relations of your Petitioner, and to state what was proper to be allowed for the education and maintenance of your Petitioner. That the said Master hath duly made and filed his Report on the matters referred, bearing date the day of , A. D. .

Your Petitioner therefore prays that the same may be in all things

confirmed, and that such further order may be made in the premises as to Your Excellency (*or* Honor) may seem meet.

And your Petitioner, as in duty bound, will ever pray, &c.

2D AUGUST, 1842.

Performance of Decrees.

1. That no writ of execution nor any writ of attachment shall hereafter be necessary for the purpose of requiring or compelling obedience to any order or decree of this Court, by subsequent process of contempt, but that the party required by any such order to do any act, shall, upon being duly served with such order, be held bound to do such act in obedience to the order.

2. That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order, shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a Sergeant-at-Arms, and such other process as he hath hitherto been entitled to upon a return of non est inventus to a writ of attachment issued for non performance of a decree or order. (*o*)

3. That every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done; and that upon the copy of the order which shall be served upon the party required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz.: "If you, the within named A. B., neglect to perform this order by the time therein specified, you will be liable to be arrested under the authority of the Court of Chancery, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order."

Writ of Assistance.

4. That upon due service of a decree or order for delivery of

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(*o*) By 2 Vict., c. 35, s. 12, it is enacted, That the Court shall have power to enforce performance of any decree, or obedience thereto, by execution against the body, or the goods and chattels, and in default thereof, the lands and tenements of the party against whom the decree is made; which execution shall have the same effect as execution issuing out of the Supreme Court; and that every person imprisoned under any execution issued out of the Court of Chancery shall be entitled to the like benefit of any statute made for the relief of Insolvent Debtors as if arrested under process of the Supreme Court.

possession, and upon proof made of a demand and refusal to obey such order, the party prosecuting the same shall be entitled to an order for a writ of assistance.

Performance of Decrees.

5. That every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

Interrogatories.

6. That no special interrogatories be inserted in any Bill, but in case any defendant appears to the bill, the plaintiff shall thereupon be at liberty without order, to file such interrogatories as might have been contained in such bill provided this order had not been made, subject to the regulations hereafter prescribed; and such interrogatories when so filed shall be deemed and taken to be part and parcel of the said Bill. (*p*)

Answer.

7. That a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto, and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Interrogatories.

8. That the interrogatories so to be filed under the 6th order, shall be duly entitled in the cause, and shall be in the form or to the effect following, viz.: "Interrogatories to be answered by the several defendants hereinafterspecified," (*or*, by the defendant, *in case there be but one defendant*,) "touching the matters alleged and contained in the bill filed in this cause in which A. B., &c., are complainants, and C. D., &c., defendants:—1st. Whether, &c."

(*p*) The Plaintiff cannot file the Interrogatories till the Defendant has appeared.—*Fielden* v. *Ansley*, ante page 116, note (*h*).

9. That the interrogatories so to be filed, shall be divided as conveniently as may be from each other and numbered consecutively, 1, 2, 3, &c., and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the interrogatories, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively, 1, 2, 3, &c." And with the copy of the bill to be served on any defendant or his solicitor, upon appearing to the bill, shall be served a copy of such of the interrogatories only as such defendant is required to answer, together with a copy of such note, unless such defendant shall, at the time of giving notice of appearance, require to be furnished with a copy of all the interrogatories, in which case a copy of the whole shall be furnished.

10. That the note at the foot of the interrogatories, specifying which of them each defendant is required to answer, shall be considered and treated as a part of the bill; and the addition of any such note or any alteration or addition to such note, or to the interrogatories after the same shall have been filed, shall be considered and treated as an amendment of the bill.

Bill.

11. That instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used, words in the form or to the effect following, "To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed, and in case of appearing to this your orator's bill, may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereafter to be filed, as by a note thereunder written, they shall be respectively required to answer"—And that the prayer of the bill shall immediately follow.

Joinder of Co-Defendants.

12. That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court as parties to a suit concerning such demand all the persons liable thereto, but the plaintiff may proceed against one or more of the persons severally liable.

Demurrer.

13. That where a demurrer shall be filed by the defendant to the

whole bill or to a part of the bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within one calendar month after service of a copy of such demurrer upon him, cause the same to be set down for argument.

Plea.

14. That when the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same extent and for the same purposes as a plea allowed upon argument, unless the plaintiff shall, within one calendar month after the service of a copy of such plea upon him, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

Demurrer and Plea.

15. That no demurrer or plea shall be held bad and overruled on argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

16. That no demurrer or plea shall be held bad or overruled upon argument, only because the answer of the defendant may extend to some part of the same matter that may be covered by such demurrer or plea.

Answer.

17. That a defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer, and that he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

Want of Parties.

18. That where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty within fourteen days after a copy of the answer delivered to him, to set down the cause for argument upon that objection only. And the purpose for which the same is so set down shall be notified by an entry to be made in the Register's book, in the form or to the effect following, that is to say, "Set down upon the defendant's objection for want of parties." And that where the plaintiff shall not so set down his cause but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be

allowed, be entitled as of course to an order for liberty to amend his bill by adding parties; but the Court, if it thinks fit, shall be at liberty to dismiss the bill.

19. That if a defendant shall, at the hearing of the cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit,) shall be at liberty to make a decree saving the rights of the absent parties.

Masters' Reports.

20. That in the reports made by the Masters of the Court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited; but such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination or answer was so brought in or used.

21. That when it shall be referred to a Master to take an account of the amount due upon any mortgage, the Master shall annex to his report and refer to therein, a statement shewing the manner in which the amount reported to be due is made up and ascertained, which statement shall be deemed and taken to be a part of the report.

Bills of Revivor. (q)

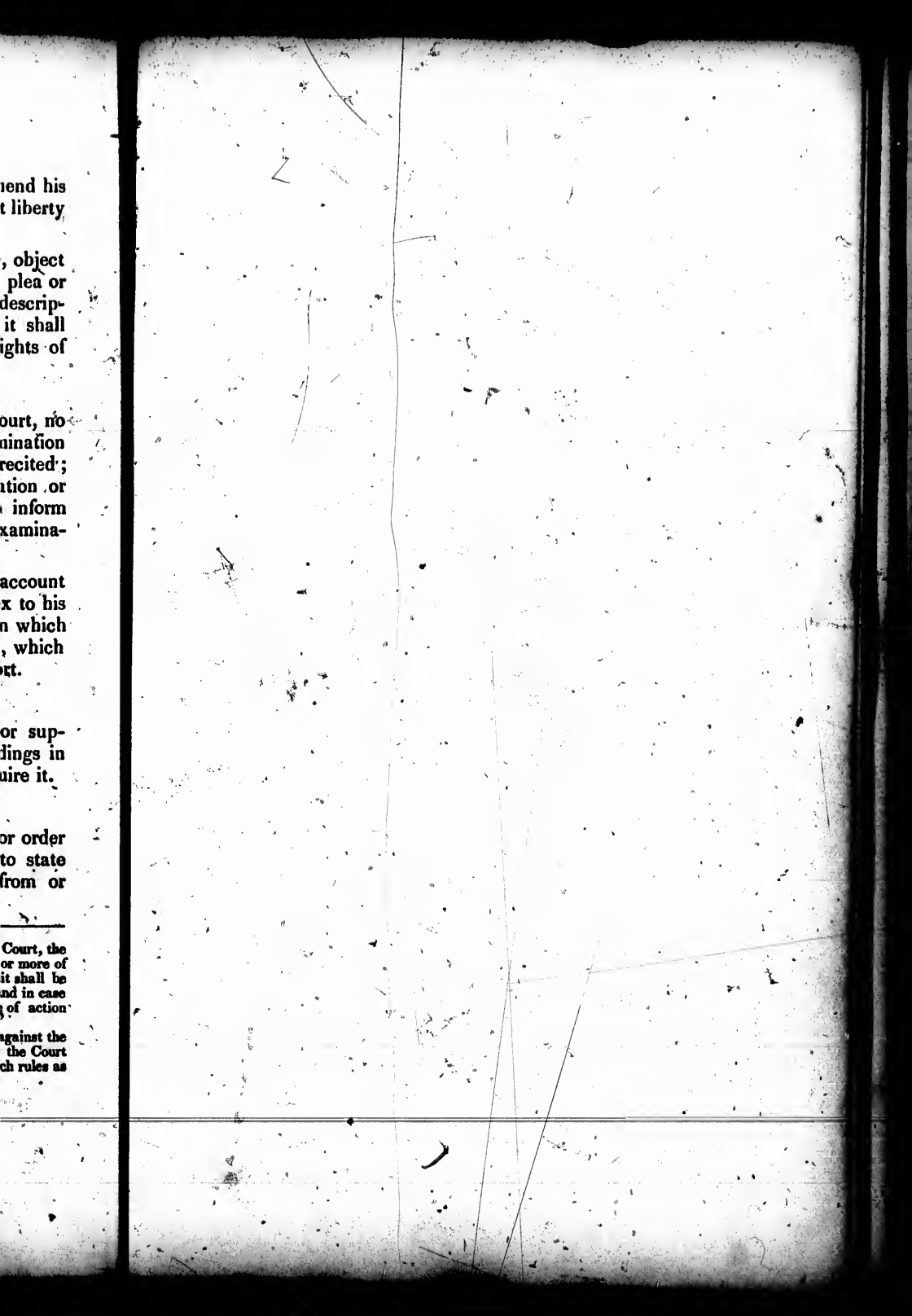
22. That it shall not be necessary in any bill of revivor or supplemental bill, to set forth any of the statements in the pleadings in the original bill, unless the circumstances of the case may require it.

Petition for Re-Hearing.

23. That in any petition of re-hearing of any decree or order made by any Judge of the Court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from or sought to be re-heard.

(q) By 2 Vict., c. 35, s. 10, it is enacted, That where in any suits pending in the Court, the cause of action shall survive, the suit shall not abate by reason of the death of one or more of the Plaintiffs or Defendants; but upon suggestion of the death to the Court, the suit shall be allowed to proceed in favor of or against the surviving party, as the case may be: and in case of the death of one or more Plaintiffs or Defendants in any suit where the cause of action shall not survive, it shall only abate as to the person dying.

Sec. 11 enacts that in all cases where it shall be necessary to revive a suit against the representatives of a deceased Defendant, no bill of revivor shall be necessary, but the Court may order that the same stand revived, upon petition of the Plaintiff, subject to such rules as may be made in that behalf.



SECTION V.

RULES OF THE SURROGATE COURT.

9TH OCTOBER, 1840.

WHEREAS by an Act of the General Assembly, made and passed in the third year of the Reign of Her present Majesty Queen Victoria, entitled "An Act in amendment of the Law relating to wills, legacies, executors and administrators, and for the settlement and distribution of the estates of intestates," it is among other things enacted, that the Court of Chancery shall and may from time to time make, establish, alter and amend rules and forms of practice and proceedings, as well for that Court in matters made cognizable before it by this Act, as for the Surrogate Courts, in such manner as the Court of Chancery shall see fit, provided that such rules and forms be in no wise repugnant to that Act.

His Excellency the Chancellor, by and with the advice and consent of His Honor the Master of the Rolls, doth hereby order and direct as follows:—

Petitions.

1. That every petition for letters testamentary or of administration, shall state the names of the Widow (if any) and of all the children (if any) of the deceased, and their additions and places of residence respectively, and in case there shall be no children, then the names and additions of all the nearest of kin in equal degree, and their representatives, with their several places of residence, and in case any of the persons whose names are required to be stated are married women or infants, the names and additions of the husbands or guardians of such infants (if any) shall also be stated with their places of residence; provided that in case any of the above particulars are sworn to be unknown to the Petitioner, and the Surrogate to whom the petition shall be presented, shall deem it unnecessary under the circumstances of the case, that the same should be stated, such particulars may be omitted. (a)

(a) See Act 3 Vict., c. 61, s. 23.

Holding Courts.

2. That the Surrogates in the several counties shall fix the time and place of holding their Courts as the business of the Courts may require, and shall be attended at the times appointed by the Registers of Probates, who shall enter in a Book, the Minutes of proceedings at such Courts.

Pleadings.

3. That the allegations and proceedings in such Courts shall be oral, except in cases where the importance of the matters in question, or other circumstances shall appear to the Surrogate to render a more formal mode of procedure necessary; when they may, to such extent and subject to such limitations and regulations as the Surrogate may prescribe, be required to be in writing.

Examination of Witnesses.

4. That the witnesses shall be openly examined before the Surrogate, and the opposing party be allowed to cross-examine without any written interrogatories on either side. (*b*)

Surrogate's Decision.

5. That when any matter is contested before the Surrogate, his decision thereupon shall be openly pronounced in the presence of the parties or on due notice given, and the same shall be entered in the minutes and a copy furnished to the party requiring the same, at his expence.

Appeals.

6. That upon filing an appeal (*c*) with the Register of Probates, the appellant do forthwith give notice thereof to the opposite party by serving him with such notice in writing, or in such other way as the Court of Chancery may direct.

7. That upon the transmission of the copy of an appeal from the decision of any Surrogate, to the Court of Chancery, on application of the appellant and proof of due notice of such appeal having been given, the said Court shall make an order for the hearing of such appeal on a day to be thereupon appointed, which order shall be

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(*b*) 3 Vic. c. 61, s. 15, enacts that the Surrogate Courts shall have power to issue subpœnas to compel the attendance of witnesses, or the production of any papers material to any enquiry pending in such Courts, and to punish disobedience to any such subpœna, and to punish witnesses for refusing to testify after appearing, in the same manner and to the same extent as Courts of record in similar cases. See the form of subpœna post.

(*c*) 3 Vict., c. 61, s. 9.

duly served on the opposite party fourteen days (or such longer time as the Court of Chancery may direct,) before the day so appointed.

8. That upon the day appointed for the hearing, on proof of the service of the order, the appeal shall stand to be heard, unless the Court of Chancery, on special cause shewn, shall think fit to postpone the same; and in that case, on the day to which the hearing shall be postponed.

9. That in case the appellant shall not, within six weeks after the transmission of the copy of the appeal, obtain an appointment of a day for hearing the same and serve the same as aforesaid, the Court of Chancery may, in its discretion, on the application of any other party interested, by an order of the said Court, appoint a day for hearing the same, which said order shall be served on the said appellant such time before the day appointed as the Court shall direct, and in case the said appellant shall make default in appearing and bringing on the cause to be heard on the day appointed, the said Court, on proof of due service of such order, may direct such appeal to stand dismissed.

10. That the following forms be used in matters relating to the said Surrogate Courts, with such alterations and additions as the case may render necessary, or the Surrogate in particular circumstances may permit or prescribe.

No. 1.

Petition for Letters Testamentary.

To A. B., Esquire, Surrogate Judge of Probates for the County of C., and Province of New Brunswick.

The petition of D. E., of H., in the said County, Yeoman,

Humbly Sheweth,

That G. H., late of the Parish of F., in the County aforesaid, Yeoman, departed this life on or about the day of last past at the Parish of F., aforesaid, having first duly made and executed his last Will and Testament in due form of law, bearing date the day of , in the year of our Lord , and thereby appointed your petitioner the sole executor thereof. That immediately before the time of his death the said G. H. was an inhabitant of the said County of C., and that he died, seized, or otherwise entitled unto real estate of the value of £ , situate within the said County (*or as the case may be,*) and personal estate to the value of £ .

Your petitioner therefore humbly prays that he may be admitted to prove the said last Will and Testament, and that letters testamentary may be granted thereof to him in due form of law: and as in duty bound will ever pray. Dated the day of A. D. .

No. 2.

Petition for Letters of Administration.

To A. B., Esquire, Surrogate Judge of Probates for the County of C., in the Province of New Brunswick.

The petition of D. E., of the Parish of F., in the said County of C., Esquire,

Humbly Sheweth,

That G. H., late of the Parish of F., aforesaid , departed this life on the day of , in the year of our Lord , at the Parish of F., aforesaid, without having, to the best of the knowledge and belief of your petitioner, made any Will. That the said G. H. immediately before his death was an inhabitant of the said County of C., and that he died, seized, or otherwise entitled unto real estate of the value of £ , situate in the said County, *(or as the case may be)* and personal estate of the value of £ , that the said G. H. left a Widow L. H., and sons, namely, your petitioner the eldest, and *(here insert the names and additions of the other sons)* and daughters, namely, *(insert their names and additions)* him surviving, which said Widow and children all reside at , in the said County.

Your petitioner prays that Letters of Administration of the estate and effects of the said G. H. may be granted to him in due form of law: and as in duty bound will ever pray. Dated the day of A. D. .

(Signed) D. E.

No. 3.

Oath to be administered to Petitioner for Letters Testamentary or of Administration.

You do swear that the contents of this petition by you subscribed, are true to the best of your knowledge and belief,—So help you God.

No. 4.

Memorandum of Jurat.

Sworn before me by the above named D. E., the day of A. D.

(Signed) A. B., *Surrogate.*

No. 5.

Form of Renunciation by person entitled to Administration. (d)

To A. B., Esquire, Surrogate Judge of Probates for the County of C.

Whereas G. H., late of F., in the County aforesaid, departed this life intestate, (*or* having made his last Will and Testament, bearing date the day of A. D.

I, J. H., the Widow and relict of the said G. H., (*or as the case may be,*) do hereby renounce all right and title to Administration on the said estate. As witness my hand hereto subscribed the day of A. D.

(Signed) J. H.

No. 6.

Affidavit in proof thereof.

A. B., of the Parish of F., in the County of C., maketh oath and saith, that he is well acquainted with J. H., of the same place, Widow and relict of the late G. H., and he is also well acquainted with her hand writing from having seen her write; and this deponent further saith, that he believes the signature "J. H." subscribed to the annexed certificate of renunciation to be of the proper hand writing of the said J. H. Sworn the day of A. D. , before me.

(d) 3 Vict., c. 61, s. 23.

No. 7.

Administration Bond. (c)

Know all Men by these Presents, That We
are held and firmly bound unto the Surrogate Judge of Probates in and for the County of
in the sum of pounds of lawful money of the said Province, to be paid to the said Surrogate Judge of Probates for the time being; for which payment to be well and truly made, We bind ourselves, and each of us by himself, for and in the whole, our and each of our Heirs, Executors and Administrators, firmly by these Presents. Sealed with our seals, dated this day of , in the year of our Lord one thousand eight hundred and

The condition of this obligation is such, that if the above bounden Administrator of all and singular the Goods, Chattels and Credits of deceased, do make or cause to be made a true and perfect Inventory of all and singular the Real Estate, Goods, Chattels, and Credits of the said deceased which have or shall come to the hands, possession or knowledge of the said , or into the hands or possession of any other person or persons for , and the same so made do exhibit or cause to be exhibited into the Registry of the Surrogate Court for the said County of on or before the day of next ensuing; and the same Goods, Chattels, and all other the Goods, Chattels, and Credits of the said deceased at the time of his death, which at any time after shall come to the hands or possession of the said or into the hands or possession of any other person or persons for , do well and truly administer according to Law; and further do make or cause to be made a true and just account of the said Administration, at or before the day of , and all the rest and residue of the said Goods, Chattels and Credits which shall be found remaining upon the said Administrator's account, the same being first examined and allowed of by the said Surrogate Court or other Court of competent authority in that behalf, do deliver and pay unto such person or persons respectively as the said Surrogate Court, or other Court of competent authority in that behalf, by decree or sentence, pursuant to the true intent and meaning of the Act or Acts of the General Assembly of the said Province for the settlement and distribution of the Estates of Intestates, shall limit and

(c) 3 Vict., c. 61, s. 24.

appoint." * And if it shall hereafter appear that any last Will and Testament was made by the said deceased, and the Executor or Executors therein named, do exhibit the same into the said Surrogate Court, making request to have it allowed and approved accordingly, if the said above bounden being thereto required, do render and deliver the Letters of Administration (Probate of such Testament being first had and made,) unto the said Surrogate Court,* Then this obligation to be void and of no effect, or else to remain in full force and virtue.

Sealed and delivered in presence of

No. 8.

Bond to Surrogate by Executor. (f)

[*The Bond, when given by any Executor, to be in like form, substituting "Executor," &c., for "Administrator," &c., and omitting the words between the asterisks.*]

No. 9.

Letters Testamentary.

SURROGATE COURT,
County of , Province of New Brunswick.

By His Excellency , Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, &c. &c. &c.

To all to whom these presents shall come or may concern, Greeting:

Know ye, that at F., in the County of C., on the day of , in the year of our Lord , before A. B., Esquire, being thereunto delegated and appointed the last Will and Testament of G. H., late of , in the County aforesaid, deceased, (a copy whereof is hereunto annexed) was proved and is now approved and allowed of by me, the said deceased having, while he lived, and at the time of his death, goods, chattels, and credits within this Province, by means whereof the proving of the said Will, and the granting of Administration of all and singular the said goods, chattels, and credits, and also the auditing, allowing, and finally

(f) 8 Vict., c. 61, s. 25.

discharging of the account thereof unto me only doth belong: And that the Administration of all and singular, the goods, chattels, and credits of the said deceased, and any way concerning his said Will, is granted unto , in the said Will named, having been already duly sworn to the faithful discharge of the duties of the trust thereby in him reposed.

In testimony whereof, I have caused the seal of the said Surrogate Court to be hereunto affixed, the day of , in the year of our Lord One Thousand Eight Hundred and ; and in the year of the Reign of our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c. &c. &e.

No. 10.

Oath to be Administered to Witnesses on proof of Will made before 1st January, 1839, in Common Form.

You, C. D. and E. F. do severally swear that you did see G. H., named in the instrument hereunto annexed, sign the same, [and that he, at the same time, published and declared the same to be his last Will and Testament,] and that at the time of such signing [publishing and declaring,] you, the said C. D. and E. F., [and also one J. K., whose name is likewise subscribed to the said instrument as a Witness, attesting the execution thereof,] were all present, and that the said G. H. appeared to you at the time, to be of sound and disposing mind and understanding, and that the names C. D. and E. F. [and J. K.,] were subscribed to the said instrument by you, the said C. D. and E. F., [and the said J. K.,] respectively, in the presence of each other and of the said G. H.

No. 11.

Indorsement on Will of Oath having been Administered.

Province of New Brunswick,
County of C.

Be it remembered, that on the day of , before me, A. B., Esquire, Surrogate for the County of C., personally appeared C. D. and E. F., whose names are subscribed as attesting Witnesses

to the instrument hereunto annexed, purporting to be the Will of G. H., late of the Parish of F., in the County of C., deceased, and being duly sworn, did (each for himself) depose and say that they did see the said G. H. sign the said instrument, [and that he at the same time published and declared the same to be his last Will and Testament,] and, at the time of such signing, [publishing and declaring,] they, the said C. D. and E. F., [and one J. K., whose name is also subscribed to the said Will as a Witness attesting the execution thereof,] were all present, and that the said G. H. appeared to them, the said C. D. and E. F., respectively, to be of sound and disposing mind and understanding, and that the names "C. D." and "E. F.," [and "J. K."] were subscribed to the said Will by them, the said C. D. and E. F., [and J. K.,] respectively, in the presence of each other and of the said G. H.

(Signed) A. B., *Surrogate of the County of C.*

No. 12.

Oath to be Administered to Executors.

You do swear that you believe this paper to be the last Will and Testament of G. H., late of F., in the County of C., deceased, and that you will pay all the debts and legacies of the said deceased, as far as the assets shall extend and the Law shall bind you, and that you will in other respects, to the best of your ability, faithfully discharge the duties of an Executor of the said last Will and Testament,

So help you God.

No. 13.

Indorsement on Will of Executor having been duly Sworn.

Province of New Brunswick,
County of C.

Be it remembered, that on the day of , A. D. , before me, A. B., Surrogate for the County of C., personally appeared L. M., sole Executor named in the within written Will of G. H., late of the Parish of F., in the County of C., deceased, hereunto annexed, and was duly sworn to the authenticity of the said Will, and to the faithful discharge of the duties of the trust thereby in him reposed by taking the oath of an Executor as by Law required.

No 14.

Oath to be Administered to Witnesses on proof of Will made after 31st December, 1838.

The same as Form No. 10, omitting only the words between brackets, and substituting the word "both," for "all."

No. 15.

Indorsement on will made after 31st December, 1838, of oath (No. 14) being administered.

(Similar to Form No. 11, omitting words between brackets.)

No. 16.

Caveat.

A. B., of F., in the County of C., a Creditor (*or* legatee, *or otherwise, as the case may be*,) of G. H., late of the same place, deceased, hereby enters his Caveat against the granting of Letters Testamentary on the Will of the said G. H. to C. D., therein named as Executor thereof, on the ground that (*here the ground of objection is to be stated.*) Dated the day of , A. D. .

(Signed) A. B.

No. 17.

Letters of Administration.

SURROGATE COURT,

County of C., Province of New Brunswick.

By His Excellency Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, &c. &c. &c.

To T. S., of the Parish of F., in the County of C., Greeting:— Whereas G. H., of F., in the County of C., lately died intestate, as it is said, having, whilst he lived, and at the time of his death, Goods, Chattels, and Credits, within this Province, by means whereof

the granting Administration of all and singular the said Goods, Chattels, and Credits, and also the auditing, allowing, and finally discharging the account thereof unto me only doth belong; in order, therefore, that the said Goods, Chattels, and Credits of the said deceased, may be well and faithfully administered, applied and disposed of according to Law, I do by these presents grant unto you, the said T. S., (in whose fidelity I do confide,) full power and authority to administer and faithfully dispose of all and singular the said Goods, Chattels, and Credits of the said deceased; and to ask, demand, recover, and receive whatever Goods, Chattels, Debts or Credits to the said deceased, while living, and at the time of his death, did in any way belong, and to pay whatever debts the said deceased, at the time of his death, did owe or was chargeable with, so far as such Goods, Chattels, and Credits will thereunto extend, and the Law charge you—you having been already sworn well and faithfully to execute the duties of the trust in you hereby reposed, as by Law required. And I do by these presents make, ordain, and depute you Administrator of all and singular the Goods and Chattels, Rights and Credits of the deceased.

In testimony whereof I have caused the seal of the said Surrogate Court to be hereunto affixed, the day of , in the year of the Reign of our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, and in the year of our Lord (*g*) .

No. 18.

Oath to be administered to Administrator.

You do swear that you believe that G. H., late of F., in the County of C., died intestate, and that you will well and truly administer all and singular the Goods of the deceased, and pay his

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(*g*) The following form of Administration with the Will annexed, is taken, with slight alterations, from 4 Burn's Eccl. Law, 371:—

"In order therefore that the said goods, chattels, and credits, may be well and faithfully administered, applied and disposed of, according to Law, I do, by these presents, grant unto you, the said , in whose fidelity I do confide, full power and authority to administer and faithfully dispose of the said goods, chattels, and credits, according to the tenor and effect of the said Will: And first, to pay the debts of the said deceased, which he did owe at the time of his death, and afterwards the legacies contained and specified in the said Will, so far as such goods, chattels, and credits will thereto extend and the Law requires; you having been already sworn well and faithfully to administer the same. And I do by these presents ordain, depute, and constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, with the said Will annexed."

Debts so far as his Goods or other assets which may come to your hands for that purpose shall extend; and that you will make a true and perfect inventory of his Estate, real and personal, and render a just and true account of your administration into the Surrogate Court for the County of C., as by Law required.

So help you God.

No. 19.

Warrant of Appraisement. (h)

New Brunswick, County of ss.

To A. B., &c., Greeting: You are hereby appointed and empowered to take an inventory of all the Real Estate, Goods, Chattels, and Credits, of which late of in the County aforesaid, Yeoman, died seized or possessed within the Province, and according to your best skill and judgment truly appraise the same; which, when completed, you are to deliver to the Executor (*or* Administrator) of the said deceased, to be returned, together with this Warrant, in three months from the date hereof.

Given under my hand this day of 184 .

B. P., *Surrogate, &c.*

ss. The above named Appraisers personally appeared before me, and made oath that they would faithfully and impartially perform the services to which they are appointed by the above Warrant.

A. L., *Commissioner, &c.* (i)

No. 20.

Oath administered thereon.

You do severally swear that you will truly and impartially appraise the real and personal Estate of G. H., late of F., in the County of C., deceased, which may be exhibited to you according to the best of your knowledge and ability.

So help you God.

(h) 8 Vic., c. 61, s. 26.

(i) By 4 Victoria, c. 40, s. 2, any Justice of the Peace of the County wherein the Warrant of Appraisement is issued, may administer the oath to the appraisers.

No. 21.

Inventory. (k)

The following is an Inventory of all the Real Estate, Goods, Chattels, and Credits of G. H., late of F., in the County of C., deceased.

REAL ESTATE.

Lot of Land containing acres in the Parish of , in the County of , with a house, barn, and appurtenances thereon, (&c.) valued at £ , (&c.)

PERSONAL ESTATE.—STOCK.

—— Horses, valued at - - - - - - - - - - £
—— Cows, „ „ - - - - - - - - -
—— Sheep, „ „ - - - - - - - - - (&c.)

HOUSEHOLD FURNITURE.

—— Tables, valued at - - - - - - - - - £
—— Chairs, „ „ - - - - - - - - - (&c.)

DEBTS.

Bond and Mortgage from C. D., to the deceased, dated Penalty of Bond, £ . Conditioned to pay £ , and interest. Paid thereon day of , A. D. , £

Judgment against E. F. at the suit of the deceased, in Court, signed day of , A. D. , for £ , (doubtful.)

Promissory Note made by R. S., payable to J. K., and indorsed to the deceased for £ , (desperate.)

BOOK DEBTS.

R. L., - - - - - - - - - £
G. S., - - - - - - - - - , (doubtful.)
M. N., - - - - - - - - - , (desperate.)

MONEY.

In Specie, - - - - - - - - - - - £
Bank Note, - - - - - - - - - - -

A. B., *Executor*, or *Administrator*.

(k) 3 Vic., c. 61, s. 29.

No. 22.

Petition to sell Real Estate for Payment of Debts. (l)

To His Excellency Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, Chancellor of the same, &c. &c. &c., (*or*, To His Honor the Master of the Rolls.)

The petition of J. W., Executor of the last Will and Testament of G. H., late of F., in the County of C., deceased, (*or* Administrator of all and singular, the Goods, Chattels, and Credits of G. H. late of F., in the County of C., deceased, who died intestate,) Humbly sheweth:—

That the personal Estate of the said , deceased, which has come to the hands of your Petitioner, amounted to the sum of £ , that the debts of the Estate, so far as they can be ascertained, amount to £ , and that your petitioner hath fully administered all the said personal Estate, as appears by the account thereof, herewith annexed, which said account contains a true statement of all the receipts and payments of your petitioner on account of the said Estate; that the Real Estate of the deceased consists of the following lots, pieces or parcels of Land, that is to say, [*here describe the several lots, pieces or parcels of land or premises, with the value of each separately, stating whether the same are occupied or not, respectively; and if occupied, the names of the occupants, so far as they have come to the petitioner's knowledge,*] That the heirs of the said deceased are A. B., of , in the County of C., C. D. of, &c., [and the devisees of the said deceased are J. K., of , in the County of C., L. M., (of, &c.)]

Your petitioner therefore humbly prays that licence may be granted to him to sell such parts of the Real Estate of the said deceased, as to Your Excellency (*or* Honor) may seem meet and necessary for the payment of his debts: and as in duty bound will ever pray.

Dated the day of , A. D. .

J. W.

The within named J. W., was duly sworn to the truth of the contents of the within petition, the day of , A. D. , before me.

A. B., *Surrogate, County of C.*

(*l*) Sec. 44—48. By 7 Vict., c. 41, s. 2, licence may be granted within seven years from the death of the testator or intestate, when such death took place after the 1st of January 1840, or within twelve years after the death of the testator or intestate, when such death took place previous to the 1st January 1840. And no licence is to be in force for more than two years.

(NOTE.—A certified copy of the inventory on file, and (in case deceased died testate,) a copy of the Will, is to be annexed to the petition; also, a copy of the Administrator's or Executor's account current with the Estate.)

[When the petition is to the Surrogate for licence to sell, a similar form, with the necessary alterations, may be used. See 3 Vic., c. 61, s. 50.]

No. 23.

Licence to sell the Real Estate by Court of Chancery. (m)

NEW BRUNSWICK—IN CHANCERY.

day of , A. D.

Whereas J. W., Executor of the last Will and Testament of G. H., late of F., in the County of C., deceased, hath, by his petition, bearing date the day of last, represented that the personal Estate of the deceased, which has come to his hands, is deficient for the payment of the debts owing by the said Estate, and hath prayed that licence may be granted to him to sell such part of the Real Estate as may be deemed meet and necessary for that purpose.

And whereas, (due notice having been given to the parties interested,) on examination into the matter of the said petition, it has been made to appear to the satisfaction of this Court, that the personal Estate of the deceased which has come to the hands of the petitioner, is not sufficient for the payment of the debts, but that a further sum of £ , over and above the amount of the said personal Estate, will be required for that purpose. And whereas it is deemed necessary that the whole of the Real Estate of the said deceased should be sold for that purpose, it is hereby ordered, That the said petitioner have licence, and he is hereby empowered and authorised to make sale of the Real Estate of the said deceased, for the purpose of paying his debts; the said petitioner proceeding therein in all things according to Law.

By the Court,

J. V., *Register.*

[In case a part only of the Real Estate is intended to be sold, or any particular lot or parcel of Land is designated for that purpose, the licence will be varied accordingly.]

The licence to lease will contain similar recitals, and may be framed in the same manner, with the necessary alterations.

(m) 3 Vict., c. 61, s. 51.

No. 24.

Notice of Sale. (o)

To be sold by Public Auction, on , the day of , at of the clock, , at the house of , in the Parish of , in the County of , (*or as the case may be,*) for payment of the debts of the late G. H., of F., in the County of C., deceased, in consequence of a deficiency of the personal Estate of the deceased for that purpose, pursuant to a licence obtained from the Court of Chancery, the Lands and Premises following, that is to say, [*describe particularly the Lands and Premises.*]

J. W., *Executor.*

No. 25.

Bond on Sale of Real Estate. (p)

Know all Men by these Presents, That We (*as in Administration Bond.*)

Whereas licence has been granted by the Court of Chancery (*or* Surrogate Court in and for the County of , *as the case may be*) to the above bounden , Executor of the last Will and Testament (*or* Administrator of all and singular the Goods, Chattels, and Credits, *as the case may be,*) of , deceased; to sell (*or* lease, *as the case may be,*) Real Estate of the said deceased for payment of debts.

Now the condition of this obligation is such, That if the said , Executor (*or* Administrator) as aforesaid, do and shall, well and faithfully apply all monies arising from the sale (*or* lease) of any of the Real Estate of the said deceased, or otherwise from the rents and profits thereof, in payment of the debts of the said deceased, agreeably to Law, and shall well and truly account for the same in Administration account before the Surrogate Court for the County of , or other Court of competent authority in that behalf, and shall pay any surplus of such monies which shall be found remaining in his hands upon such accounting, unto such person or persons as the said Surrogate Court for the said County of , or other Court of competent authority in that behalf shall, by decree or sentence, pursuant to the true intent and meaning of the Act or Acts of the

(o) 8 Vic., c. 61, s. 53.
(p) Sec. 54.

General Assembly of the said Province, in such case made and provided, limit and appoint; then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of

No. 26.

Appeal from decision of Surrogate, respecting sale of Real Estate. (*q*)

To His Excellency Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, Chancellor of the same, &c. &c. &c.

The humble petition and appeal of R. J., of F., in the County of C., one of the heirs of G. H., late of the same place, deceased, intestate, sheweth:

That A. B., of the Parish of F., in the County of C., aforesaid, Administrator of all and singular the Goods, Chattels, and Credits of the said G. H., did, on the day of last, present a petition to , Esquire, Surrogate of the County of C., for licence to sell the Real Estate of the said G. H., for the payment of his debts, on the alleged ground of the insufficiency of the personal Estate for that purpose, a copy of which said petition is hereunto annexed; that the said application was resisted by your petitioner, who filed a Caveat with the said Surrogate against granting such licence, a copy of which is likewise annexed. That notwithstanding the objection of your petitioner, the said Surrogate decided that licence to sell the Real Estate, should be granted to the said A. B., Administrator, as aforesaid. And your petitioner humbly represents to Your Excellency that the circumstances of the case are not such as to warrant the sale of the Real Estate for the purpose aforesaid.

Your petitioner therefore humbly appeals to Your Excellency, from the decision of the said Surrogate: and as in duty bound will ever pray.

No. 27.

Bond on Appeal. (*r*)

[The Bond to be taken for £30, payable to the Surrogate in the

(*q*) See rules 6—9 ante page 128, also 3 Vict., c. 61, s. 9.

(*r*) 3 Victoria, c. 61, s. 9.

same manner as Administration Bonds, and conditioned as follows:]

Whereas the above bounden hath appealed from the decision of the said Surrogate Judge of Probates, made in a certain matter pending before him:

Now the condition of this obligation is such, that if the said shall well and truly pay such costs arising from such appeal, and to such person as the Court of Chancery may order and direct; then this obligation to be void, otherwise to remain in full force.

Sealed and delivered in presence of

No. 28.

Citation. (s)

New Brunswick. ss. To the Sheriff of the County of , or any Constable within the said County, Greeting:

Whereas A. B., Executor, (*or* Administrator, *or other person interested, as the case may be,*) hath prayed that may appear and (*here state in short form the object,*) You are therefore required to cite the said (*and all others interested, as the case may be,*) to appear before me at a Court of Probate, to be held at , within and for said County, on the day of next, to (*here state in short form the object.*)

Given under my hand and the seal of the said Court, this day of , 184 .

A. Z., *Surrogate, &c.*

A. F., *Register of Probates.*

No. 29.

Subpœna. (t)

ss. To Greeting: You are hereby required to appear before me, at a Court of Probate, to be held at within and for said County, on the day of , to testify

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(s) See 3 Victoria, c. 61, § 16 and 41, as to the service of Citations.

(t) See § 15 and 42.

and give evidence what you may know touching (*here state shortly the object,*) hereof fail not.

Given under my hand this day of , 184 .

B. P., *Surrogate, &c., County of*

No. 22.

Execution. (*m*)

SURROGATE COURT.

County of ss. To the Sheriff of the said County of , Greeting:

You are hereby required (*or in case it be an alias Execution,* as before,) to levy of the Goods and Chattels of within your Bailiwick, the sum of for costs awarded in favor of , in a certain proceeding lately had before me as Surrogate Judge of Probate in and for said County, and have that money before me at my office in within thirty days from the date hereof, to be rendered to the said ; and for want of such Goods and Chattels whereon to levy, you will take the body of the said and deliver him to the keeper of the Gaol of said County, and the said keeper will take the said in custody, and him safely keep, until the said sum, and your costs of levying this Execution, be paid. And make return hereof within thirty days from the date hereof.

Given under my hand this day of , 184 .

A. L., *Surrogate.*

O. P., *Register.*

No. 23.

Attachment. (*n*)

SURROGATE COURT.

County of ss. To the Sheriff of , Greeting:

You are hereby required to attach by his body, if found

(*m*) See 3 Vic., c. 61, s. 20, as to the power of the Surrogate to tax costs and issue execution.

(*n*) By sect. 15, the Surrogate Courts have power to punish disobedience to Subpœnas, and to punish witnesses for refusing to testify after appearing, in the same manner as Courts of Record in similar cases.

within your Bailiwick, and him safely keep, so that you may have his body before me at my office in , on the day of next coming, to answer concerning a contempt by him lately committed, in neglecting to appear before me pursuant to a Subpœna issued in that behalf, (*or in case it be for refusing to testify after appearing*, for refusing to testify before me,) in a certain matter lately pending before me as Surrogate Judge of Probates for said County, and have there then this Writ.

Given under my hand this day of , 184 .

A. F., *Surrogate.*

O. P., *Register.*

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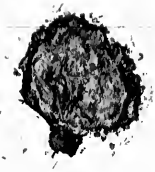

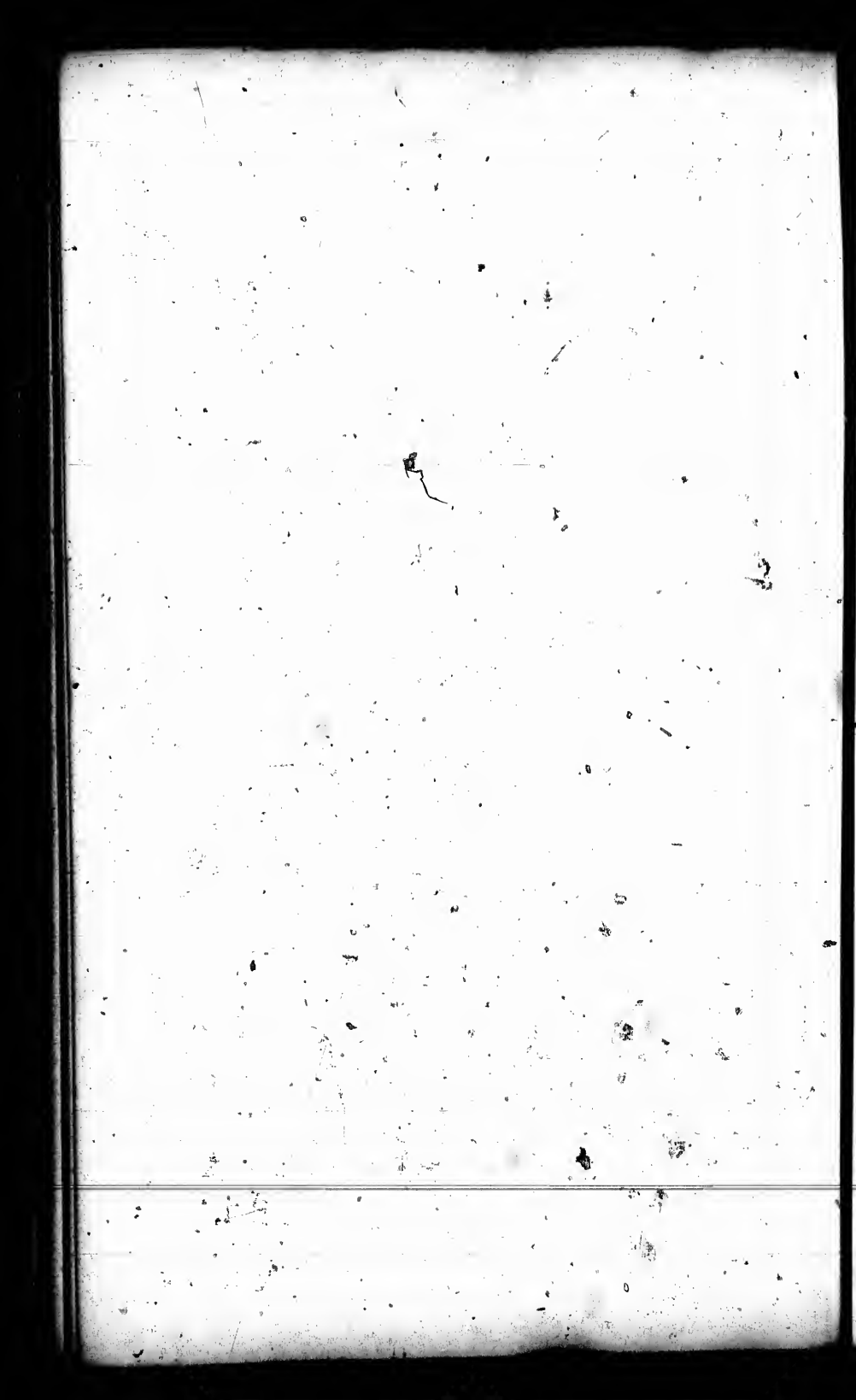

SECTION VI.

ORDERS RELATING TO BANKRUPTCY. (a)

8TH DECEMBER, 1843.

His Excellency the Chancellor, by and with the advice and consent of His Honor the Master of the Rolls, doth order and direct:—

1. That the forms contained in the Schedule at the foot of these Orders be established as precedents and modes of proceeding in matters relating to Bankruptcy, and that future proceedings be made conformable thereto, with such alterations and additions as may be deemed requisite under the circumstances of each particular case.

2. That the practice in regard to appeals from the decisions of the Commissioners of the Estates and Effects of Bankrupts be conformed as nearly as may be (subject to such modifications and restrictions as circumstances may render just or necessary,) to the practice in appeals to the Court of Review in Bankruptcy in England.

SCHEDULE OF FORMS. (b)

No. 6.

Petition from Creditor. (c)

To His Excellency the Chancellor (*or* His Honor the Master of the Rolls,) of the Province of New Brunswick:

The humble petition of A. B., of , in the County of , Merchant, Sheweth:—

(a) The Act 6 Vic., c. 4, s. 32, empowers the Court of Chancery to establish and amend rules and forms of practice and proceedings in matters relating to Bankruptcy, and for the guidance of the Commissioners appointed under the Acts relating to Bankruptcy.

(b) The Act 7 Vic., c. 31, s. 1, having repealed the provisions of the Acts 5 Vic., c. 43, and 6 Vic., c. 4, relating to the voluntary declarations of persons, being deemed acts of Bankruptcy; the forms applicable to those proceedings are omitted.

(c) See 5 Vic., c. 43, § 3 and 5, and 7 Vic., c. 31, s. 1.

That C. D., of and resident in , in the County of , and Province aforesaid, Trader, before and at the time of committing the act hereinafter stated and relied on by your Petitioner as an Act of Bankruptcy, was and still is indebted to your Petitioner in the sum of one hundred and fifty pounds, (*d*) (*or as the case may be,*) for principal and interest due on a certain promissory note made by the said C. D., bearing date, (&c.,) and payable to, (&c.,) [*or* on a certain bond, bearing date, (&c.,) and made and entered into by the said C. D., to your Petitioner, in the penal sum of pounds conditioned for the payment of pounds and interest,] on the day of , (&c.,) (*or as the case may be.*) And your Petitioner further sheweth, that to the best of his knowledge and belief, the said C. D., at the time of committing the said act, owed and still owes debts to the amount of five (*e*) hundred pounds. And being so indebted, the said C. D. did, on the day of last, [*If the act of Bankruptcy be a departing from the Province with intent to defraud creditors, an escape from arrest, or any other of the acts declared to constitute an act of Bankruptcy by the Act of Assembly,* (*f*) *it will not be sufficient to swear in general terms in the words of the Statute, but the facts must be specially stated and set forth with sufficient certainty of time and place, according to the circumstances of each case, and established by the affidavits of at least two witnesses,* (*g*) *together with such additional documentary evidence (where the proof depends on documents,) as the case may require; the evidence to be regulated by the same rules as to the degree of proof as would apply to the establishing the like facts in*

(*d*) By Act 6 Vic., c. 4, s. 3, it is enacted that the amount of the debts of any creditor or creditors petitioning for a fiat, shall be as follows, viz.: The single debt of such creditor, or of two or more persons being partners, shall amount to £50, or upwards; the debt of two creditors so petitioning shall amount to £75, or upwards; and the debt of three or more creditors, petitioning, shall amount to £120, or upwards; and that every creditor for valuable consideration for any sum, payable at a certain time, which shall not have arrived when the debtor committed an act of Bankruptcy, may so petition, whether he has security in writing for such sum or not.

(*e*) See 7 Vic., c. 31, s. 1.

(*f*) The Act 5 Vic., c. 43, s. 3, enacts that all persons residing in the Province, owing debts to the amount of not less than £500, shall be liable to become bankrupts, and may be declared accordingly by fiat of the Chancellor or Master of the Rolls, whenever such persons shall depart from the Province with intent to defraud their creditors, or to avoid service of, or arrest by the ordinary process of Law; or shall conceal themselves to avoid being arrested; or having been arrested by mesne or final process, or rendered in discharge of their bail, shall escape, or remain prisoner, either in gaol or on the limits for the space of two months; or shall willingly or fraudulently procure themselves to be arrested, or their goods, chattels, lands or tenements to be attached, distrained, sequestered, or taken in execution; or shall remove their goods, chattels, or effects, or conceal them to prevent their being levied on or taken in execution or by other process; or shall make any fraudulent conveyance, sale, assignment, gift, loan, or transfer, warrant of Attorney to confess judgment, or other device, of or affecting their lands, tenements, goods or chattels, monies, credits, or evidences of debt: Provided that no person shall be liable to become bankrupt by reason of any such act of bankruptcy committed more than six months before the issuing the fiat against him.

(*g*) See 5 Vic., c. 43, s. 5.

a cause in Court.] And your Petitioner humbly submits, that by , he, the said C. D., hath committed an Act of Bankruptcy.

Your Petitioner therefore humbly prays that the said C. D. may be declared a Bankrupt by fiat of Your Excellency, (*or* Honor,) according to the Acts of the General Assembly relating to Bankruptcy: and your Petitioner will ever pray.

The above named Petitioner was duly sworn to the truth of the allegations in the above petition, the day of , A. D. , before . (*h*)

No. 9.

Fiat on application of Creditor. (i)

Upon reading the petition made to me by A. B., of the City of Saint John, in the Province of New Brunswick, Merchant, against C. D., of the same place, Blacksmith, as being indebted to the said A. B. in the sum of pounds, and as owing debts to the amount of five hundred pounds, and as having committed an Act of Bankruptcy; and on reading the affidavit of E. F. and G. H., and, (&c.,) [*as the case may be,*] I do hereby declare that the said C. D. hath committed an Act of Bankruptcy.*

Dated the day of , A. D.

To J. K., Esquire,
Commissioner of the Estates and Effects of Bankrupts for the County of .

No. 10.

[If the Commissioner for the County be disqualified from acting,

(*h*) By 7 Vic., c. 31, s. 9, all affidavits to be made in matters relating to Bankruptcy may be sworn in this Province before the Chancellor or Master of the Rolls, or any Judge of the Supreme or Inferior Court of Common Pleas, or Commissioner of Bankrupts, or Master in ordinary or extraordinary in Chancery, or any Commissioner for taking affidavits in the Supreme Court; or in the United Kingdom of Great Britain and Ireland, or any of the British Dominions, before any Judge of any Superior Court, or Mayor or Chief Magistrate of any City, Town, or Borough, attested by a Notary; or in any foreign country, before a British Minister, Consul or Vice Consul.

(*i*) By 5 Vic., c. 43, s. 7, all the property and rights of property of the Bankrupt, shall, by operation of Law, from the receipt of the fiat by the Commissioner, be divested out of the Bankrupt, and vested in such assignee as shall be appointed: and by 6 Vic., c. 4, s. 28, publication of notice of a fiat in the Gazette, shall divest the property of the Bankrupt in the same manner as the receipt of the fiat by the Commissioner; and the production of the Gazette, containing such notice, shall, in all cases, be evidence of the publication without other proof. As to proof of the Fiat, see 8 Vic., c. 88, s. 6.

by reason of affinity, &c., then add after the asterisk, "And it further appearing that I. K., Esquire, the Commissioner of the Estates and Effects of Bankrupts, is disqualified from acting herein by reason of affinity to the said C. D., &c., I do hereby appoint R. S., of , aforesaid, Esquire, to act as the Commissioner in the whole of the proceedings in Bankruptcy under this Fiat." (*k*)

No. 11.

Warrant of Appointment of Provisional Assignee. (l)

Whereas a Fiat in Bankruptcy, dated the day of , A. D. , hath been awarded against J. L., of , in the County of , and Province of New Brunswick, Merchant, and duly transmitted to and received by me; I hereby appoint C. D., of , Esquire to be a Provisional Assignee of the Estate and Effects of the said J. L., pursuant to the Act of Assembly in such case made and provided.

Given under my hand and seal, the day of A. D.

(L. S.) G. F.,

Commissioner of the Estates and Effects of Bankrupts for the County of

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No. 12.

Notice to Bankrupt to surrender and conform or to dispute Bankruptcy. (m)

Whereas a Fiat under the hand of His Excellency the Chancellor (*or* His Honor the Master of the Rolls,) has been issued against J. S., by the name and addition of J. S. of , in the County of , and Province of New Brunswick, Merchant, declaring you to have committed an Act of Bankruptcy, and hath been duly transmitted to me, I do hereby summon and require you, the said J. S., personally to be and appear before me within thirty days after the service hereof, at , in the Parish of , in the County

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(*k*) See 5 Vic., c. 43, s. 31, and 6 Vic., c. 4, s. 26.

(*l*) See 5 Vic., c. 43, s. 8; 7 Vic., c. 31, s. 2; 8 Vic., c. 88, s. 6.

(*m*) See 5 Vic., c. 43, s. 8, and 6 Vic., c. 4, s. 7.

aforesaid, to surrender and conform to, or to dispute the said Bankruptcy.

Dated the day of A. D.

E. F.,
Commissioner of the Estates and Effects of Bankrupts for the County of

To Mr. J. S.

No. 13.

Declaration of Dissent. (n)

I, A. B., of , in the County of ; Merchant, against whom a Fiat in Bankruptcy was issued, bearing date the day of last, do hereby declare my dissent and my desire to contest such alleged Bankruptcy.

Dated the day of A. D.

A. B.

No. 14.

Notice of appointment of Assignee. (o)

County of , Province of New Brunswick, ss.

In the matter of A. B., of , in the County of , a Bankrupt.

Whereas under the provisions of the Acts of the General Assembly in this Province, intituled "An Act relating to Bankruptcy in this Province," and of "An Act in addition to and in amendment of the same," A. B., of , in the County of , Merchant, hath been declared a Bankrupt, and hath accordingly surrendered himself to me; now therefore I do hereby give public notice, that by virtue of the power and authority to me given in and by the said Act, I have appointed C. D., of , aforesaid, Esquire, Provisional Assignee of the Estate and Effects of the said Bankrupt; and I do hereby require all persons indebted to the said Bankrupt, to pay to the said Assignee, on or before the day of next, all such sum and sums of money, debt or duties, as they may owe to the said

(n) See 5 Vic., c. 43, s. 8.

(o) See 5 Vic., c. 43, s. 8: This form is altered from the original, in consequence of the Act 7 Vic., c. 31, s. 2, which requires the Commissioner to appoint two public meetings of creditors; the last of which shall be on a day not less than thirty, and not exceeding sixty days from the date of the advertisement, and shall be the day limited for the surrender.

Bankrupt; and all persons who have in their possession, power or custody, any property or effects of the said Bankrupt, to deliver the same up to the said Assignee on or before the said day of next; and I do require all the creditors of the said Bankrupt residents in the said Province, or in any of Her Majesty's North American Colonies, or in the West Indies, or in the United States of America, within three months from the date hereof, to deliver in to the said Assignee, and to prove to my satisfaction their respective claims and demands, whether the same be actually due or to become due, against the said Bankrupt: And notice is also hereby further given, that I appoint a meeting of the creditors of the said Bankrupt, to be held on the day of next, at the office of the undersigned Commissioner, in ; and a further meeting of the creditors of the said Bankrupt will be held at the same hour, at the office aforesaid, for the purpose of receiving proof of, or contesting any claim presented against the said Estate; at which meetings, or at any adjournment thereof, the said Bankrupt will be examined on oath touching his estate and dealings; and such other business relating to the said estate will then and there be transacted as may be deemed necessary.

Given under my hand, at , the day of , A. D.

E. F.,

Commissioner of the Estates and Effects of Bankrupts in and for the County of .

No. 15.

Memorandum of Surrender. (p)

At the day of , 18 .

In the matter of A. B., against whom a Fiat in Bankruptcy, bearing date the day of , was duly issued.

MEMORANDUM.—That A. B., of the Parish of , in the County of , Merchant, did, at the time and place above mentioned, surrender himself to me, the Commissioner, to whom the said Fiat was transmitted, and submitted himself to be from time to

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(p) By 7 Vic., c. 31, s. 2, the Bankrupt is to be free from arrest in coming to surrender, and after his surrender and examination for such time as the Commissioner shall think fit to appoint; and if he shall be arrested within that time, he shall, on producing his summons to the officer, and giving him a copy, be immediately discharged. See also 5 Vic., c. 43, s. 24, as to the discharge of the Bankrupt from arrest after surrender. *Reynolds* v. *Hanford*, 2 Kerr 114.

time examined touching the discovery of his Estate and Effects, and in all things to conform himself according to the directions of the Acts of the General Assembly in such case made and provided.

E. F., *Commissioner.*

No. 16.

Notice in London Gazette. (q)

County of , in the Province of New Brunswick, British North America.

In the matter of A. B., a Bankrupt.

Whereas under the provisions of the Acts of the General Assembly of this Province, relating to Bankruptcy, A. B., of , in the County of , and Province aforesaid, merchant, hath been declared a Bankrupt, and hath accordingly surrendered himself to me, I hereby call upon the creditors of the said A. B., resident in any part of the United Kingdom of Great Britain and Ireland, to appoint an agent or agents in the Province aforesaid, and to deliver and prove to my satisfaction their respective claims and demands against the said Bankrupt, within three months of the date of the publication of this notice in the London Gazette.

Given under my hand at , in the County of , and Province aforesaid, the day of , 18 .

G. H.,
Commissioner of the Estates and Effects of Bankrupts for the County of , in the Province of New Brunswick.

No. 17.

Warrant, under 5 Vic., c. 43, s. 10.)

[L. S.] Whereas a Fiat in Bankruptcy, dated the day of , A. D. , hath been duly awarded and granted against C. D., of , in the County of , Trader, and hath been duly received by me, G. H., Commissioner of the Estates and

(q) See 5 Vic., c. 43, s. 8; 7 Vic., c. 31, s. 3.

Effects of Bankrupts for the County of , and it hath been proved to my satisfaction by the oaths of two reputable witnesses, that there is reasonable or probable cause for believing that the said C. D. is about to quit this Province, (*or* to remove or conceal, or otherwise dispose of some part of the property or right of property,) (*or* that the said C. D. hath removed, *or* hath concealed upon his person, &c., *or as the case may be*, divested out of him by operation of Law, by means of the Acts of the General Assembly relating to Bankruptcy,) with intent to defraud his creditors. These are therefore by virtue of the Acts of the General Assembly in such case made and provided, to authorise and empower you to arrest and search the person of the said C. D., and to seize and take the goods and chattels aforesaid, wheresoever he and they may be found within this Province: and for that purpose, taking with you a Peace Officer to break open, (*describe the place where the property is sworn to be concealed,*) and him, the said C. D., and the said property safely to keep until the expiration of the time for annulling the Fiat, (*or* until the said C. D. be dealt with according to the provisions of the Acts of the General Assembly relating to Bankruptcy.)

Given under my hand and seal this day of , in the year of our Lord .

G. H.

No. 18.

Appointment of Assignees at the instance of Creditors. (r)

In the matter of A. B., a Bankrupt.

Upon reading the aforegoing petition of C. D., of , in the County of , and others, being a majority in number and value of the creditors who have proved debts against the said A. B., praying that an Assignee or Assignees may be appointed of the Estate and Effects of the said A. B., and on reading the affidavits of , accompanying the same, and the certificate of R. H., the Commissioner of the Estates and Effects of Bankrupts for the County of , I do hereby, by virtue of the Acts of the General Assembly relating to Bankruptcy, appoint E. G., of , in the County of , to be the Assignee of the Estate and Effects of the said A. B.

Given under my hand the day of , A. D.

C. H., *Ch.*, (*or M. R.*)

(r) See 5 Vic., c. 43, s. 11.

No. 19.

Bond by Assignee. (*s*)

Penalty at discretion of Commissioner.

[Bond to be in the usual form.—Unto A. B., Commissioner of the Estates and Effects of Bankrupts for the County of , and his successor in office.]

Condition.

Whereas the above bounden C. D., hath been duly appointed Assignee of the Estate and Effects of G. H., of , in the County of , Bankrupt: The condition of this obligation is such, that if the said do and shall well and truly observe, discharge and fulfil all the duties, appertaining to his said office, as Assignee as aforesaid, then this obligation to be void, otherwise to remain in full force.

Signed, &c.

No. 20.

Oath to be administered to Assignee. (*t*)

You, C. D., do solemnly swear, that you will well and faithfully perform the duties of Assignee of the Estate and Effects of C. H., of , in the County of , a Bankrupt.

So help you God.

No. 21.

Memorandum of Oath.

The within named duly sworn to the faithful performance of his duties as Assignee, before me this day of , A. D.

G. R., *Commissioner.*

(*s*) See 5 Vic., c. 43, s. 11.
(*t*) See 5 Vic., c. 43, s. 11.

No. 22.

Certificate of Conformity. (*u*)

To His Excellency , Lieutenant Governor and Commander-in-Chief of the Province of New Brunswick, Chancellor of the same, and to His Honor the Master of the Rolls in the Court of Chancery, in the said Province.

I, B. C., being the Commissioner of the Estates and Effects of Bankrupts in and for the County of , in the said Province, acting in pursuance of a Fiat in Bankruptcy, awarded and issued against J. R., of , in the County of , do humbly certify that, having proceeded in all things under the said Fiat, according to the Laws in force concerning Bankrupts, I did this day at the hour of o'clock, at my office in , hold a public sitting for the allowance of a Certificate of Conformity to the said Bankrupt, whereof due notice was given as by Law required, at which public sitting no cause being shewn against the allowance of the said certificate, and being of opinion that the said J. R. is entitled to such certificate, and to having such allowance and benefits as by the said Acts are allowed to Bankrupts, and being discharged from all debts due by him when he became Bankrupt, and from all claims and demands provable under the said Fiat in pursuance of the said Acts, I have allowed and do allow the same: and I do therefore, pursuant to the Acts in force relating to Bankruptcy, further humbly certify that the said J. R. hath duly surrendered himself to me, and having been duly examined upon oath, hath made a full discovery of his Estate and Effects, and hath in all things conformed himself to the Laws in force at the time of issuing the said Fiat against him, and that there does not appear any reason to doubt the truth or fullness of such discovery.

(*u*) 6 Vic., c. 4, § 24 and 25. By 7 Vic., c. 31, s. 5, any Bankrupt who shall, after his certificate shall have been confirmed, be arrested or have any action brought against him for any debt, claim, or demand, provable under the fiat against such Bankrupt, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became Bankrupt, and may give this Act and the special matter in evidence; and such Bankrupt's certificate and the confirmation thereof, shall be sufficient evidence of the Bankruptcy, fiat, and other proceedings precedent to obtaining such certificate; and if any such Bankrupt shall be taken in execution, or detained in prison for such debt, claim, or demand, where judgment has been obtained before confirmation of his certificate, it shall be lawful for any Judge of the Court wherein judgment has been so obtained, on such Bankrupt producing his certificate, to order any officer who shall have such Bankrupt in custody by virtue of such execution, to discharge such Bankrupt without exacting any fee.

By 8 Vic., c. 88, s. 12, confirmation of the certificate shall be applied for within six months from the time the same is ordered; and by 9 Vic., c. 59, s. 2, when the time limited for confirming certificates has expired, the confirmation may be applied for within twelve calendar months from the passing of this Act, (14th April, 1846.)

In witness whereof I have at , in the County aforesaid, hereunto set my hand and seal the day of , in the year of our Lord .

B. C. [L. S.]

Signed and sealed by the above named Commissioner, in the presence of .

[*Where there is an opposition by creditors, or any other special circumstance, the certificate will be varied accordingly.*]

No. 23.

Advertisement of Meeting to audit Assignee's Accounts. (*v*)

In the matter of A. B., a Bankrupt.

A public meeting will be held on the day of next, at o'clock, in the noon, at , for the purpose of auditing the Assignee's accounts, under the Fiat issued against the above named A. B., (*adding, if it be intended to declare a dividend at the same meeting*, and to make a dividend of the Estate and Effects of the said Bankrupt,) when and where the creditors who have not already proved their debts are to come prepared to prove the same, or they will be excluded the benefit of the said dividend.

Dated the day of A. D. .

G. H.,
Commissioner of the Estates and Effects of Bankrupts for the County of .

No. 24.

Advertisement of Sale. (*w*)

To be sold at public Auction on (*day and hour*) at (*place*) all the outstanding debts due and owing to A. B., against whom a Fiat in Bankruptcy has issued, and all the interest of the creditors of the said A. B., therein.

(*v*) 6 Vic., c. 4, s. 22.
(*w*) 5 Vic., c. 43, s. 27; and 8 Vic., c. 88, § 2 and 7.

No. 25.

Notice of Meeting to consider of the Sale of Debts. (*x*)

In the matter of A. B., of , against whom a Fiat in Bankruptcy has issued.

Notice is hereby given, That a Public Meeting of the Creditors of the above named A. B., will be held at (*place*) and (*time*) to take into consideration the expediency of selling the outstanding debts due to the Estate of the said A. B., and all the interest of the creditors therein.

G. H., *Commissioner, &c.*

No. 26.

Certificate of Sale. (*y*)

These are to certify that upon notice duly published, all the outstanding debts due to the Estate of A. B., against whom a Fiat in Bankruptcy has been issued, and all the interest of the Creditors therein have been duly sold by my order, pursuant to the Acts of the General Assembly relating to Bankruptcy, to of Trader. (*z*)

Given under my hand the day of A. D.

G. H.,

Commissioner of the Estates and Effects of Bankrupts for the County of

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(*x*) 5 Vic., c. 43, s. 27.

(*y*) Ibid. and 8 Vic., c. 88, s. 2.

(*z*) By 8 Vic., c. 88, s. 3, the purchaser of any debt is to be deemed the Assignee of the Estate and Effects of the Bankrupt, for the purposes of any action for the recovery of such debt. See also § 4 and 5, as to the proof in actions by the purchaser.

SECTION VII.

RULES OF THE COURT OF GOVERNOR AND COUNCIL.

19TH JULY, 1791.

At a Court of the Governor and Council of the Province of New Brunswick, held in pursuance of an Act of the General Assembly of the said Province, intituled "An Act for regulating Marriage and Divorce, and for preventing and punishing Incest, Adultery and Fornication;" (*a*)

The following rules and orders were established for the regulation and government of the practice in the said Court.

1st. That all Citations and other Processes be directed to the Sheriff of the County in which the defendant resides.

2d. That all Citations be served thirty days before the return, and that a copy of the complainant's libel be delivered to the defendant at the time of serving the Citation.

3d. That all evidence touching the matters in controversy be examined *viva voce* in open Court.

4th. That all Attornies of the Supreme Court be admitted to practice as Proctors and Advocates in this Court.

5th. That the Commissioners for taking Affidavits in the Supreme Court, be Commissioners for taking Affidavits in this Court, in all such cases where depositions are to be admitted *de bene esse*, under the Act of Assembly.

6th. That on the return day of the Citation, the defendant file his or her answer, and be ready with evidences for trial.

(*a*) 31 Geo. 3, c. 5, s. 5.

APPENDIX No. 1.

ORDINANCE ESTABLISHING FEES

TO BE TAKEN IN THE

SUPREME COURT.

IN COUNCIL, THIS 2D DAY OF MARCH, 1785.

By His Excellency THOMAS CARLETON, *Esquire, Captain-General, Governor and Commander-in-Chief in and over the Province of New Brunswick, Chancellor and Vice-Admiral of the same, &c. &c.*

THERE being no Law or Ordinance now in force for the regulation of the fees to be taken by the respective officers in the Province of New Brunswick, and it being necessary that a reasonable provision be made, and a Table of Fees ordained in due proportion to their services, in order that every one may know what is of right in each case to be demanded: In pursuance thereof, His Excellency the Governor, by and with the advice and assistance of His Majesty's Council for said Province, hath thought fit to ordain and declare, and His said Excellency, by and with the advice and assistance aforesaid, doth hereby ordain and declare, that from and after the first day of April next ensuing, no officer or other person or persons whatsoever, for any service or services by him or them to be done or performed in their respective offices, or for or in respect of his or their said office or offices, for any fee, perquisite, or other benefit or reward, shall exact, demand or ask, any greater or other fee or fees, sum or sums of money for the discharge of his or their several and respective duty or duties in their respective offices, other than what hereinafter is allowed and established for the same.

And it is hereby further ordained, That the Chief Justice of the Supreme Court, and all Judges within this Province, do tax and allow all bills of cost arising within their several Courts, according to the Table of Fees hereinafter established, and not otherwise.

JUDGE'S FEES.

	£	s	d
For the first motion in every action not criminal,	0	10	0
Allowing a Writ of Error, and marking the Roll,	0	6	8
Every Supersedeas, Writ of Privilege, Habeas Corpus, Procedendo, Certiorari or Prohibition,	0	2	6
Taking Bail,	0	2	6
Filing,	0	1	0
Searching,	0	1	0
Justification or Disallowance of Bail,	0	2	0
Confession of Judgment or acknowledgment of satisfaction out of Court,	0	2	6
Acknowledging a Deed,	0	3	0
Admission of an Infant by Guardian or Prochein Ami to sue and defend,	0	2	6
Affidavit or Recognizance out of Court,	0	1	0
Signing Judgment Roll,	0	2	0
Attendance at his Chambers on argument or examination of a Witness,	0	3	4
Every trial on the Circuit unless Criminal,	0	6	8
Admittance of an Attorney,	1	0	0
Admittance of a Barrister,	1	0	0

ATTORNEY'S FEES.

	£	s	d
Retaining Fee,	0	15	0
Warrant of Attorney,	0	1	6
First Process in a cause, and engrossing,	0	3	4
Copy thereof and notice where no Bail is required,	0	2	0
Drawing Processes, Returns, Admissions, Bonds to prosecute, Affidavits, Pleas, Adjournments, Suggestions, &c., each 100 words,	0	1	0
Engrossing on Parchment, every 100 words,	0	0	8
Copies on Paper, every 100 words,	0	0	6
Copy of first Process and notice for Common Bail,	0	2	0
Every Bail-piece engrossed,	0	3	4
Every Special Motion or Argument,	0	3	4

Term Fee, (no more than three allowed,)	£0	3	4
Argument on Demurrer or Special Verdict, or in Error, at the Judge's discretion.			
Brief,	0	6	8
Attending Jury of Inquiry,	0	6	8
Drawing up the Judgment,	0	3	4
Entering Judgment on the Roll,	0	2	0
Every continuance on the Roll,	0	1	0
Every Notice, Copy, and Service,	0	2	0
Drawing Affidavits to be read on Trial, every 100 words, (to be paid by the party requiring the same,)	0	1	0
Copies for the opposite party, every 100 words,	0	0	6
Attendance on balloting or striking a Jury,	0	3	4
Taxing Client's Bill, or attending a Judge on ordinary services,	0	1	0
Serving Notice of Trial on the Judge,	0	1	0
Service of Copy of Declaration and Rule to Plead,	0	1	0
Copy of Bill of Costs delivered to the opposite party,	0	2	6
Declaration in Ejectment and Notice,	0	10	0
Drawing a Nolle Prosequi,	0	2	6
Entering on the Roll,	0	1	0
Trial Fee on the Circuit or at Bar,	0	10	0

CLERK'S FEES.

Sealing and entering a Writ and filing the Præcipe,	£0	1	6
Entering an Appearance or Motion, Interlocutory Judgment, Admission by Guardian, every Default, Continuance, Discontinuance, Non Pros, Relicta Verificatione, Retraxit, Satisfaction on Record, each,	0	1	0
Filing Every Affidavit, Writ, Declaration or other paper,	0	0	6
For monies tendered in Court, per pound,	0	0	6
Taking Special Bail in Court, each person,	0	1	0
Copy of all Common Rules,	0	1	0
Entering Verdict, and calling and swearing Jury and Constable,	0	1	6
Swearing a Witness, or reading a paper in Evidence,	0	0	6
Entering Return of Writ of Inquiry,	0	1	6
Entering a Judgment on the back of the Declaration, or in the Minutes,	0	1	0
Every Commitment by the Court,	0	1	0

Warrant to levy a Fine, (to be levied with the fine,)	£0	1	0
Searching the Records,	0	1	0
Entering the allowance of Writ of Error, Certiorari or Habeas Corpus,	0	1	0
Copies of all papers, other than common Rules, every hundred words,	0	1	0
Certifying a Judgment under Seal,	0	3	6
If above two hundred words, the same as for Copying, and the Seal,	0	1	0
Drawing a Recognizance, each person,	0	1	0
Entering Bond of Arbitration and Award, Judgment, and examining Costs,	0	3	6
Filing the Roll,	0	3	0
(a) Docket of Judgment not exceeding £25,	0	1	0
(a) Ditto over £25, not exceeding £200,	0	1	6
(a) Ditto over £200, not exceeding £1000,	0	2	0
(a) Ditto over £1000,	0	3	0
(a) Certified Copy of the Entry of Judgment,	0	1	0
(b) Certificate of Satisfaction of Judgment,	0	1	0
(b) Memorial of Judgment;	0	1	0

CLERK OF THE CIRCUIT'S FEES.

Entering on the Judge's Book every cause to be tried,	£0	2	0
Filing the Nisi Prius Record,	0	2	6
Reading and Filing every Affidavit,	0	1	0
Entering Confession of Lease, Entry and Ouster,	0	1	6
Returning each Postea,	0	3	4
Entering each Default,	0	1	6
Swearing and Impannelling a Jury,	0	1	6
Swearing a Witness, or reading a paper in Evidence,	0	0	6
Taking a Verdict,	0	1	6

COUNSEL'S FEES.

Perusing and amending Special Pleadings and Entries, or assisting on Demurrer or other special proceedings,	£0	6	8

(a) Established by 8 Geo. IV., c. 7.
(b) Established by 8 Geo. IV., c. 8.

Trial Fee,	£0 15	0
In all causes tried, or after being entered for trial, referred to arbitration by rule of Court, a Counsel Fee in the discretion of the Judge, not exceeding Five Guineas,		

SHERIFF'S FEES IN ALL COURTS.

Serving every Writ or Process,	£0	2	6
Return of every Writ,	0	0	9
Travelling, per mile, from the Court House,	0	0	3
Execution and Return thereon, beside mileage,	0	5	0
Levying, Receiving, and Paying (*c*) all monies on Execution—to £40,—per pound,	0	1	0
From £40 to £100,—per pound,	0	0	6
All above £100,—per pound,	0	0	4
Drawing a Bail Bond,	0	2	6
Every Cause tried on the General Venire,	0	2	6
Summoning a Jury of View, and attendance per day,	0	10	0
Serving Writ of Possession,	0	10	0
Every person committed, or return of every Writ,	0	2	0
Bringing up a Prisoner by Habeas Corpus, or mileage,	0	6	8
Attending a Prisoner before a Judge, and receiving him in Custody,	0	3	4
For Discharge of every person committed by the Chancellor,	0	7	6
Summoning a Jury on the Satute for Forcible Entry and Detainer, or on an Extent,	0	10	0
Attending the taking an Inquisition,	0	10	0
Writ of Rebellion or Attachment with Proclamation,	0	10	0
Serving and Executing Writ of Restitution,	0	10	0
For Ne Exeat or Scire Facias,	0	4	0
(*d*) Summoning and returning a Special Jury, (in the discretion of the Judge) not exceeding,	1	10	0

(*c*) The Sheriff is only entitled to poundage where money has been levied; therefore if the defendant is discharged out of custody under the Insolvent Debtor Act, without any money being paid, the Sheriff is only entitled to the execution fees.—*Kavenagh* v. *Phelon*, 1 Kerr 472.

(*d*) Established by 45 Geo. III., c. 9.

(e)	Entering a Writ of Replevin, and indorsing time of receiving the same,	£0	1	0
	Mileage in travelling to execute same, to be computed from the Court House to the place where the goods are found, and back, each mile,	0	0	3
	Executing the Replevin,	0	6	8
	Making a Return, if common,	0	1	0
	Making a Return, if special,	0	2	6
	Entering Writ De Proprietate Probanda, and indorsing time of receiving the same,	0	1	0
	Mileage, to be computed as above, each mile,	0	0	3
	Summoning the Jury,	0	5	0
	For the Constable,	0	2	6
	Swearing the Jury,	0	2	6
	Swearing a Witness or reading a paper in Evidence,	0	0	6
	Attending the Inquest,	0	5	0
	Making out Inquisition, and returning Writ De Proprietate Probanda,	0	5	0
	Order to restore the Goods,	0	1	0
(f)	Drawing a Limit Bond,	0	5	0

CRYER'S FEES IN ALL COURTS.

Calling a Jury, or for every Verdict or Nonsuit,	£0	1	0
For ringing the Bell, each action, or calling Defendant on Recognizance,	0	1	0
On Swearing each Witness,	0	0	3
Discharging a person by Proclamation,	0	1	0

CONSTABLE'S FEES IN ALL COURTS.

Attending the Jury, each cause,	£0	1	0
Serving a Warrant,	0	1	0
Summoning the Jury on Inquest,	0	2	0
Attendance thereon,	0	2	0
Travelling, per mile,	0	0	3

(e) Established by 4 William IV., c. 38.
(f) Established by 6 William IV., c. 41.

WITNESSES FEES IN ALL COURTS.

Attendance per [illegible]	£0	1	6
Travelling, if from a Foreign County, per mile,	0	0	3

JUROR'S FEES IN ALL COURTS.

In each Civil Cause,	£0	1	0
Attending a View, per day,	0	4	0
Trial from a Foreign County, per day,	0	4	0
(*g*) Special Juror, (at the discretion of the Judge,) not exceeding per day,	0	5	0
(*h*) Attending any Inquest or Inquiry before the Sheriff or Coroner in Civil Suits, at the discretion of the Sheriff or Coroner, not exceeding,	0	2	6

CORONER'S FEES.

When acting as Sheriff, the like Fees.

APPENDIX No. 2.

FEES IN SUMMARY ACTIONS IN SUPREME COURT,

By Act 4 William IV., Cap. 41.

JUSTICE'S FEES.

On the Entry of every Cause,	£0	3	4
On Trial,	0	3	4

(*g*) Established by 45 Geo. III., c. [illegible]
(*h*) Established by 6 William IV., c. [illegible]

CLERK'S FEES.

For Signing and Sealing the Writ and Filing Præcipe,	£0	1	6
Filing all other papers, each,	0	0	6
Filing Writ and entering cause,	0	1	6
Taxing Costs,	0	1	0
Entering Memorandum and signing Judgment,	0	3	0
Entering Defendant's Appearance and filing Plea,	0	1	6
Interlocutory Judgment and Certificate thereof,	0	2	0

ATTORNEY'S FEES.

On commencing every action, for Writ, Præcipe, Affidavit and Declaration,	£0	11	8
Copy thereof for Defendant;	0	5	0
Bill of particulars per folio, for original and copy,	0	0	6
Attending taxation of Costs,	0	1	0
Attending Execution of Writ of Inquiry,	0	3	4
And in cases that do not go to a Jury, for all other proceedings until final Judgment,	0	8	4
For every motion before the Court in Banc, actually made in open Court, and entered in the Minutes,	0	3	4
On every cause entered for trial, and for every argument before the Court in Banc, not less than half a Guinea, nor more than two Guineas, in the discretion of the presiding Judge.			
And for all other necessary proceedings in the conducting of any cause under the provisions of this Act to final Judgment, not otherwise provided for, per folio,	0	0	6

Costs of Defending Summary Actions, same as are now allowed and taxable in the Inferior Courts of Common Pleas for like services.

(These Fees are as follows:—)

Retaining Fee,	£0	6	0
Entering Appearance, or Common Bail,	0	1	0
General Issue or Plea,	0	1	0
Drawing and serving all necessary notices,	0	1	0
Subpœna;	0	1	4
Each Ticket,	0	0	6

Drawing a Scire Facias,	£0	2	0
Attending the Execution of a Writ of Inquiry,	0	3	4
Attending Court on trial, and arguing Cause,	0	5	0
Drawing every Affidavit,	0	1	0
Drawing all Affidavits to be read on the trial, every hundred words,	0	1	0
Copy for opposite party, each	0	0	6

CLERK OF THE [illegible]'S FEES.

Half the Fees now taxable in other cases not Summary.

APPENDIX No. 3.

FEES ON REVIEW FROM JUSTICES' COURTS,

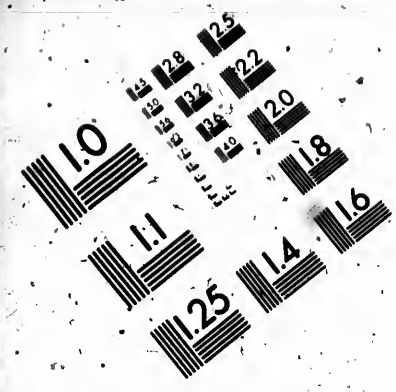
By 4 William IV., Cap. 45, and 1 Vic., Cap. 11.

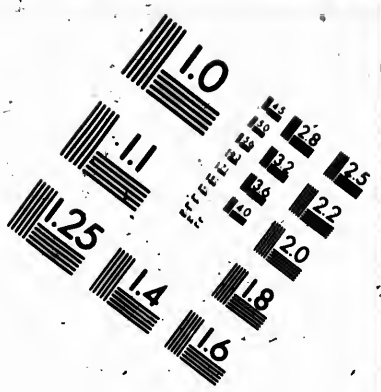
JUDGE'S FEES.

Every application for order to remove Cause,	£0	2	6
Every order to remove,	0	2	6
Hearing Cause upon return of the order and his Judgment thereupon,	0	10	0
Every Affidavit,	0	1	0
Taxing Bill of Costs,	0	2	0
Every Attachment, Summons, or other order made in the course of any proceeding before him,	0	2	6

ATTORNEY'S FEES.

Drawing every Affidavit, or other paper, per folio, of one hundred words,	£0	1	0
Copy of same, per folio,	0	0	6





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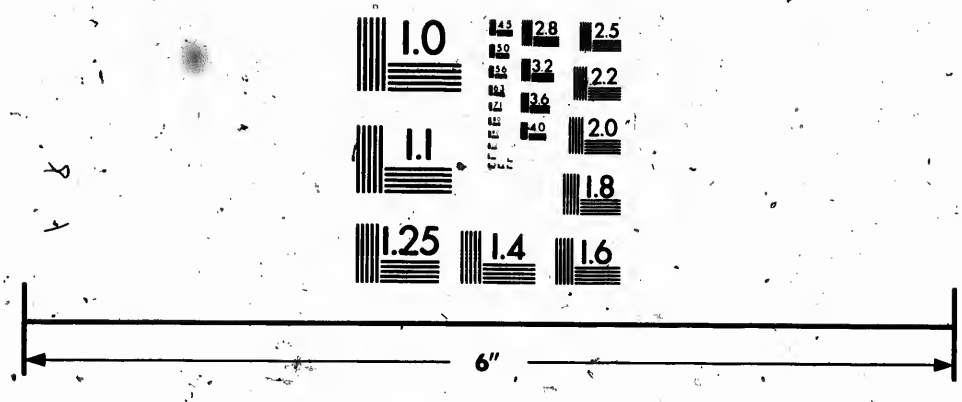

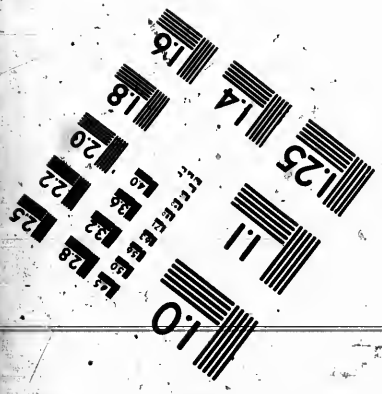

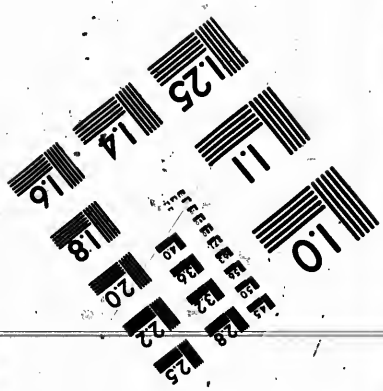

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WEBSTER, N.Y. 14580
(716) 872-4503

Every order to remove and copy thereof,	£0	6	8
Attendance on Judge for his allowance,	0	3	4
Every other necessary attendance,	0	3	4
Upon every Appeal heard or argued before the Judge, not less than,	0	11	8
And not exceeding (at the Judge's discretion,)	2	6	8
If argument be heard before the Court, such fee not exceeding 3 Guineas, as the Court may allow.			
Preparing Bond,	0	5	0
Every Attachment,	0	5	0
Every notice or Summons and service on adverse party,	0	2	0
Attachment for Costs, and proceedings obtaining same,	0	10	0

SHERIFF'S FEES.

Same Poundage and Fees as on Execution.

APPENDIX No. 4.

FEES IN ACTIONS NOT SUMMARY IN THE COURTS OF COMMON PLEAS,

By 5 William IV., Cap. 29.

JUDGE'S FEES.

On the entry of every cause not settled at the return of the Writ,	£0	5	0
On the entry of every cause for trial,	0	3	4
On every Judgment,	0	3	4
Taking Special Bail and entering the same in Bail-Book,	0	3	0
Every Summons granted or order made out of Court,	0	2	6
Taking a Deposition *de bene esse*,	0	5	0
Justification or disallowance of Bail,	0	2	0
Appointment of a Guardian or Prochein Ami,	0	2	6
Taxing a Bill of Costs,	0	2	0
Render of a Defendant in discharge of Bail, (including the commitment or order for taking into custody,	0	2	6

Every affidavit, for each Deponent, - - -	£0 1 0
The same fee to any person authorised to take affidavits to be read in Court.	

CLERK'S FEES.

Signing and Sealing every Writ or Process, (including the filing of the docket or precipe therefor,) Subpœna excepted, - - -	£0 1 0
Entry of every Cause, - - -	0 1 0
Entry of every Rule, - - -	0 1 0
Entry of Appearance or filing Common Bail, -	0 1 0
Filing every Process, pleading or other paper, and marking the same as filed, - -	0 0 6
Copy of every Common Rule, - -	0 1 0
Entering Interlocutory Judgment, - -	0 1 0
Entering Admission of Guardian or Prochein Ami, -	0 1 0
Every rule or order entered in the Minutes, -	0 1 0
If more than one folio, for every additional folio, -	0 1 0
Copy or transcript from the Minutes or Records, per folio, (a folio in all cases to include 100 words,)	0 1 0
Every search made in the Files or Minutes, -	0 1 0
Signing and Sealing every Subpœna, and filing Precipe, if any, - - - -	0 0 6
Entering a cause for trial, - - -	0 1 0
Calling and swearing Jury, and taking and entering verdict or non-suit or entry of discharge of Jury,	0 2 0
Swearing every Witness or Constable, and reading every paper in evidence, - - -	0 0 6
Taxing costs where a trial has been had, -	0 2 0
Taxing costs in any other case, - - -	0 1 0
Making return to every Writ of Error, Habeas Corpus or Certiorari served on him, (exclusive of copy or transcript,) - - - -	0 2 0
Every Certificate under the Seal of the Court, including the Seal,) - - - - -	0 2 0
On all monies paid into Court to one hundred pounds, per pound, - - - -	0 0 6
All above one hundred pounds, per pound, -	0 0 3

* When such money is paid in by a Defendant on a plea of tender or order obtained by him for paying money into Court, the poundage shall be paid to the Clerk, in addition to the money paid in, and may be included in the Defendant's taxable costs.

ATTORNEY'S FEES.

	£	s	d
Taking instructions to commence action,	0	6	8
Writing letter to Defendant requiring settlement before action brought,	0	5	0
Preparing every Process in a cause excepting Subpœna or Writ of Inquiry,	0	3	0
The Precipe or Docket thereof,	0	0	6
Copy of the Writ and notice, (when requisite,)	0	1	6
Drawing every Declaration and copy to file, not exceeding ten folio,	0	5	0
For every additional folio above ten, (when necessary,)	0	1	0
Every copy of Declaration for adverse party or when otherwise requisite, per folio,	0	0	6
Taking instructions to defend action or to enter Special Bail,	0	6	8
Special Bail-Piece,	0	1	4
Common Bail or Appearance,	0	1	0
Drawing General Issue,	0	1	0
Each copy thereof,	0	0	6
Drawing every Special Plea, per folio,	0	1	0
Each copy thereof, per folio,	0	0	6
Preparing a Writ of Inquiry of Damages, (or 1s per folio)	0	4	0
Making up Judgment Roll, per folio,	0	0	9
Attending Assessment of damages before Court,	0	3	4
Attending Assessment of Damages before Jury of Inquiry,	0	6	8
Every Subpœna,	0	2	0
Every copy thereof or Ticket,	0	0	6
Service on every Witness,	0	1	0
Attending the examination of a Witness de bene esse,	0	6	8
Every notice, not exceeding one folio,	0	1	0
For every additional folio,	0	1	0
Every necessary copy thereof, per folio,	0	0	6
Serving every notice or other paper,	0	1	0
Every Summons or order of a Judge, (including attendance,)	0	3	4
Attending a Judge on Summons in controverted cases,	0	6	8
Every necessary attendance before a Judge or the Clerk, (not otherwise provided for,)	0	1	0
Preparing Brief for trial or argument,	0	6	8
On Entry of a cause for trial,	0	5	0
Preparing every Writ of Scire Facias, per folio,	0	1	0
Preparing Bill of Costs where a trial has been had,	0	3	0

In any other case, - - -	£0	1	6
Half of the above fees for a copy of Bill of Costs for Client or adverse party when requisite, and no charge for a Bill of Costs to be allowed in any case before the entry of the cause on the return of the Writ.			
Preparing every Affidavit or other paper not otherwise provided for, for the original, per folio. -	0	1	0
Every additional copy, per folio, - -	0	0	6
Every motion actually made in open Court and entered on the Minutes, - - - -	0	3	4

COUNSEL'S FEES.

Perusing and signing Demurrers, Special Pleas, Replications, Rejoinders, &c., to which the signature of the Counsel is necessary, - -	£0	11	8
This fee to be allowed only for one signature, when more than one Special Pleading in a cause is prepared and delivered at the same time.			
On every cause entered for trial, and for every Argument before the Court, not less than One Guinea, nor more than Three Guineas, at the discretion of the presiding Judge.			

APPENDIX No. 5.

FEES IN SUMMARY ACTIONS IN THE COURT OF COMMON PLEAS,

By 6 Vic., Cap. 33.

JUSTICE'S FEES.

Upon entering the Cause, - - -	[illegible]	2	0
Assessing Damages, - - -	0	3	0
Trial, - - - -	0	3	4
Taking Bail, - - - -	0	2	0

CLERK'S FEES.

For Signing and Sealing Writ and filing Precipe, -	0	1	6

Filing all other papers, each,	£0	0	6
Filing Writ and Entering Cause,	0	1	6
Entering Assessment and Final Judgment Taxing Costs,	0	2	0

ATTORNEY'S FEES.

Writ, Precipe, Affidavit and Declaration,	£0	11	8
If no Affidavit,	0	10	0
Copy of Writ for Defendant or Bail, each,	0	5	0
Bill of Particulars, for original and copy, per folio,	0	0	6
Attending Assessment of Damages and Entering Judgment,	0	3	4
Attending Taxation of Costs,	0	1	0
Attending Execution of Writ of Inquiry,	0	3	4
And in all cases that do not go to a Jury, for all other proceedings to final Judgment,	0	8	4

For every motion necessarily made to the Court in Term, and for all other necessary proceedings in conducting or defending any cause under the provisions of this Act, and not herein otherwise provided for, the Fees shall be the same as are allowed and taxable in and by the Act of Assembly regulating the Fees in actions not Summary in the Inferior Courts of Common Pleas.

COUNSEL'S FEES.

On every Cause entered for trial, and for every Argument before the Court in Term, not less than 11s. 8d., nor more than £1 3s. 4d., as the Judge presiding may determine on.

APPENDIX No. 6.

FEES IN THE COURT OF CHANCERY,

Prepared pursuant to 2 Vic., C. 35, S. 14. 15

MASTER'S FEES.

For every Summons,	£0	2	0
Copies of all writings brought in before the Master, for each folio containing 100 words,	0	0	6

For every Report or Certificate made pursuant to a hearing,	£1	0	0
If Report exceeds ten folio, for every additional folio beyond that number,	0	1	6
For every Report or Certificate made upon petition or motion only,	0	10	0
If Report exceeds five folio, for every additional folio,	0	1	6
For every Recognizance prepared by him, per folio,	0	1	6
For an Examination Fee, each person examined,	0	3	0
For every Exhibit signed by a Master, every person shewn to,	0	1	6
For every Exemplification examined by two Masters, for each of the two Masters,	0	3	0
For preparing and executing a Conveyance of Land,	1	3	4
For every folio beyond ten, which the Conveyance may contain,	0	2	0
For preparing an Advertisement of sale of Land,	0	5	0
For attending a public sale when Conveyance is to be executed by him,	1	3	4
For examining and settling a Conveyance to be executed by another,	0	11	8
For every Bill of Costs taxed, for each folio of the same,	0	1	0
For swearing every Witness,	0	1	0
Appointing time and place for examination of each Witness,	0	1	6
Taking down Interrogatories and depositions, per folio,	0	2	0
Certifying the Examination,	0	2	6
Swearing a party to an answer or other pleading,	0	2	0
For every short attendance on Summons to appear before him,	0	6	8
For every attendance on ditto over one hour and not exceeding two hours,	0	13	4
For every attendance on ditto over two hours and not exceeding four hours,	1	0	0
For every Recognizance acknowledged before him,	0	3	6

MASTER'S EXTRAORDINARY'S FEES.

The like Fees as the Master's for the like services.

REGISTER'S FEES.

For drawing and entering all orders and rules, per folio,	£0	2	0
Filing and entering every Bill, answer or other pleading,	0	2	3

For filing every Report or other paper, -	£0	1	0
Copies of all Orders and Reports, per folio, -	0	1	0
For drawing, engrossing on parchment, and copying on paper, in cases not otherwise provided for, the same fee as the Solicitor for the like services respectively.			
For the Register's or Deputy's hand to every copy of Affidavit, - - - -	0	1	0
For every Certificate with the Register's or Deputy's hand to it, - - - -	0	2	3
For entering a cause for hearing, or setting down in motion paper, - - -	0	1	0
For every Decree and Dismission, - -	0	5	0
For every Search, - - -	0	1	0
For entering Attachments, for each person, -	0	0	6
Entry of all Amerciaments, - -	0	1	0
Entry of Appearances, - - -	0	2	0
Signing and Sealing every Writ or Process, -	0	1	6
For every paper read in evidence, - -	0	0	6
For preparing every Subpœna over and above signing and sealing, - - -	0	2	6

COUNSEL'S FEES.

Retaining Fee in each cause, - -	£1	0	0
For perusing and signing every Bill, Answer, Plea, Demurrer, or any other Special Pleading, Interrogatories or Exceptions, - -	1	0	0
For every Motion of Course, - - -	0	10	0
For every Special Motion, - - -	0	15	0
For arguing every Plea, Demurrer, or other Special Argument before the Court, and on the hearing of the cause, fee at the discretion of the Court.			
For attending the examination of, and examining each Witness when examination is oral, -	0	5	0
Counsel Fees upon special matters, where their assistance is necessary and not otherwise provided for; at the discretion of the Court on Master's Certificate.			

SOLICITOR'S FEES.

Retaining Fee in each cause, - -	£0	15	0

For drawing every Bill, Answer, Plea, Demurrer, or any other writing, not otherwise provided for, per folio,	£0	1	0
For every copy thereof engrossed on parchment, per folio,	0	0	8
Every copy on paper, per folio,	0	0	6
Solicitor's Fee for each Term, only four allowed,	0	5	0
Attending in getting every Petition answered,	0	6	8
Attending the Court on every Common Motion where actual attendance is given,	0	3	4
For the like attendance on every Special Motion,	0	6	8
For copy of every Order, per folio,	0	0	6
Serving the same,	0	3	4
Attending the Court upon every hearing, and upon every argument where actual attendance is given,	0	15	0
For abbreviating every Bill, Answer, and all other proceedings, per folio,	0	0	4
Every Subpœna or other Process,	0	1	0
Attending the Register upon drawing every Decretal Order,	0	6	8
Attending the Master to file any charge or discharge,	0	3	4
Attending on Summons to procced,	0	6	8
Serving all papers not otherwise provided for,	0	1	0

Postage actually incurred to be allowed

The Solicitor General to have the same as other Solicitors, and one fourth more in cases that concern the Crown.

SERGEANT AT ARMS FEES.

For taking a prisoner into his custody,	£0	13	4
Mileage, for each mile,	0	0	3
For serving every Summons to attend a Master,	0	1	0
Serving every Subpœna to appear and answer, or other Process on each Defendant, not otherwise provided for,	0	2	6

Poundage, the same allowance as on Process at Common Law, (except that no poundage to be allowed except in cases of monies levied and paid over under Process of the Court,) the amount to be levied in addition to the sum directed to be paid or levied by such Process.

SHERIFF'S FEES.

Serving every Subpœna to appear and answer, or other Process not otherwise provided for,	£0	2	6

Mileage, for each mile to be computed as on Process at Common Law,	£0	0	3
Poundage, the same as the Sergeant at Arms.			
For every arrest under Writ of Attachment, or other Process,	0	5	0

NOTE.—In all cases under the foregoing Table, the *folio* is to be considered as containing one hundred words, and the fraction of a folio is to be reckoned as one folio.

APPENDIX No. 7.

FEES IN THE SURROGATE COURT,

By 3 Vic., Cap. 61.

SURROGATE'S FEES.

Examining Petition for Letters of Administration or Probate of a Will, and granting Order for the same,	£0	6	8
Every Fiat for Appraisers or Bondsmen,	0	2	6
Every Order not herein specially provided for,	0	2	6
Certificate endorsed on Will, of the proof thereof,	0	6	8
Certificate endorsed on Will, of Oath to Executors,	0	3	4
For the Probate of a Will or Letters of Administration, where the Estate does not exceed £300,	0	16	8
Where above £300 and not exceeding £1000,	1	3	4
Above £1000,	2	6	8
Signing Warrant of Appraisement,	0	2	6
Citation, including Order for the same,	0	3	4
Every Subpœna, Attachment, Execution or other process, not otherwise provided for, including Order for the same,	0	2	0
Letters *ad Colligendum*,	0	10	0
Sentence or Decree in ordinary cases of granting Licence to sell Real Estate, passing Accounts, or of Distribution, &c.,	1	3	4
Sentence or Decree for Probate of a Will, Letters of Administration, or on granting Licence to sell Real Estate, passing Accounts, or Distribution, &c., where there is a contest,	2	6	8

Transmitting Appeal, with statement of reasons,	£1	3	4
Taking Testimony in Writing, each Witness, if Testimony does not exceed three folios,	0	3	4
Every folio above,	0	1	0
Examining and Taxing Costs,	0	2	6
Every Oath,	0	1	0
(a) On granting Probate of a Will or Letters of Administration when the Estate does not exceed £100, and there is no contest,	1	0	0
(a) When the Estate does not exceed £200, and there is no contest,	1	10	0
(a) For Licence to sell Real Estate, and all proceedings relating thereto, where the Estate does not exceed £200, and there is no contest,	1	0	0

REGISTER'S FEES.

Filing Petition for Probate of Will or Letters of Administration, and Order of Surrogate thereon,	£0	1	0
Entry of Order for Probate or Letters of Administration and every other Special Order not herein otherwise provided for,	0	2	6
For the Probate of a Will or Letters of Administration, where the Estate is under £300,	0	15	0
Where above £300 and not exceeding £1000,	1	0	0
All above £1000,	1	6	8
Copy of Will annexed to Probate, per folio,	0	1	0
Registry of Will in Book, per folio,	0	0	9
Preparing Bond of Administration, or on sale of Real Estate, or for payment of Costs on Appeal,	0	6	8
Preparing Citation, and Seal,	0	4	0
Each copy thereof to be served,	0	2	0
Preparing Affidavit of Service of Citation or other process, or any other necessary Affidavit,	0	1	0
Warrant of Appraisement and Seal,	0	4	0
Filing every Paper, except Vouchers filed with Accounts,	0	0	6
Filing every Account and Vouchers,	0	3	4
All Copies of Papers, for first folio,	0	1	0
Every additional folio,	0	0	6

(a) See 7 Vic., c. 41, s. 6.

Certificate under the Seal, including the Seal,	£0	5	0
Entry of every Order or Decree in the Registry Book, not specially provided for, per folio,	0	0	9
For every inspection of original Will, and attending the party inspecting the same,	0	2	0
Every search in every other case,	0	1	0
Preparing Subpœna and Seal,	0	2	6
Every Copy or Ticket required,	0	1	0
Entry of Caveat or Appeal,	0	3	4
Preparing every Execution, Attachment or other process not specially provided for	0	2	0
Certificate of Licence for sale of Real Estate,	0	5	0
(b) On Probate of a Will or Letters of Administration, when the Estate does not exceed £100, and there is no contest,	1	0	0
(b) When the Estate does not exceed £200, and there is no contest,	1	10	0
(b) On Licence to sell Real Estate, and all proceedings relating thereto, where the Estate does not exceed £200, and there is no contest,	1	0	0

PROCTOR AND ADVOCATE'S FEES.

Taking Instructions from Client to commence or defend any proceeding in Surrogate Court,	£0	15	0
Preparing every Petition, Allegation or other Paper necessary to be prepared by him, per folio,	0	1	6
Every additional Copy thereof, per folio,	0	0	6
Every necessary attendance on the Surrogate,	0	6	8
Every Hearing or Argument before the Surrogate, not less than Half a Guinea, nor more than Three Guineas, at the discretion of the Surrogate.			
Serving every Notice, or other Paper, on each person,	0	1	0

SHERIFF OR OTHER MINISTERIAL OFFICER'S FEES.

Serving Citation or other process, (Subpœna excepted,) on each person,	£0	2	6

(b) See 7 Vic., c. 41, s. 6.

Posting up same in three public places, directed by Surrogate,	£0 5 0
Serving Subpœna on each person,	0 1 0
Mileage, the same as in other Courts.	

APPENDIX No. 8.

FEES IN BANKRUPTCY,

By 5 Vic., Cap. 43.

COMMISSIONER'S FEES.

For receiving, opening and filing every Fiat of Bankruptcy,	£1 3 4
Appointment of Assignee by Warrant	0 5 0
Warrant to Arrest Bankrupt, &c.,	0 5 0
Causing the necessary Notices of Bankruptcy to be inserted in the Newspapers,	1 3 4
Receiving Petition of alleged Bankrupt, &c.,	0 5 0
Granting copy of same, and Documents, to be paid by the alleged Bankrupt, per folio,	0 1 0
Every Warrant to Summon Jury or Witness,	0 2 6
Each day's sitting in Court to hear any cause for meeting of Creditors to prove or contest debts, make distribution or oppose Bankrupt's Certificate, to be apportioned among the different cases,	1 3 4
Copy of Minutes and Evidence for the Chancellor or Master of the Rolls, to be paid by the party appealing, per folio,	0 1 0
Bankrupt's Certificate,	0 11 8
Any Order made on hearing,	0 11 8
For Examination of Bankrupt or Order on personal inspection of his property,	1 3 4
For Administering an Oath,	0 1 0

APPENDIX No. 9.

FEES IN THE COURT OF GOVERNOR AND COUNCIL.

ADVOCATE'S FEES.

Retaining Fee,	£1	0	0
Perusing and Signing Libel, Answer, Interrogatories, or Exception,	0	15	0
For every Motion of Course,	0	5	0
For every Special Motion,	0	10	0
For Arguing the Cause,	1	0	0

PROCTOR'S FEES.

Retaining Fee in every Cause,	£0	15	0
Drawing every Citation, Libel, Answer, Interrogatory, Record, &c., every sheet containing one hundred words,	0	1	0
For every Copy thereof, per sheet,	0	0	6
For Engrossing the same, per sheet,	0	0	8
Term Fee,	0	5	0
For attending a Commissioner upon Examination of a Witness *de bene esse*, upon Interrogatories,	0	10	0
Serving all necessary Notices,	0	1	0

CLERK'S FEES.

For Signing every Citation or other Process,	£0	2	0
Filing every Paper or Process, and for every Search,	0	1	0
For Copies of all Common Rules,	0	2	0
Minuting every Motion,	0	1	0
Entering every Order or Decree,	0	2	0
Filing the Record,	0	3	0

For Drawing and Copying, the same Fee as to the Proctor.

SHERIFF'S FEES.

Serving Citation, on each person,	£0	5	0
Travelling, from the Court House of the County, per mile,	0	0	3
Serving copy of Libel on Defendant,	0	2	6

CRYER'S FEES.

Upon first Motion in each Cause,	£0	1	0
Upon final Decree,	0	1	0
Swearing each Witness,	0	0	6

COMMISSIONER'S FEES.

For each Witness examined,	£0	8	0
Taking Affidavit,	0	1	0

For Drawing and Copying Answer to Interrogatories, if done by him, the same Fee as to the Proctor.

PAGE

PAGE

ERRATA.

PAGE 3.—Notes (*m*) and (*q*), for "*Hilary T.* 1 *Vict.*," read, "*Hilary T.* 2 *Vict.*"
120.—Note (*n*), for "*Ex parte v. Mazerol*," read "*Ex parte Mazerol.*"

ADDENDA.

PAGE 8.—To note (*g*)—"*McPherson* v. *Hoskins*, before Carter J., July, 1840."

16.—Note (*v*)—*Doe* v. *King*, is reported in 3 Kerr 178.

17.—Note (*x*).—A second Writ of ca. sa. issued upon a judgment more than a year old, is irregular without a *scire facias* to revive the judgment, unless the original execution issued within a year and day, is on file.—*Brown* v. *Partelow*, Hil. T., 1847.

25.—Note (*q*).—A motion to enlarge a rule Nisi for an attachment against a witness, in consequence of not being able to serve him with a copy of the rule, must be made during the term in which the rule was returnable.—*Abbot* v. *Frink*, Hil. T., 1847.

27.—Note (*v*).—It is no objection to a motion for judgment as in case of a nonsuit, where a clear default has been committed, that a similar application was unsuccessfully made in a previous term, upon an affidavit which left it doubtful whether the application was not then made too soon.—*Whithers* v. *Spooner*, 5 M. & G. 721.

Where there are several defendants appearing by separate Attornies, they may each move for judgment as in case of nonsuit.—*Rhodes* v. *Thomas*, 2 Dowl. & L. 531.

A record having been withdrawn in consequence of the absence of a witness by the contrivance of the defendant's Attorney, a rule for judgment as in case of a nonsuit, was discharged with costs.—*Appleyard* v. *Todd*, 6 M. & G. 1019.

Where a plaintiff does not proceed to trial according to notice, the defendant may have judgment as in case of a nonsuit, though neither he, nor any person representing him, appeared to claim a nonsuit when the cause was called on.—*Allott* v. *Bearcroft*, 10 Jur. 972.

The affidavit, in answer to a motion for judgment as in case of a nonsuit, stated, that the case arose out of circumstances similar to those existing in a case of W. against the defendant in this suit, tried at the same assizes, and that the plaintiff withdrew the record in consequence of the Judge, who had tried that cause, having decided the question of law against W. A motion for a new trial in that cause having been refused, and the facts shewing that the plaintiff in this case could not recover, judgment as in case of a nonsuit, was granted.—*White* v. *McDonald*; 3 Kerr 220.

27.—Note (*w*).—In answer to a motion for judgment as in case of a nonsuit, the affidavit of the plaintiff's Attorney stated that a commission had been issued to examine witnesses on the part of the plaintiffs at W., in the United States; that one of plaintiffs residing at W. had written to the other plaintiff residing in this Province, that the commission had been received and would be executed, in consequence of which he gave notice of trial, but was obliged to countermand the same, the commission not having been returned; that the plaintiff residing at W., had since written to the other plaintiff, assigning as a reason for not executing the commission, his own necessary absence on pressing business, and the residence of one of the required witnesses at a distance from the place where the commissioners resided; and stating that the commission should be executed and returned. Held a sufficient excuse.—*Doe* d. *McTavish* v. *Roulston*, Mich. T., 1846.

An application for judgment as in case of a nonsuit, is sufficiently answered by shewing that the plaintiff was ready to proceed to trial, but was prevented from doing so, by the defendant's Attorney objecting to the insufficiency of the notice of trial.—*McDonald* v. *Rider*, 3 Kerr 218.

PAGE 28.—Note (*w*).—Where the plaintiff was compelled to withdraw the record in consequence of the absence of a material witness who had been in attendance, and swore that he went home with the intention of returning to the Court, but was prevented from doing so by information received from the defendant that the plaintiff had withdrawn the record; though the defendant denied having made such a statement, or that he endeavored to induce the witness to believe that such was the case; the peremptory undertaking was enlarged on payment of costs of the day, and of the motion.—*Trustees of Greenock Church* v. *Love*, 3 Kerr 179.

69.—Note (*b*).—Where the trial of a cause was put off at the assizes on terms of the defendant paying to plaintiff all costs that had been incurred in preparing for trial, and for the expences of M., of Canada, who had been sent for by the plaintiff, as a witness in the cause; it was held that the plaintiff was not entitled to recover more for M's expences than the taxable fees allowed by the ordinance.—*Pollok* v. *Ritchie*, Hil. T., 1847.

102.—Note (*l*).—The Act 42 Geo. III., c. 7, extends to actions of trespass to personal property.—*Amos* v. *Fields*, Hil. T., 1847.

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(*The letter "n," affixed to the figures, denotes a reference to the Notes.*")

For English rules of Court
see 3 Barn & Alderson 374