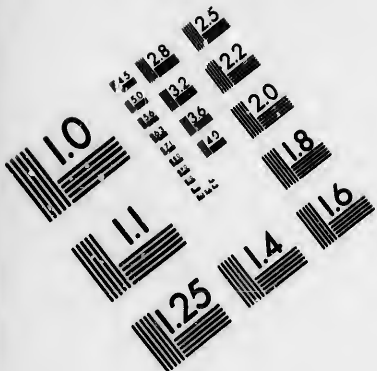
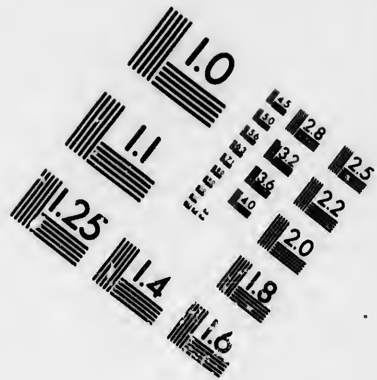
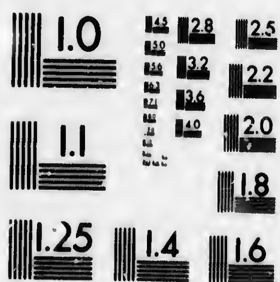
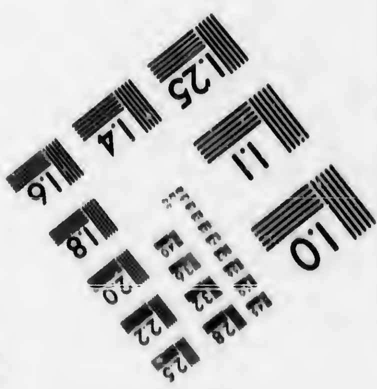



IMAGE EVALUATION
TEST TARGET (MT-3)



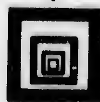


Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

CIHM/ICMH
Microfiche
Series.

CIHM/ICMH
Collection de
microfiches.



Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

© 1986

## Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [ ] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [ ] Includes supplementary material/ Comprend du matériel supplémentaire
- [ ] Only edition available/ Seule édition disponible
- [ ] Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

- [x] Additional comments:/ Commentaires supplémentaires: Irregular pagination : [4], [1] - 72, 75 - 76, 73 - 74, 79 - 80, 77 - 78, 81 - 244 p.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X 14X 18X 22X 26X 30X

12X 16X 20X ✓ 24X 28X 32X

The copy filmed here has been reproduced thanks to the generosity of:

McLennan Library
McGill University
Montreal

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol ―▶ (meaning "CONTINUED"), or the symbol ▼ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

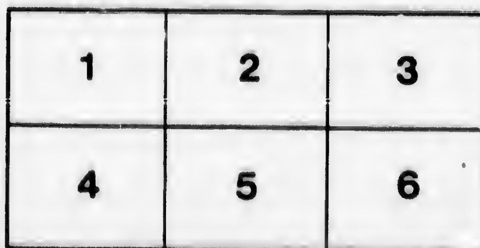
McLennan Library
McGill University
Montreal

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole ―▶ signifie "A SUIVRE", le symbole ▼ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.



LA

# EPITOME

OF THE

# LAWS OF NOVA-SCOTIA,

BY

BEAMISH MURDOCH, Esq.

BARRISTER AT LAW.

VOL III.

HALIFAX, N. S.
PRINTED BY JOSEPH HOWE.

1833.

d
sl
ve
up
ca
m
ac
12
fo
pr
ge
im
Br
Cl
cr
thi

## TO THE READER.

The minutes of cases in the Supreme Court at Halifax, during 1823, given in this work, are from the author's short hand notes, except the case of Mitchell *vs.* Ring, in volume 2d, communicated. The later cases are drawn up from recollection of the points decided in several causes in which he was professionally engaged. Very many interesting questions of law and practice have been adjudged on in the Supreme Court, within the last 10 or 12 years, the scattered notes of which, if collected, would form a valuable book. During that period the bar of this province has vastly increased both in numbers and intelligence, and the style of legal argument and research has improved under the talented presiding judge, the Hon. BRENTON HALLIBURTON, on whose recent elevation to the Chief Justiceship of Nova-Scotia, in the room of the venerable Mr. BLOWERS, resigned, the author cannot omit this opportunity of congratulating the profession.

HALIFAX, February 7, 1833.

## VOL. III.—TABLE OF CONTENTS.

### Book II.—Part II.


| | | Pages. | |
|---|---|---|---|
| Chap. 1 | Personal property - - - | 1 | to 22 |
| 2 | On bailment - - - - - | 23 | 32 |
| 3 | Wills of personal property - | 33 | 48 |


### Book III.—Civil Courts of Common Law.


| | | | |
|---|---|---|---|
| Chap. 1 | Jurisdiction - - - - - | 49 | 64 |
| 2 | Actions - - - - - | 65 | 90 |
| 3 | Distresses - - - - - | 91 | 96 |
| 4 | Limitation of actions - - | 97 | 104 |
| 5 | Preliminary steps before action, parties, attornies - - - | 105 | 122 |
| 6 | Writs by which an action may be commenced - - - | 123 | 148 |
| 7 | Appraisement, bail and appearance | 149 | 155 |
| 8 | Pleadings - - - - - | 156 | 169 |
| 9 | Juries - - - - - | 170 | 179 |
| 10 | Evidence - - - - - | 180 | 206 |
| 11 | Trial by jury - - - | 207 | 216 |
| 12 | New trials, motions and rules | 217 | 222 |
| 13 | Judgments and costs - - | 223 | 234 |
| | Addenda - - - - - - | | 235 |
| | Index - - - - - - - | | 239 |

Pages.
to 22
32
48
64
90
96
104
122
148
155
169
179
206
216
222
234
235
239

# BOOK II.

## PART 2.

### CHAPTER I.

*Personal Property.*

While the feudal system prevailed in Europe, the interests of tenants for terms of years, or any other kind of property in land which did not amount to a freehold, was little regarded, and almost unprotected by the laws. The persons who actually managed and labored in agriculture, were either villains, (i. e. slaves annexed for life to the soil, and sold or given as appendages to it,) or they were in a situation of such dependance, as to be little above that class. This state of things has passed away with the advanced civilization of western Europe, but has still an extensive existence in the territories of Russia and the adjacent countries. Property in general was consequently divided in our early law, into *real estate*, including only estates of inheritance and life estates, and *chattel interests*, comprising all interests in land below a freehold, such as estates for terms of years, and all moveable property. Personal property, in the middle ages in Europe, was of small value compared with what it is now, and was rarely noticed in the earlier laws or writers on law subjects. Chattels real have been noticed, as a part of the subject of real estate in general.

We will now consider personal property in the more limited and the natural sense of the expressions, including under it only chattels personal, which embraces all moveable property. Landed estates attract to them certain moveables, which as auxiliary and necessary to the use of the land, follow it in its course of descent or alienation. Such are the title deeds by which it is held, and any other documents that assist to substantiate and explain the title. In England, deer in a park, fish in an artificial pond, and pigeons in a pigeon house, have been considered to belong to the real estate. Co. Lit. 8 a. 20 a. Although generally all buildings and fixtures are considered part of the real estate; yet, in modern times, tenants have been permitted to separate and carry away certain kinds of fixtures, as their personal or moveable property. Thus in the case of a soap boiler who had a lease for years, his vats, coppers, tables and partitions, were decided to be removeable by him. So chimney pieces and wainscot have been considered removeable. So a building resting on blocks, may be removed, or a windmill on posts. 1 Salk. 368, 1 Atk. 477. 1 Taunt. 21, 6 T. R. 377, but this right of removal must be exercised *before* the expiration of the term of years. A distinction is made, that buildings and fixtures, erected for the use of trade or manufactures, may be thus removed in many cases, but that erections for agricultural purposes are not so privileged. 3 East 38.

The Roman law adopted the obvious division of property into moveable and immoveable things, and whatever was affixed to the freehold *perpetui usus causa*, that is to say, with a view to its being of permanent utility, was classed among the immoveable property,

*Of absolute and qualified property in personal chattels.*

Moveables, that is chattels personal, are divided into such as are in *possession*, and such as are in *action*. The

latter are such goods or money claims, as the party has a right to, but not having in his actual or constructive possession, he is entitled to recover by an action or suit at law. 2 B. C. 396, 397. Some kinds of personal chattels are by their nature susceptible of absolute possession or property. 1. Inanimate things moveable, whether the productions of nature or human industry. 2. Vegetable productions, when severed from the stem or from the soil of the freehold, they being appurtenant to and a part of it before. 3. Domestic animals, which are tame by nature. In the case of domestic animals, the progeny belongs to the owner of the mother, both by the English and Roman code.—2 B. C. 390. Human beings cannot be considered as property. Wild animals cannot be the subject of absolute property, but a person may have a right and property in them, limited in its character, and commensurate with the degree of power the possessor has obtained over them, by reclaiming, wounding, capturing, or confining them. If an animal, naturally wild, has been partly tamed, or has been restrained or imprisoned, and regain its natural liberty and habits, the right of property in it ceases. But although it leave its place of confinement or rest, and wander abroad, yet if it is in the habit of returning periodically to its master, it is regarded as his property still, and this is also a rule both in the English and Roman law.—2 B. C. 392.

This kind of property, when fit for food, is as much protected by the common law, as that of domestic animals, it being felony to steal either—2 B. C. 393, and Christian's note. But the stealing of dogs, bears, apes, parrots or singing birds, is laid down in the old writers, to be only punishable by action at law of a civil kind, at the suit of the owner. It may be a doubt whether this is not giving too much latitude to aggressors. The owner of land has also a property in the young of birds and wild animals on his grounds, while they are unable as yet to fly off and leave

the place—2 B. C. 394. No game laws exist in the colonies, to confer exclusive privileges of hunting and sporting upon any class of men. Every man is free to pursue game or fish in uninclosed grounds, but he cannot traverse any enclosures for the purpose, unless permitted by the owner, without incurring penalties and being liable to a civil action of damages for a trespass.

A qualified or special ownership may also subsist in things moveable, capable by their nature of absolute possession. Such is that of a person to whom goods are delivered to carry for hire,—of a pawn broker in things pledged, and in similar cases. If the goods are taken away improperly, either the general owner, or the party having the possession and special property, may sue for damages.—2 B. C. 396. But a domestic servant will not have any property in the things placed under his charge, nor will a hired shepherd in the masters' sheep.—ibid. They have a care and custody without any property in these cases.

*Undivided interests in moveables.*—Personal property may be the subject of joint tenancy, or tenancy in common, and the doctrine of survivorship applies to personal, as it does to real estates. Stock in trade or stock on a farm, held in joint tenancy, are excepted from the incident of survivorship.—2 B. C. 399, 5 B. and A. 395.

*Expectant interests in moveables.*—An estate for life may be limited by deed or will, in money or other chattles personal, and a remainder over to another person. But if they be given in tail, the tenant in tail will hold them with the fullest powers of ownership, as if fee simple had been intended.—See 2 B. C. 398, 2 Kent Com. 285, and many English and American cases there cited. The title to personal property may arise, 1. From original acquisition. 2. By contract. 3. By representation. 4. By operation of law.

1. *Original acquisition.*—Occupancy was in the early

ages of mankind, an extensive source of acquisition, but at present, as almost every thing has a proprietor, the usages of society require a form of voluntary or at least systematic transfer, to give a title to any thing. Any lost articles, which do not come within the description of wreck, estrays, waifs or treasure trove, belong to the finder, if no owner can be ascertained, and if the owner appear he is bound to pay the actual expences of finding or preserving them.—2 B. C. 102. 2 Kent Com. 290.

*Capture.* Things taken by the government vessels of war, or by the troops of the crown in war, are public property, and so if taken by privateers or letters of marque. The officers and men in the one case, and the owners in the other, obtain such share of the proceeds as the government previously stipulates for. Wild animals and fishes, and perhaps wild fruit, may be considered as the property of the captor or gatherer, by the principle of occupancy. 2 B. C. 403.

*Accession.* If any corporeal substance receive an increase, or be added to by nature or art, the accession and improvement belongs to the original owner.

*Transmutation.* But if its species be entirely changed, as from wheat into bread, from grapes to wine, &c. then the property belongs to the operator, and the former owner can only claim compensation for his raw materials used up. 2 B. C. 404. 5. These rules respecting accession and permutation, have been strictly copied from the Roman law.

*Confusion.* If goods be intermixed inseparably, so that the respective owners cannot sever their own part, where it is the result of mutual consent, each owner is tenant in common, in proportion to his own original amount. This is the rule both of English and Roman law, but if one wilfully confound his goods with those of another, so that they cannot be distinguished and set apart, without the consent of the other party, then the English law gives the

whole property to the non concurring owner ; but by the Roman law he was bound to compensate the other, which he is not by ours. I take it for granted, that if the confusion be the result of accident, that they will be tenants in common, as in the case of mutual consent. See 2 B. C. 405, 2 Kent. Com. 297.

*Manufactures.* By the civil law if a man rebuilds or repairs a vessel, (even from her keel,) with another's materials, the property in the vessel is not changed. Dig. 6, 1, 61. If a house be built on the land of A. with materials belonging to B. or by B. with his own materials, in either case the house is accessory to the land and belongs to the owner of the land. So with respect to trees, &c. they follow the title to the land when rooted in it. The civil law also held that a painting belonged to the artist, and not to the owner of the canvas or pannel on which it was executed. Inst. De rer. div. 2, 1, s. 34. The English law, however, makes a distinction, in cases of accession, &c. in the case of a wilful trespasser who is not allowed by any transmutation or improvement to acquire a property. Year Books, 5 Hen. 7, 15, 12 Hen. 8, 10.—The civil law rule was similar. See 4 Kent. Com. 296. In the Supreme Court of New York, it was decided that where A had entered upon the land of B. and cut down trees and sawed and split them into shingles and carried them away, the conversion of the timber into shingles, did not change the right of property—ibid. 296, 7.

*Copyrights.*—An author has, at common law, an exclusive and permanent property in the copyright of his works ; without his permission no one can legally publish copies of his composition. See 2. B. C. 407, and Christian's notes. This right has been protected in its exercise, but yet limited in its duration, in the mother country, by the statute law, (8 Anne, c. 19, 15 Geo. 3, c. 53, 41, G. 3, c. 107, 12, G. 2, c. 36, 34, G. 3, c. 20, sec. 57, 8, Geo. 2, c. 13, 7 G. 3, c. 38, 17, G. 3. c. 57, 54 G. 3, c.

156.) So the right to the exclusive advantage, from new manufactures, to the inventors is regulated there by statute. see 21, Jac. 1, c. 3, &c.

Laws of a similar character have been passed in the United States by the Congress (or general legislature.)—See 2 Kent Com. 306. The statutes in question have given to authors and inventors a facility of restraining piracy, but the protection is limited to fixed terms, and attended with much expence and trouble. The encouragement of intellectual improvement would point out the propriety of giving to inventors and authors a fair and easy mode of protecting their right to the permanent property in their mental productions. No statute has been passed here on the subject; accordingly the right is perpetual as at common law, and the author or inventor may, by bringing his action of damages, obtain redress for any invasion of his interest. Translations and abridgments are a fair subject of property—3 Ves. and Bea. 77. So are the notes of a particular edition of a work. 1 East. 361. Ambler 403. Dramatic pieces see Ambl. 694, 5 T. R. 25. Music in single sheets. 11 East. 244 note. This kind of property would appear to be capable of being inherited, devised, or assigned like any other. It seems doubtful whether the legal title to it, can be regularly transferred, unless by deed.—3, Mau. & Selw. 9. Jacob's Rep. 316. If the proprietor of a copy right apply to a court of equity, to protect his rights by injunction, he must file a separate bill against every bookseller, whom he would prevent from making sale of the copies of a spurious edition.—2 Ves. Jun. 487, Hardr. 337.

*Title to personal property by contract.*

1. *Gifts.*—It has been a question, whether a gift is to be considered as a contract. A gift is a transfer of property, without an equivalent being received in lieu of it. Viewing it as a contract, it is not binding in the courts of law

or equity until delivery has taken place.—12 Ves. 39, Jenk Cent. p. 109, case 9. Bract. l. 2 p. 15, 16. Gifts are distinguished into such as are made *inter vivos*, that is between living persons, and such as are made by a party in contemplation of death (called gifts *causa mortis*,) the latter not taking effect unless the owner shortly after die. 1. Gifts (*inter vivos*) go into full effect on delivery, until which the proprietor is legally free to change his mind and retract his intended generosity. The promise or offer to make a gift being one of those contracts classed by the English law as *nuda pacta*, or bargains without consideration or equivalent, and the performance of which cannot be demanded, because as the contracting party has received no benefit, nor the other sustained any loss, it would be unreasonable to give the latter the power, of enforcing what may have been a rash and improvident promise. When a gift is made by a person *sui juris*, of his personal property, and it is perfected, by as full a delivery of the possession and control over the subject matter, as it is capable of in its nature, it becomes in our law an irrevocable transaction, unless its operation should defraud the creditors of the giver. He who is a creditor of the giver at the time of making the gift, is entitled to treat the transfer as a voidable one. This principle is firmly established by the statutes,—3 Hen. 7, c. 4, which makes void all gifts of personal property in trust for the donor, and the 13th Eliz. c. 5, which renders void all gifts of goods or lands made with intent to defraud or impede creditors from obtaining their demands. These two statutes may be regarded, as declaratory of a general principle of our laws, that fraud vitiates every transaction in which it is discovered, and therefore it is that the same rule is adopted in all parts of the United States, as well where these statutes have not, as where they have been re-enacted.—2 Kent, 356. We may therefore conclude that they are virtually in force in this province, though not re-enacted.

If a specific fraudulent intention can be shewn to have actuated a gift, it is thought it will be void, even in favor of subsequent creditors.—ibid. 357. A distinction has been drawn by authors, between property which a creditor could not reach by legal process, and that which he could levy on for his demands; and an idea held out, that fraud would not be presumed, in a voluntary gift or settlement of the former kind of effects.—Roberts on frauds, 421, 2. The general rule of law is, it is true, that fraud is not to be presumed in any case until it is proved, and perhaps this subject has been clouded a little, by the use of the word 'fraud' in the statutes and authorities. It would be more conformable with propriety, to consider the gift made by a person in debt to be revocable, if his creditors should insist upon it, and this is nearly the light in which the civil law views it.—Code lib. 3. tit. 29, lib. 8, tit. 56. The creditors, to whom debts were incurred by the donor subsequent to the donation, could of course have no just claim to demand a revocation of the gift, unless actual fraud or their interests had been intended in the making of it,—or unless by the delivery not taking full effect, and the goods remaining apparently in the possession of the donor, as if still his own, they were calculated to induce persons to give him a credit. *Gifts to a wife or family* are not protected from these rules, the claim of the creditor being considered more binding than theirs over the debtor's effects. Indeed the creditor may be considered as having an indirect ownership in the debtor's effects, to the amount of his demand, and it would therefore be unreasonable to suffer the person indebted to dispose of them, without having any regard to the right of the other. The rights of the creditor are much protected in every code of laws, and the power he has needs to be tempered by moral justice and benevolence. There is unfortunately too literal a truth in the saying of the wise man, that the borrower is slave to the lender. The Jewish code is replete with divine injunctions to

the wealthy, to use with forbearance the power providence has entrusted them with, and not to make it it an engine of oppressing or tormenting their brethren of mankind, and the Christian dispensation enjoins forgiveness of debts, as a condition of obtaining a release, of our own transgressions, against the laws of the omnipotent creator and father of all. False liberality displays itself by gifts to which the claims of justice, to creditors, and to the family of the donor, are opposed. It is much decried by moralists.—(Cicero. de officiis. 1, 14,) and the civil law was strongly opposed to it. In that system the prodigal was subjected to curators and guardians, as much as the infant or the insane, and this wise regulation has been applied, I believe, in some parts of the United States, to the habitual drunkards who waste their time and goods. The principle is just and and rational, and should be adopted in its full extent every where. The gambler, prodigal, and habitual drunkard, are certainly as fit subjects for curators as the insane.

2. *Gifts causa mortis.*—These are in the nature of legacies. They must be made in the party's last illness, in contemplation and expectation of death, and with a view to their taking effect, only in case of death taking place. If he recover, the gift is annulled. See Swinb. 18, 1 P. Wms. 404. 1 Ves. Jun. 546. The near approach of death from old age, or infirmity, or from external danger anticipated, will make such gifts valid, according to the civil law, from which the English has derived them.—Dig. 39, 6. s. 3, 4, 5, 6. Neither can they be made to the prejudice of creditors. Dig. 39. 6, sec 17, and if the donor revokes the gift, or recovers, or survives the donee, they are void.—Inst. 2, 7, 1, Code, 8, 58, 4. Prec. in Chan. 300. The delivery should be actual, though symbolical deliver- was held good, where the key of a room containing furniture was delivered. See 2 Ves. 431. Str. 955. 2 Ves. Junr. 111. 7 Taunt. 224, 3 Atk. 214. A delivery of a note of

hand was considered insufficient as a gift *causa mortis* but *contra* of a bond.

*Contracts in general.*

A contract is defined to be "an agreement upon suffi-" cient consideration, to do or not to do a particular thing." 2 B. C. 442. If the contract be written and under seal, as a deed, it is called a specialty. If not authenticated as a sealed deed, it is called a *parol* contract, whether it be verbal or in writing. 7 T. R. 350 note. A contract is said to be executed, or executory. Thus a contract of sale is *executed*, when the price is paid, and the thing sold delivered, and it is *executory*, when the bargain is made that one party shall, at such a time, deliver to the other such an article, and that the other should pay such a sum as the price, in which case a right in action to the article sold is transferred to the buyer, while the executed contract of sale gives the absolute property in possession to him. 2 B. C. 443. Besides *express* contracts, the English law establishes *implied* contracts in many cases, where value has been given or services performed, and where common justice requires that a compensation should be made. If a contract is valid by the law of the country in which it is made, its efficacy is not limited as to territory, but is valid and may be enforced in any country. Contracts are considered to derive their efficacy in a great degree from the law of nations, being essentially necessary to commercial intercourse. Inst. 1, 2, 2—2 Kent. Com. 364.

*The consideration.* An adequate consideration (or an equivalent,) is essential to the validity of a contract by the civil and the English law. See Dig. 19, 5. 5. Gravina l. 2, s. 12, 2 B. C. 444, 2 Kent. Com. 364, 5. Consanguinity is a *good* consideration, but will be insufficient when third parties may be affected by it. *See supra.* "*Gifts.*" "*Title by deed.*" "*Consideration.*" Marriage intended, work

done, money, goods, &c. are classed as *valuable* considerations, and if adequate, will make a contract binding in the fullest extent. A contract without a consideration is called by Sir W. Blackstone, a *nudum pactum*, or naked bargain, a term borrowed from the civil law, and no action will lie to enforce it. A contract by deed is an exception, but it is the general rule of English law that unless there exist a proper consideration, a contract cannot be enforced, though it be in writing. 7 T. R. 350. note. 7 Bro. P. C. 550. There is also an exception in favor of an innocent indorsee of a bill of exchange or promissory note, but between the original parties either will be void, if it can be proved that consideration was wanting. 1 Str. 674, Bull. N. P. 274. To create a *valuable* consideration, some benefit must be conferred on the contracting party, or some labor performed, inconvenience suffered, or risk assumed by the other party. See 4 East. 855. Mutual promises, made at the same time, may be considerations for each other. A consideration wholly past and executed before a contract is made, will not support it, except it arose on the request of the contracting party, either expressly made or legally inferred. The consideration must not be illegal or immoral, as in either case the contract will be void and may be set aside, even at the instance of a partaker in the offence,* nor will a contract be valid if it be contrary to principles of public policy. Therefore contracts connected with breach of the revenue laws of the country are not valid. Cowp. 341. Commerce with an enemy of the state, 8 T. R. 458, 7 Taunt. 439. Sales of immoral prints, 4 Esp. 97, sales of clothes to prostitutes to be paid for out of the gains of their occupation. 1 Camp. 348, are all illegal, so wagers on political events in some cases are held illegal and void.

---

* See also 3 Ves. 456. 11 Ves. 526. 13 Ves. 581. Com. Dig. tit. action upon the case upon an assumpsit. B. & F. s. 6, 7, 8. Comyn on Contracts. v. 1 p. 1, c. 2.

*Sale and Exchange.*—Sales and exchanges differ little in their definition, and are governed by the same rules of law, 2 B. C. 446, 447. A sale is a transfer of property from one person to another, for a *valuable* consideration.

*Title of the Vendor.*—He who sells goods as his own and obtains a fair price for them, is responsible for the *title*, although no express stipulation to that effect be made. This implied warranty is the rule of the civil and the English law. 2 B. C. 451, Dig. 21, 2. 1. But he is not responsible that they shall turn out good and sound in their quality, unless he has made an express promise to that effect, or has used fraudulent means to disguise their appearance, or has represented them to the buyer, to be different from what they really are. ibid. If goods turn out different from what has been ordered, or to be unsound, the buyer should notify the seller to take them back and rescind the contract, and if he delays to do so it will be an acquiescence, and relieve the seller from his responsibility. 1 Campb. 190. On breach of a warranty it may be sued on without return of the goods, but if the contract be rescinded it must be done away with *in toto*. 5 East. 449.

Intentional suppression of facts material to the contract will vitiate it. Thus where a ship had a latent defect known to the seller, and which the buyer could not by any attention be able to discover, the concealment was held a breach of faith, Peake's cases, 115. 3 Campb. 154, 7 Taunton, 779. So where the seller's artifice induced the buyer to give a large price for a picture, under the false idea of it's being the work of an ancient master, or the property of a connoisseur in painting, the same rule will apply. See 1 Starkie, Rep. 352. Obvious defects, which the buyer with ordinary attention may perceive, he is bound to discover for himself, see 2 Kent Com. 379, 10 Ves. 507. The rule of moral justice, as to the duty of disclosure of faults in the article sold, is treated very beautifully by Cicero in 3rd book *de officiis* 13th and subsequent sections. It

forms also a subject of very learned enquiry, in the first part of Sir E. B. Sugden's work on vendors and purchasers. There are some cobweb distinctions, between that fair conduct on the part of the vendor which conscience will sanction, and that which the law will permit. It is beyond the limits of this work to enter upon the niceties of a subject, so ably handled in 2 Kent. Com. 377 to 386, as well as in Sugden on V. & P. I may however observe, that the discrepancies between the law and the moral code, in this respect, are very slight, although Cicero has been thought to have erected in some points a theory of moral justice, too elevated and severe for practical application.

*The change of title.*—As soon as the terms of sale are completely agreed upon and fixed, the property of the goods vests in the buyer, who is also from that time liable to the risk attending on the article sold. On tender or payment of the price, the buyer is entitled to take the goods but not otherwise, unless there be a credit agreed on.—2 B. C. 448, 7 East, 751. The buyer acquires a right of property by the agreement for sale, but not a right of possession until payment of the price, unless otherwise specially agreed on. 4 Barn & Cres. 941.

*Acts necessary to make a sale valid.*—To render a sale of goods valid, there must be a delivery or an offer to deliver, payment or tender of the price, an earnest given, or a memorandum of the agreement in writing, signed by the party to be rendered responsible. If none of these acts are done, the sale amounts to nothing in point of law, and the goods may be kept or sold to another. The provincial statute of frauds, act of 1758, 32 G. 2 c. 18, sec. 5. 1 P.L. 26. ( nearly a transcript of the English act, 29 Car. 2 c. 3, sec. 17) enacts "that no contract for the sale of any " goods, wares and merchandizes, for the price of ten " pounds or upwards, shall be allowed to be good, except " the buyer accepts part of the goods so sold, or actually

"receive the same, or give something in earnest to bind "the bargain, or in part of payment, or that some note or "memorandum in writing of the said bargain be made "and signed by the parties to be charged by such con- "tract, or by their agents thereunto lawfully authorized." If the earnest be given, or part payment or part delivery made, or a memorandum signed, the contract is then valid and the property and risk of the goods passes to the vendee. 5 T. R. 409, 6, East. 614, Yet if the buyer does not offer to pay for them, in a reasonable time after request, the contract is dissolved, 1 Salk, 113, 2, H. Bl. 316. The property does not pass to the buyer, if the goods are not ascertained and separated, so that if A have 10,000 bushels of oats in bulk, and bargain with B. to sell him 5,000, and receive earnest or sign a memorandum, yet, until they are set apart, the property does not pass to the buyer; and as long as any thing remains to be done by the seller, to the whole or any portion of the goods sold, the part so unfinished, or requiring any acts of his, remains as his property.—6 East. 614, 13 East. 522, 2 M. & S. 397, 5 Taunt. 617, 11 East. 210, 4 Taunt 644, 5 Taunt, 176. Where no time is agreed on for payment, the vendor may refuse to deliver until he is paid, but if he freely, and not being imposed upon, deliver the articles without looking for payment at the time, the right of property passes. 5 T. R. 231. In some cases a symbolical delivery is equivaleot to a real delivery. Thus the delivery of a key of a warehouse, wherein the goods are placed, is sufficient to transfer the property. 1 Atk. 171, 7 T. R. 71. Where the thing sold does not admit of actual delivery, then it will be sufficient to take a symbolical delivery. The civil law gives instances of wine in a cellar, delivered by the transfer of the keys,—so verbal consent on the spot is sufficient to the delivery of a massy column of granite, see Dig. 41, 2, 1, 21. So in the sale of a ship which is at sea at the time, or her cargo, the delivery of the papers of the title,

and a bill of sale are sufficient.—2 T. R. 462. A bill of sale has been considered a sufficient delivery, in case of very bulky articles, such as timber lying on the banks of a canal, and so has marking the goods in such cases; and generally, marking the goods by the buyer, with the concurrence of the seller, is sufficient delivery. So has delivery of a sample where the goods (not having the duties paid) could not be actually delivered. See 7 T. R. 67, 14 East. 308, 7 T. R. 278, 2 Esp. 598. The delivery of an order in writing addressed to the warehouseman, and its being given to him, is sufficient to meet the statute of frauds, and so is a delivery to a carrier in the usual course of business. 2 Esp. 598, 2 Campb. 243, 3 Campb. 528. If the article is to be manufactured, the contract is valid without the forms required by the statute.—3 Mau. & Sel. 178.

*Place of delivery.*—If no place be named, the goods are to be delivered at the place where the vendor has them at the time of the contract. Pothier trait. des oblig. No. 512, 513. But if it be a debt or promissory note payable in goods or specific articles instead of money, the creditor has a right to name a place of delivery, but one reasonable and not inconvenient to the debtor.—Co. Lit. 210, b. 2 Kent.Com. 400, and if the creditor refuse to receive the articles, when tendered according to agreement, it seems the debt is discharged.—Co. Lit. 207, 9 Co. 79 a. but money is subject to a different rule.—1 Bos. & Pull. 332. The Provincial statute of frauds (copying the 4th clause of the English act) 1758, 32 G. 2 c. 18, Sec. 4, 1 P. L. 25, 26, enacts that no action shall be brought whereby to charge "the defendant upon any agreement, that is not to be "performed within the space of one year from the making "thereof, unless the agreement upon which such action "shall be brought, or some memorandum or note thereof, "shall be in writing and signed by the party to be "charged therewith, or some other person thereunto by "him lawfully authorized."

The memorandum required by the 4th and 5th clauses of the statute, if signed by one party only, will bind him. 3 Taunt. 169, 7 Ves. 265. So in sales at an auction, if the name of the highest bidder be put down in the usual manner as purchaser, this will be a sufficient memorandum, the auctioneer being in law the agent of both the vendor and purchaser.—3 Burr. 1921. Rob. on Frauds 112, to 115. A pencil signature will be good, and so will the mark of one who cannot write,—so has a printed signature or name in print on a bill of parcels.—ibid. 124, 125, 2 Kent Com. 402. The memorandum must contain the essential terms of the contract, or furnish the means of ascertaining them, without the necessity of resorting to oral testimony.—Roberts on frauds 105. to 110. 2 Kent Com. 402. A letter, or a bill of parcels, may in some cases be a sufficient memorandum.—ibid., as no specific form is required, provided the terms of the bargain be substantially stated.

*The rights of the creditors of the vendor to set aside a sale.*

1. In case there is a fraudulent design in the buyer, to assist the debtor in defeating the just claims of his creditor, this if clearly proved will vitiate the sale, and enable the creditor to annul it. The purchase must be not only for a fair value, but transacted in good faith, *bona fide*, that is without any design of injury to any person, as such an intent to deceive will destroy the validity of any contract. —See 1 Burr. 474, Cowp. 434, 8 Taunton 678. Cic. de off. lib. 3, sec. 17. If the purchaser discover that he is insolvent, and not able to pay for the goods, he may agree with the seller to rescind the contract of sale, provided the bargain was not consummate by an absolute delivery and acceptance, but if the transaction be perfect and complete, the rights of other creditors will attach, and the property cannot be restored to the vendor.—2 Kent Com. 404, 6 T. R. 80. 3 Bos. & Pull. 119. The statutes of 13 Eliz.

c. 5. to protect creditors, and 27 Eliz. c. 4, to protect purchasers from the effect of fraudulent sales, have been already noticed in treating of real estates. They have not been incorporated into our laws, but in the opinion of Lord Mansfield they introduced no new rule, but are merely declaratory of the common law principles against fraud.—Cowp. 434. We can therefore in general take the English decisions as fully binding, where they define and fix the bounds of constructive fraud in contracts of sale. It is necessary to observe, that many times the English law sets a sale aside as a nullity, in order to protect the interest of creditors, and in doing so calls it a fraudulent sale, although no fraud is actually proved to have been mingled with the transaction. This is done in a large class of cases, where the sale is of a suspicious character on account of the possession remaining in the vendor, and this rule is intended to discourage such arrangements, as giving an opportunity to much imposition. The leading case on this subject is Twyne's, 3 Co. 87. In this, several marks or *indicia*, from which fraud might be suspected or inferred, were pointed out. 1, the generality of a gift, *quod dolus versatur in generalibus.* 2. The donor's continuing to possess, and appearing to be the owner of goods after the gift, thereby holding a false appearance of property and credit. 3. Secrecy in the transaction, clandestine transactions being always open to suspicion. 4. That the suit of a creditor was pending, when the debtor made the assignment (which was to another creditor.) 5. That there was a trust, which is a usual cover to a fraud. 6. That the deed was expressed to be made "in good faith, &c." an unusual clause, and therefore suspicious. See Long on sales, 66, 67. The principle, that the possession remaining with the vendor, should be regarded as a mark of fraud, taking its rise in Twyne's case, has been established by many subsequent decisions, which are stated at some length in Long on Sales, 66 to 80. (2 Kent. Com. 405 to

419. 2 T. R. 587.) If the sale be on some condition of payment, to be made by the vendee before he is to have possession, this will be an exception to the general rule. 2 Bulstr. 225. In a mortgage of goods, the necessity of the possession being given to make it valid, appears to be the same as in the case of an absolute sale. 1 Ves. 348, 1 Burr. 467. An exception to this rule has been made, in favor of fair settlements of household effects, made by the husband and wife before marriage, and his possession of them will not render them liable for his debts. Cowper.432, 3 T. R. 618, 620, n. Another exception has been made, in the instance of goods taken under execution, and purchased by a third person, either from the sheriff or the owner, and left in the possession of the first owner by the purchaser. In this class of cases, the law raises no necessary inference of fraud, to invalidate the sale. 2 Bos. & Pul. 59. 1 Lord Raym. 724, 10 Ves. 145. 4 Taunt. 823. ibid 838. 4 Barn. and Cresw. 652, and goods sold at auction, under an assignment by an insolvent debtor, come within the same exception. The general rule, that an absolute bill of sale of goods, not accompanied with possession, is fraudulent in law, and void as against creditors, has been fully established. 1 Campb. N. P. 332, but there are many exceptions and modifications of this rule, so that according to Mr. Kent, it has become difficult to apply it according to the English authorities; and he also informs us, that the law on this subject is still more unsettled in the United States. The loan of goods is an exception also to this general rule. See 3 Taunt. 256. The rule itself is rendered less clear by the doubts affecting it. See 1 Brod. & Bing. 506.

*Assignments in trust for creditors.*

A debtor may assign his estate in trust for creditors, and is allowed to give a preference to one creditor above ano-

ther, where there is no fraud in the transaction. 5 T. R. 235. 3 Mau. & Selw. 371, 3 Price 6. It will not be prudent to make such preference, if he means to take the benefit of the insolvent act. The current of the American cases establishes as a rule in the United States, that this preference is limited to priority of payment only, and that any assignment which would tend to deprive a creditor of his priority, and leave part of the property in the hands of the debtor, would be fraudulent *in toto*. See 2 Kent. Com. 421. Any fair reservation for the benefit of the debtor, of part of his income or property, until the estate should be settled, it was held would not invalidate the assignment. 5 T. R. 420. This doctrine was adopted both in the English and American Courts, but the latter have since ruled, that any such reservation will render the whole assignment void. See 2 Kent 422.

*Sales by auction.*

An auctioneer has a special property in the goods sent him for sale, and a lien on them for the commission and charges. He may sue the buyer for the purchase money, and if he deliver the articles without payment, it is at his own risk.—1 H. Bl. 81. If he receive notice, that the property does not belong to the person from whom he received it for sale, and he sell it afterwards, he is responsible to the owner for the amount.—5 Esp. N. P. Rep. 103. (In sales at auction of real property, if the description is inaccurate in a slight degree only, the purchaser may be entitled to a small deduction to compensate him, but not to destroy the contract.—1 Ves. Jun. 221.) A bidding may be retracted before the hammer is down.—3, T. R. 148. The employment of puffers to enhance the price is fraudulent and illegal, but the owner may openly reserve a bid for himself, as a condition before the bidding begins, or he may have the article set up at a certain price, which the bidders may advance upon if they choose. (But if a

vendor employ a person to bid for him up to a *certain price*, to prevent property being sacrificed, it is not within the rule.—See 3 Ves. 620, 625. 12 Ves. 483. The Dutch auction consists in the owner naming a high price, and gradually lowering it until some one present is satisfied to accept it. This has been practised recently, in the sales of some ships of war by the English government. The East India Company sell by "inch of candle." that is, the biddings are limited to a certain space of time.—e. g. as long as the inch of candle takes to consume, and when that is expired the last bidder has the article. At chancery sales in this province, a time of a minute or so is generally fixed by the master for each bid. If no further bid be made in that time, the sale closes.

*Stoppage in transitu.*

In case of the purchaser becoming insolvent, the vendor has a right to stop the goods on their way, and resume possession. If however the purchaser come into actual possession of them, while they are on their way, this right ceases.—2 Bos. & Pul. 461. So long as they are in the hands of a common carrier, or on board of a general ship, or in any other situation, not in the possession of the purchaser or his immediate personal agents, they are liable to this right.—See Long on sales, 182, 183. They may be stopped although partly paid for. 7 T. R.440, and an endeavor to stop them, or a demand of the carrier, will affect the title of the goods in favor of the vendor. Cook's B. L. 49, 2 Esp. 613. 2 Bos. & Pull. 457, 7 Taunt. 169. Although the ship were chartered by the consignee, yet the vendor may stop the goods. 3 East. 381, 4 ib. 211. But if the vendee owns or has a lease of years of the ship, the delivery is absolute, as much as if they were in his warehouse, and no right of stoppage would be allowed. 1 East. 522. 4 Esp. 82. Actual delivery of part of the cargo or parcel will affect the whole. 2 H. Bl. 504. 4 Bos. & Pull.

69. 6 East 627. If goods are in the public warehouse, the consignee not having paid the duties on them, they are not considered as delivered, and may be stopped *in transitu* 2. Esp. 613. Abbot on shipping 426. But if the purchaser receive a bill of lading in favor of him "or his assigns," and transfer it by endorsement for value, the indorsee having no notice that the party is insolvent, it is considered to destroy the right of stopping *in transitu*; see 9 East. 506, 2 Bing. 260. The American cases are to the same effect. But a factor cannot, by assigning the bill of lading, alter the right of stoppage, although the indorsee did not know him to be a factor. 6 East. 17. unless a valuable consideration be given for the endorsement, and not as a pledge for a previous debt or future advances. The French law, has adopted the principles of stopping *in transitu*, and they were carried still further by the civil law, which authorised the seller to resume his goods, if not paid for, out of the possession of the buyer even after after full delivery.—Dig. 18. 1. 19. Domat. 6, 4. tit. 5. sec. 2, art 3.

By the English law, goods sold in market overt. i. e. open market belong to the purchaser *bona fide*, although they may have been previously stolen from the real owner. 2 B. C. 449, 450. Those fairs and markets are held in particular places and at stated periods by local customs and laws, and all shops in the city of London have the privilege of fairs in this respect. This principle is unknown to the civil law, the rule of which is, that no one can transfer to another more right than he himself has, and this is also the general rule of the common law, the law of sale in market overt being an exception. The United States courts have repeatedly decided, that this rule of market overt had not been adopted there, and the learned commentator says it is understood to be inapplicable.—2 Kent Com. 262. It is a rule of local character and I suppose our courts would decide that it does not apply here.

## CHAPTER II.

### *ON BAILMENT.*

An extensive class of contracts is comprehended under the term 'Bailment,' in the English law. Bailment is defined to be, a delivery of goods, on a condition expressed or "implied, that they shall be restored by the bailee to the "bailor, or according to his directions, as soon as the pur-"pose for which they were bailed shall be answered."—Sir William Jones on Bailments,* with notes by Wm. Nichols, Esq. 3d Edition, London, 1823. page 1.

*Bailments.*—Bailments are of five species.—1. Deposit, 2. Commission, 3. Loan, 4. Pledge, 5. Hiring.

1 *Deposit.*—A deposit is a contract, by which a thing is committed to the custody of one who is to keep it without compensation, and to return it when the owner shall demand it. The depositary is not responsible for the safety of such goods, unless he should be chargeable with gross neglect, that will amount in fact to a violation of good faith—unless there be a special agreement to make him so responsible. As he receives no benefit, he is not bound to

* The edition quoted throughout this chapter.

any extraordinary care, but if he takes the same care of the deposit, that he does of his own property, he will be freed from responsibility.—Jones 35 to 48. As the depositary is usually chosen on account of his habits of carefulness; if he be a very careful man, his responsibility appears to be greater, than in the case of one who is of an inattentive character.—Jones 46, 47. The general rule making the depositary answerable only for gross neglect,—the exceptions are, 1. In case he accepts the goods specially to keep them safe. 2. Where he spontaneously and officiously offers to take charge of them. 3. When he receives by agreement a reward for his trouble; though in this last case he is not (strictly speaking) a depositary—Jones 47, 48, 49. Dig. 16, 3, 1, 36. Under the first exception he will be answerable to the extent of his special agreement, and in the 2d & 3d will be responsible for ordinary neglect. Where a deposit is made by joint owners, the depositary will not be safe in restoring it to one only, unless he is authorized by the others.—13 East. 197.

*Commission, or Mandatum.*—This is a contract where goods are delivered to a person, who undertakes to do some act respecting them, without compensation.—Jones 118. He who undertakes to *carry* goods without a reward, is not responsible except for gross neglect, but one who *engages gratuitously to perform a work*, is bound to use a degree of diligence adequate to the performance of it.—ibid. 120, 52, 62. 1 H. Bl. 158. 1 Stark. 238. If a party undertake gratuitously to perform work, and actually proceed upon it, he will be liable for any damage sustained, if it be not properly executed,—but he cannot be compelled to perform such a promise if he has not begun the work 5 T. R. 143. A mandatary is not accountable in the English law for any damage arising from *non feasance*, though he is for *misfeasance*. In the Roman law he was answerable in both cases, but Sir Wm. Jones it would seem was mistaken in his idea, that the English rule corresponded with

the civil law in this particular.—See 2 Kent Co. 444, 446. The most important case on this kind of bailment, and indeed on bailment in general, is that of Coggs & Bernard, Ld. Raym. 909. wherein Lord C. J. Holt, investigated the legal principles very profoundly. As in the law of deposits, so in that of mandates, the responsibility may be increased by special agreement,—by spontaneous and officious undertaking, or by the stipulation for reward. Jones 63. See further on the subject of mandates, 1 B. & A. 59. Dig. 17, tit. 1. Inst. 3 tit. 27, Code 4. tit. 35.

3. *Loan for use (gratuitous) or commodatum.*—The English, Roman, French and American codes, appear to be perfectly coincident on this head. See Jones 64. Kent Com. 2d v. 447, who both quote Pothier, Trait. du Pret a Usage. This is a contract whereby an article is lent for a certain time, to be used by the borrower, and returned again without paying for it's use. The same identical article is to be returned, as a horse, carriage or book. The loan for consumption or *mutuum*, is a loan of such articles as corn, wine or oil, which does not require the return of the same, but of similar articles by weight, number or measure. In the loan for use or *commodum*, the borrower will be responsible for even slight neglect.

In case the articles are destroyed or lost by inevitable accident, such as fire, robbery, wreck or pillage, without any fault of the borrower, he is not liable to make the loss good to the lender; but in the case of the *mutuum*, or loan for consumption, which is not a bailment but equivalent to a sale, the property is actually transferred to the borrower, and with it the risk of accident, therefore he must return the amount in quantity or value, notwithstanding any casualty.—Jones 65, 66. Noys' Maxims, p. 91.

The borrower for use, is not free to apply the article lent him, to any other purpose than that for which it was obtained, nor to keep it beyond the time limited, nor can

he retain it as a pledge, for any demand he may have against the lender. Although slight neglect renders a borrower liable, yet the lender is not entitled to exact greater care or skill in the borrower, than he could fairly presume him capable of exercising. Thus if a spirited horse be lent to one, whom the owner knows to be raw and inexperienced as a rider, he will not be entitled to compensation, for every omission that might be accounted a neglect in a skilful horseman. In general it may be concluded, that as this contract is for the benefit of the borrower only, he is bound to use the greatest care and circumspection in the use of the thing borrowed ; but this contract, like all others, may be extended or restricted by special agreement of the parties.—Jones 72. A case is mentioned of a loan, where the goods are lent for the sole advantage of the lender, as where a passionate lover of music lends his own instrument to a performer in a concert, merely to augment his pleasure from the performance, and Sir W. Jones decides, that the player would not be liable unless for gross neglect. —Jones 73. I would suggest a class of cases, where loans are thrust upon persons by whimsical individuals, and should conceive the borrower not answerable in such instances, unless for gross neglect.

4. *Pledge.*—This is a contract, by which a debtor puts moveable property of his own into the hands of his creditor, as a security for the debt, to be redelivered on payment of the debt. Jones 118. Ersk. Inst. 274. It differs from the mortgage of chattles (called *hypotheca* in the civil law)—where the articles remained in possession of the debtor. The creditor is bound to take *ordinary* care of the pledge, and is answerable for ordinary neglect, but not for the slightest neglect, as this is a contract by which each party derives a benefit.—See Jones 74. If the goods pledged be such as may deteriorate by being used, the creditor cannot make use of them, Clothes, linen, &c.—will come under this rule,—but jewels and such things

may be used, at the risk of the creditor if any thing should happen to them while in use. Where however the article pledged is attended with expense in the keeping, as horses, cows, &c. the creditor may use them, accounting for the profit, if any should arise beyond their expense of keeping.—Jones 81. 2 Kent. Com. 450. Sir Wm. Jones thinks the holder of the pawn or pledge responsible, if it is stolen from him clandestinely, but not if taken violently by robbery.—Jones 79.

An American decision quoted in 2 Kent. Com. 452, has established as " the ancient and settled English law," according to the old authorities, " that delivery was essential " to a pledge, and that the general property did not pass " as in the case of a mortgage, but remains with the pawn- " or. If the pledge was not redeemed by the stipulated " time, it did not then become the absolute property of " the pawnee but he was obliged to have recourse to pro- " cess of law to sell the pledge, and until that was done, " the pawnor was entitled to redeem. If the pledge was " for an indefinite term, the creditor might at any time call " upon the debtor to redeem by the same process of de- " mand. Where no time was limited for the redemption, " the pawnee, had his own lifetime to redeem, unless the " creditor in the mean time called upon him to redeem, " and if died without such call, the right to redeem de- " scended to his personal representatives." This corresponded with the Scotch law which required also an application by the creditor to the judge ordinary, in which the debtor was made a party, to authorize a sale of the pledge. But the Roman law permitted the creditor after two years notice or denunciation to the debtor to sell the pledge.—Domat. v. 1, 362, s. 9, 10. Code 8. 34, 3, 1. Dig. 13, 7, 4. Ersk. Inst. 275, v. 2, tit. 1, sec. 13. The Code Napoleon and the Louisiana Code agree with the Scotch and the old English law, in requiring judicial proceedings to warrant the sale, but the modern English law adopts the

reasonable principle of the civil law to the fullest extent, by permitting the creditor to sell the pledge, after giving reasonable notice to the debtor to redeem it, and the principle ; has been even extended to authorize the pawnee of public stocks (and even a mortgagee of stock securities) to sell them after notice, without foreclosure or other judicial proceedings. But the creditor may file a bill of foreclosure against the pawnor of moveables, or a bill for an account and transfer of stock.—1 Maddock's Ch. 529, and this is recommendable in case the property is large, but it is optional with the creditor, who may sell without such proceedings, but he is bound to act with fairness, in giving sufficient notice of the sale, and conducting it so as not to injure the interest of the pawnor unnecessarily. This power of selling a pledge without judicial proceedings is also adopted in all the United States, except Louisiana, and we may conclude it to be the law of Nova Scotia also.

The rule of equity noticed in treating of mortgages, by which the strictness of a condition is relaxed, and the right to redeem extended beyond the time stipulated, will apparently be equally applicable to pledges of moveables. By the civil law, if the parties stipulated, that on failure to redeem the pledge by a certain day, the absolute property should devolve on the creditor, this agreement was nullified to let in the equity of redemption Code.—8, 35, 3, and Chancellor Kent says, " Every agree-" ment preventing the right of redemption in mortgages " of chattles (as of lands) would no doubt be equally con-" demned in the English law."—2 K. Com. 454. The contract of pledge may stipulate, that the pawn shall stand as security for future advances—ibid. 454, 455, and the English and American cases there cited.

5. *Hiring.*—There are two kinds of contracts coming under this general head of *location* [or hiring] in connection with moveable or personal property. 1. Letting personal property for reward or hire, called *locatio rei.* It is in the

nature of a sale,—the temporary use of the thing hired, and a qualified property in it being transferred for a valuable consideration. The hirer is bound to answer only for ordinary care, and liable for ordinary neglect.—Jones 68 to 90, and the master is responsible for the acts or neglect of servants acting under his express or implied directions—ib. 89. 2. Lett'ng out work or labor, (or care and attention) for hire. *Locatio operis.* This will include the contract of hire between master and servant, and other bargains, where skill or labor are exchanged for reward, but at present we are looking at the more limited class of bargains, where the labor, &c. is to be bestowed on the goods of the hirer, who delivers them for this purpose to the bailee. (The responsibility will be the same, whether the hire be payable in money, or consist of any other valuable consideration or barter of goods, work, &c. See Jones 92, 23.) Where materials are given to an artist or mechanic, to be worked up by him for the owner, he is entitled to compensation for his industry, and in return, is bound by his implied contract, to perform his undertaking in a skilful or workmanlike manner, and also to take *ordinary* care of the articles delivered to him.—Jones 91.

An innkeeper is bound to receive guests, if he has spare accommodation for them.—See Jones on B. 94 c. *in notis.* He is bound also to take *ordinary* care of the horses and goods of travellers who put up with him, and if any thing be stolen, through want of care on his part, or that of his servants, he is responsible for it.—Jones 94, 8 Co. 32. But his duty of receiving travellers extends only, to such as are capable of paying suitably for the accommodation provided.—See B. and A. 2, 85. If his servants rob the guests, he is bound to pay for the loss. But if goods be left behind by a traveller, he is not bound to answer for their loss (except in case of fraud) unless he specially undertakes the care of them.—Cro. Jac. 189. A tavern and coffee house in London where

travellers and others were provided with lodging and entertainment, (though there were no stables attached to it,) was considered an inn, and the keeper considered liable to his lodgers (though they were not travellers) in the same way as innkeepers are.—3 B. & A. 285. A room hired by a guest, for a purpose of business distinct from his personal accommodation, will not impose the liability as to goods upon the landlord.—4 M. & S. 306. The civil law is equally strict on innkeepers.—D. 4, 9, 1, & 3. (6).

A carrier for hire is not responsible, except for ordinary neglect, unless he be a common carrier.—2 Ld. Raym. 918. Common carriers are—all persons who carry goods generally for hire,—proprietors of stage waggons,—stage-coaches, that carry goods for hire,—masters and owners of ships, vessels, boats, steamboats, ferrymen and wharfingers. They are responsible in case of accident or theft, and even must make good losses by robbery.—See Nichols' notes on Jones, 103, Kent. Com. 465. There is no distinction between a land and water carrier, and they are all responsible for the acts of their servants and agents. The act of God or of the king's enemies, will excuse a common carrier for the damage or loss of the goods. It is not usual to charge for the baggage under a certain weight, and it would seem by old cases, that the carrier is not responsible beyond ordinary neglect, for baggage so excused from payment ; but this is doubted.—See Nichols' notes on Jones 103, a. and it has been held, that a passenger's voluntary care of his baggage, will not excuse the carriers if it be lost—ibid. Although the contents of a box or a parcel are unknown to the carrier, he is responsible for their safety, however valuable.—1 Str. 145, 4 B. & A. 21, 31. The responsibility of common carriers may be limited 1. By special acceptance, that is by receiving the goods to carry on certain stipulated conditions—1 Ventr. 238, 3 Taunt. 271. 2. By publishing general notices, limiting the responsibility they are willing to incur in their calling.

—5 East. 507. It will be a matter of fac. for a jury to decide, whether the owner of the goods had notice of the terms published by the carrier.—2 Campb. 415. 1 Stark. N. P. C. 186. 2 ibid. 256, 279, 3 Campb. 28. 2 ibid 108. Nichols' notes. Jones 3d ed. 104. j. k. Where the usage of business is for the carrier to deliver goods as directed, he is bound to do so, but when there is no usage in his own, or the general trade of the place, it is doubtful how far he is bound to do it.—5 T. R. 396. 3 Bro. & Bing. 182. 2. B. & A. 358. 5 B. & A. 58. The leaning of these cases seems to make it a part of his contract, to deliver goods as they are directed as well as to carry them, but, in foreign commerce, the terms of the bill of lading most frequently regulate this point. In New-York it has been decided, that landing goods on a wharf " is not a delivery " to the consignee so as to discharge the carrier, although " there was a usage to deliver goods in that manner. The " carrier must not leave the goods on the wharf, even " though there be an inability or refusal of the consignee " to receive them."—2 Kent. Com. 469. The English statutes 7 G. 2, c. 15. 26 G. 3 c. 86, & 53 G. 3 c. 159. (See Jones 107, r. *in notis,)* exempt owners of ships and vessels from responsibility as common carriers in case of losses by fire, and limit their responsibility for the loss of gold, silver, diamonds, jewels, watches, and precious stones, to cases where the shipper inserts the nature, quality and value of the articles in the bill of lading. The liability of the owners to make good embezzlements, is limited to the value of the ship and freight (except they are personally culpable) and that of part owners to their share of ship and freight. Those statutes will of course extend their protection to all ship owners in the British empire. The United States have not any similar enactment.—2 Kent, Com. 470, and their courts have fully adopted the rules of the English law as to common carriers (ibid. 471.) by land, but as to ships, the liability is restricted to ordinary neglect

only.—ibid. 472. yet the learned Chancellor himself considers this rule erroneous, and thinks they should be held liable as common carriers are. ibid. 473 n. 6. Postmasters are not liable as common carriers, but a deputy postmaster will be personally responsible in damages, to any party injured by his misconduct or neglect of duty. Cowp. 754. 15 East. 384. 2 Kent Com. 474.

*Additional rules and definitions respecting bailments.*

1. The bailor and the bailee have a concurrent right of action for any injury the goods may sustain. Which ever sues first, the other is then precluded from suing, and a judgment obtained by one may be pleaded as a bar to the action of the other.—1 Bulst. 69. 1 B. & A. 59. 1 Wms. Saund. 47, e. n. 1, 2, B. C. 396. There is the same concurrent right of action, to recover the goods or their value if taken away. 2. "Ordinary neglect is the omission of "that care which every man of common prudence, and ca- "pable of governing a family, takes of his own concerns." 3. "Gross neglect is the want of that care which every "man of common sense, how inattentive soever, takes of his "own property." 4. "Slight neglect is the omission of that "diligence which very circumspect and thoughtful per- "sons use in securing their own goods and chattles."—Jones on B. 118. 5. "Negligence is a relative term, "depending upon the known value of the article to be "taken care of, and the means of securing it in the power "of the bailee, and these circumstances may vary,—there- "fore the degree of care required must depend on the "value of the articles, their liability to be lost or injured, "the notice given to the bailee respecting them, and his "situation."—See 4 B. & A. 21. 5 B. & A. 348. 4 Price 31.

## CHAPTER III.

### *WILLS OF PERSONAL PROPERTY.*

The rules respecting wills of personal property, are less strict than the regulations as to devises of freehold interests. Thus, while a will of any person under 21 years of age is not valid to pass real estate; a will of personal property is legal, if made by any person above 14 (if a male)—and above 12 years old, if a female, a rule taken from the civil law.—2 B. C. 497. Mental incapacity is equally an objection to a will of personal as of real estate. Conviction for high treason must invalidate a will of any kind, and a person convicted of any other offence amounting to felony cannot, by his will dispose of either land or goods. A married woman may make a will of personal property, by permission of the husband, or by agreement before marriage.—1 Roberts on Wills, 25, Toller on Executors 9. An alien belonging to a friendly state can make a valid will of personal effects.—1 Roberts 42. Toller 12. A will of *personal* property may be either *nuncupative*, that is made by word of mouth only, or *written*. The provincial statute of wills and distributions, in conformity with 19, 20, 21, 23, and 24 sections of the English

statute 29 Car. 2 c. 3.—restricts nuncupative wills as follows, viz.: Act 1758, 32 G. 2 c. 11, 1 P. L. 10—Enacts sec. 3. That no nuncupative will shall be good, where the estate bequeathed exceeds £30. "that is not "proved by the oath of three witnesses (at the least) that "were present at the making thereof, nor unless it be "proved that the testator, at the time of pronouncing the "same, did bid the persons present, or some of them bear "witness, that such was his will, or to that effect; nor "unless such nuncupative will was made in the time of "the last sickness of the deceased, and in the house of "his or their habitation or dwelling, or where he or she "hath been resident, for the term of ten days or more, "next before the making of such will, except where such "person was surprised or taken sick, being from his own "house, and died before he returned to the place of his or "her dwelling." Sec. 4. enacts, that unless the substance of the nuncupative will is put in writing within 6 days after it is made, proof of it shall not be received after 6 months. Sec. 5, Forbids probate to be granted on a nuncupative will, until 14 days at least after the testator's death, and requires before testimony to establish it be received, that "process have first issued to call in the widow, or next of "kindred of the deceased, to the end they may contest "the same" and (following the English act of 4 and 5 Ann. c. 16, sec. 14.) directs that witnesses, who would be received on trials at law, shall be deemed good witnesses to prove nuncupative wills and matters relating thereto. Sec. 6. Enacts that no written will, concerning personal estate, shall be wholly or in part revoked or altered by word of mouth, unless the revocation or alteration be reduced into writing in the life of the testator, read to and approved by him; and requires three witnesses at least, to prove such revocation or alteration. The same section exempts "any soldier, being in actual military service, or "any mariner or seamen, being at sea" from these restric-

tions; leaving them the power they had at common law, of making verbal dispositions of their personal property; and it also preserves the governor's jurisdiction over probates.—act of 1758, 32 G. 2 c. 11. 1 P. L. 10.

Soldiers have had, from the earliest times, the right of making a verbal will of their moveable property, when in actual service. The soldier on the eve of battle, in the uncertainty of his fate, according to the Roman custom used to grave his will upon his shield, or intrust his comrade with his dying wishes. This rule has been continued in force. Where the soldier makes no will, his moveable that are with him in camp or barrack, are taken care of by the Quarter Master of the regiment, who acts as his administrator.—(See the mutiny act.) The verbal wills of seamen are also protected by the statute; but wills of *petty officers and seamen in the king's service* and of *non-commissioned officers and privates of marines*, are not valid to pass any claim they have for *pay, bounty, or prize money*, or any *allowance* from government, unless they are written and authenticated in a particular manner pointed out in the English statute.—55 G. 3 c. 60. This act requires, that the will should contain the name of the ship, to which the testator belongs, or last did belong,—a full description of the degree of relationship or residence of the party in whose favor it is made—the day of the month and year and name of the place where it is made. If the testator be in the service, it must be attested by the commanding officer of his ship. If in hospital, it is to be witnessed by the governor, physician, surgeon, agent or chaplain. If made on board a transport or merchant vessel, by some commissioned officer of the navy or army, or the master or first mate of the ship. If in London, or near it within the bills of mortality, by the inspector of seamen's wills, or his assistant or clerk. If within 7 miles of any port where seamen's wages are paid, by one of the clerks in the pay office of the port. If elsewhere in the mother country, by

a justice of the peace, or clergyman of the parish. If made in a colony, by an officer of the navy, marines, or dockyard, or a magistrate. If in a foreign country by a British Consul, or a Magistrate or Notary Public.—Toller on Ex'ors. 59. 60. The act further makes a will of seaman or marine good, if the testator be a prisoner of war, if attested by any commissioned officer of army, navy, or marines, or by a notary public. (The Romans considered a prisoner of war civilly dead, and therefore incapable of doing any legal act respecting his property; but the English law will make good his will, if it appears from circumstances that it was his free and voluntary act.—Toller on Exors. 9.) It was a practice formerly, for seamen to assign what was due to them for pay or prize money, by a letter of attorney in favor of some one who bought their claims, and to annex to it a will in favor of the purchaser, to prevent his losing by the death of the seaman, whose letter of attorney could not be valid after his decease. This double instrument went by the name of a sailor's *will and power.* The act 55 G. 3 c. 60, annuls every seaman's will which is in the same instrument, paper or parchment with a letter of attorney. The wills made under this act to bequeath pay, &c. must be sent to the navy pay office in London, and the act points out the steps which must be there taken to obtain probate, which it is not necessary to dwell on here, as the public officers are entrusted with regulating them by the act itself, and those rules must be complied with, before the will can be acted on.—See Toller on Ex. 108.

Nuncupative wills are not favored by the courts of probate; therefore the provisions of the statute must be strictly complied with, or they will not be admitted. Thus if there be no proof of the testator's calling on the persons present, to bear witness of what he says, the court will not grant probate.—1 Phillim. 191. 195. Independant of the statute, stricter proof is necessary in every particular, to

testify the making of a verbal than of a written will. The capacity and intention of the testator, at the time, must be most distinctly proved, and the true import of his testamentary expressions shewn.—1 Addams, 389. As the statute requires a verbal will to be *proved* by three witnesses,—if one of them should die, it cannot be proved by the two surviving.—1 Eq. ca. abr. 404.

*Written wills of personal property.*

A will of personal estate, if written in the testator's own hand is effectual, although it has neither his name or seal to it, nor witnesses present at its publication.—1 Roberts on W. 183. It will also be valid, if written by another person and signed by the testator, or even without signature, if made according to his instructions, and approved by him, although he never saw it. ibid. 184, 2 Phill. 351, 2 B. C. 502.

As to the form of the instrument, a memorandum, written with the intention that it should be considered a will, is held to be sufficient. 1 Roberts. on W. 187. It will be good, though only written in pencil, on the same principle that the dying soldier's will, written in the dust with his sword, was considered valid by the civil law. Cod. l. 6. t. 21, s. 15. See Roberts on Wills, 1st Vol. 187 to 196. Sir William Blackstone recommends, whenever it can be done, that a will should be signed, sealed and published before witnesses. 2 B. C. 502. and Lord Eldon expressed his regret, that there was no solemnity necessary for a will of personal estate. 5 Ves. Jun. 280, 4 Ves. Jun. 208, It would appear desirable, that some form should be established as generally necessary in wills of personal property, but that the strictness of execution required to devise lands, should be relaxed, in favor of persons, who through exigency, or want of legal knowledge, could not exactly comply with the forms of the statute. Indeed one can

hardly think, the original framers of the statute intended it to be construed, in the strict manner which has been adopted. Borrowing the more solemn forms of testament from the civil law system, one would imagine that the equitable exceptions in favor of wills of persons in exigency, or rustics, would have naturally followed.

*Of executors and administrators.*

The person appointed in a will to carry it into effect, is called the executor. The testator may appoint whomsoever he pleases, with hardly any exception; for an infant may be appointed, or a married woman, or an alien (not enemy) or a person insolvent. But a married woman cannot act as executrix, without her husband's concurrence; and if an infant be named, he cannot act until the age of 17 (now altered in Great Britain by 38 G. 3, c. 87, s. 6, to 21) and another person is made administrator to act for him during the interval. Persons laboring under insanity, idiocy, or total imbecillity of mind, cannot act as executors. Toller on Ex. 31, 32, 33, 34. 2 Rob. on W. 169. 2 B. C. 503. An executor may be appointed expressly, or by necessary implication,—absolutely, or with a temporary or limited power,—exclusively or jointly with others. Toller 34. A stranger who meddles improperly with the effects of the deceased, may incur the liability of an executor, and he is called an executor *de son tort*, or of his own wrong. But mere acts of kindness and charity, which a neighbor may perform about the funeral of a deceased person, or the preservation of his effects for the time being, until a proper executor and administrator appear, are not to be considered as the officious intermeddling which produces such responsibility. Toller 39, 2 B. C. 507. The office of an executor cannot be assigned by him to another, it being a personal confidence, yet it will devolve on his executor after his death, but not on his administrator. Toller 41. 2 B. C. 506. A person appointed executor, may

renounce before he has taken the usual oath, or has done any act amounting to an acceptance, but his renunciation must be t[illegible] and not qualified. Toller 41, 42.

*Jurisdiction of probate and administration.*

The authority of judging of the validity of wills, and granting administration of the effects of the deceased, where no will was made, belonged originally, in England, to the crown but was transferred afterwards to the ecclesiastics with whom the jurisdiction still remains in the mother country. In the colonies this authority has been vested in the governors (see Stokes on the colonies *passim.*)—but in Nova Scotia, it was at an early period transferred to a single judge of probates. The governors have long established a surrogate judge for each county, and in every county there is a registry of probate which is noticed in the act of wills in 1758, 1 P. L. 9, and the act of 1760, 1 P. L. 58. The districts of Colchester and Pictou have each separate courts of probate as counties, and some of the larger counties have several judges of probate, one for each district. Cape Breton is divided into three probate jurisdictions, viz.—Southern, N. W. and N. E. by Act of 1830, 2d Session, 1 Wm. 4, c. 7.

The judge of probates for Halifax proper, claims a general jurisdiction over the province, but his authority in this respect is by no means settled. Where the deceased person left property or had debts in several parts of the province, it is most prudent to obtain probate or administration in each county or district with which the estate stands connected. The provincial statute of wills and dist. 1758, 32 G. 2, c. 11, sec. 7, 1 P. L. 11, directs the executor to bring the will to the registry of probates for the county where the deceased was domiciled, and either to prove it and record it, or to refuse and renounce the trust. This the act directs him to do, within 30 days after

the death of the testator, and adds a penalty of £5 for every month that he shall neglect it ; and the next section imposes the same penalty on any one suppressing a will. This penalty is recoverable by action of debt in the inferior court of the county, at the suit of any of the heirs or creditors ; the amount recovered to belong to the prosecutor. In case the executor refuses to act, the judge of probate is authorized by the 7th sec. "to "commit administration of the estate of the deceased, "with the will annexed, unto the widow, or next of "kin to the deceased, and upon their refusal, to one "or more of the principal creditors, as he shall think "fit." The 9th section makes every "certain legacy," and every "uncertain legacy," when reduced to certainty by the executor's account, recoverable by suit at common law. The 10th section requires every executor to exhibit "a full and true inventory of the whole estate of the deceased," within three months after probate. This is to be added to, if other property come to his knowledge subsequently, and the same penalty is imposed as in case of suppressing a will or not proving it, on executors neglecting to give in their inventory. Whenever the executor is not residuary legatee, he is to give bonds and to account as an administrator would. The 11th section gives to a residuary legatee an action of account against the executors, and this although he be a co-executor himself. The 12th section which we have noticed before, in 'title by descent' directs that if the widow or next of kin of an intestate, apply for administration within 30 days after his death, the judge of probate shall grant letters of administration to the applicant. If they fail to apply in that time, "upon "first citing such widow or next of kin, and their refusal "to accept the same, such judge of probate shall grant "administration to such person or persons as he shall "judge fit." The act directed a bond with sureties to be taken, as directed by the English statute, 22 & 23 Car. 2,

c. 10, sec. 2, but the form* of such bonds is now prescribed by act of 1829, 10 G. 4, c. 11. The act of 1758, c. 11, sec. 12, whichis given at full length, Epitome 2nd vol. p. 179, 180, authorizes the judge of probate to call administrators to account, to pass their accounts, and to order and make distribution of the estate both real and personal; allowing the administrators for debts, funeral and just expenses of all sorts," giving " due hearing and consideration to the parties. The 17th sec. gives an appeal to the governor and council from " any order, sentence or decree, made for the settlement and distribution of any intestate estate." Security must be given to prosecute the appeal with effect, and the appeal must be made within 30 days after the judge of probate gives sentence. 1 P. L. 13. Executors have also to give a similar bond, and are liable equally to account before the judge of probate under the 10th sec. 1 P. L. 11.

---

* Know all men by these presents, that we of in the province of Nova Scotia, are held and firmly bound unto in the full sum of of good and lawful money of Nova Scotia, to be paid to him the said or his successors in office, for which payment well and truly to be made, we bind ourselves, our and each of our Heirs, Executors and Administrators, jointly, severally, and firmly, by these presents, sealed with our Seals—dated this day of in the year of His Majesty's Reign, and 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 Estate, Goods, Chattles, and Credits of deceased, do make or cause to be made, a true and perfect Inventory of all and singular, the Goods, Chattles and Credits of the said deceased, which have or shall come to the hands, possession, power, or knowledge of the said or into the hands, possession, or power of any other person or persons for him, and the same so made, do exhibit into the Registry of the Court of Probate, for the county of at at or before the day of next ensuing. And the same Estate, Goods, Chattles and Credits, and all other the Goods, Chattles and Credits

An executor before probate may perform almost any act of administration. He may pay or receive monies for the estate, dispose of goods, commence suits, though before he can recover he must produce the probate.—Toller 45. The executor may prove the will, either in common form, that is by his own oath, or in solemn form by citing the parties interested and the oath of two attesting witnesses.—2 Roberts on W. 174. Toller 56. In cases where there is no will, the judge of probates may elect to grant administration to any one or more among the next of kin, to the exclusion of others in equal degree of relationship. Absence beyond sea and insolvency are legal objections to a claim to be appointed.—2 Rob. on W. 188, 189. An administrator cannot act until he receives the letter of administration. When an executor who has proved the will, or an administrator, dies before the estate is fully ad-

---

of the said deceased, at the time of his death, or which at any time after shall come to the hands, possession, or knowledge of the said or any other person or persons for him, do well and truly administer according to Law, and further do make, or cause to be made, a true and just account, of his said administration, at or before the ——— day of ———, in the year of our Lord One Thousand Eight Hundred and ———. And all the rest and residue of the said Estate, Goods, Chattles and Credits which shall be found remaining upon the said Administrator's account (the same being first examined and allowed by the Judge, for the time being, of the said Court) shall deliver and pay unto such person or persons respectively, as the said Judge or Judges, by his or their decree or sentence, shall limit and appoint: and if the said Administrator shall obey, abide by and perform, all such orders and decrees as shall from time to time be made by the said Court, touching the Estate, Goods, Chattles and Credits of the said deceased: and if it shall hereafter appear that any Last Will and Testament was made by the said deceased, and the same be proved and allowed by the said Court, then if the above bounden being thereunto required, do render and deliver the said letters of Administration to the said Judge of Probate or his successor in office, then this Obligation to be void and of none effect, or else to remain in full force and virtue.—Signed, Sealed, and delivered in the presence of.

ministered, administration is granted *de bonis non*, that is of the goods not yet administered.

*Duties of executors and administrators.*

The burial of the deceased is the first thing to be attended to, and the expense of this must be regulated according to the circumstances in which he died, as extravagant charges will not be allowed, particularly if creditors interests should be thereby affected.—1 Rob. on W. 214. The proving of the will is the immediate duty of an executor, and the making up a correct inventory is the next thing to be done by an executor or administrator. Then it becomes the duty of every executor and administrator to collect the debts due to the deceased, and to ascertain what sums he owed to other persons when he died. For this purpose the provincial statute of 1790, 30 G. 3 c. 5. 1 P. L. 279, enacted by sec. 2. "that every executor and " administrator, previous to the payment of debts or dis- " tribution of the estate of the deceased, shall by advertise- " ment in the royal gazette published in this province," (so amended by temporary act of 1812, 52 G. 3 c. 3, 2 P. L. 86. sec. 2,—before which the act of 1790 required an advertisement in the Nova Scotia, and New Brunswick papers, if the estate exceeded £100.) " for the space of six " months, call on all persons who have any demands on the " estate of the deceased, to exhibit such demands within " the space of eighteen calendar months from the date of " said advertisement, which advertisement made and pub- " lished as aforesaid, shall exclude every creditor who " shall not exhibit his demand in manner aforesaid. Pro- " vided always nevertheless, that nothing herein contained " shall extend to judgments on record, or mortgages regis- " tered." The same act of 1790, c. 5. sec. 1, P. L. 279, requires " every executor or administrator, having sued " out letters testamentary or letters of administration, at

" the expiration of *two years and six months*, from the date " of said letters, &c. to pay all such debts, dues and de- " mands as shall then be exhibited, so far as the real or " personal estate of the deceased in his hands will enable " him, and after the payment of such debts, dues and de- " mands, if there shall remain any overplus, to make such " further distribution of the same, as by law, or by the last " will and testament of the deceased, is directed." The last clause imposes a fine of £50 on any executor or administrator, neglecting or refusing, when called on, to distribute the estate according to this act, recoverable by bill, plaint or information, in any of his majesty's courts of record in this province, by any of the heirs or creditors.

In the English law it is a matter of much nicety, to settle which of the debts due to an estate shall have the priority, when there is not sufficient to pay all; but the course of administration in estates which prove to be insolvent, is rendered very plain in this province by the act of 1812, 52 G. 3, c. 3, 2 P. L. 86, (a temporary act, continued by several acts the latest of which is the act of 1832, 2 W. 4, c. 60, continuing it for one year.) The preamble states it to be just and reasonable, that in the settlement and distribution of insolvent estates, equal distribution thereof should be made to and among all the creditors, without preference or partiality. The 1st clause enacts, " that in the settlement and distribution of the in- " solvent estates of deceased persons hereafter to be made, " the whole of the real and personal estate, (except such " part thereof as shall have been allowed by the judge of " probate or surrogate, for the expenses of the funeral, and " the necessary attendance on the deceased in his last ill- " ness) shall be equally distributed, divided and paid, to " and among the creditors, in proportion to their several " and respective debts, without partiality or preference: " and no executor or administrator, being a creditor, shall " be allowed to retain out of the estate or effects which

" may come into his hands, more than his equal or rateable " share or proportion thereof, in payment or satisfaction of " his own debt. *Provided always*, that nothing herein con- " tained shall extend, or be construed to extend, to affect " debts due to the crown, or on mortgage, or on judg- " ments docketted in the life time of the intestate, or " testator, or to the widow's dower in real estate.—2 P. L. 86. It appears by these acts, that the executor or administrator is not safe, in paying debts or distributing the estate, until the end of the period of eighteen calendar months, pointed out in the act for rendering the bills of creditors, unless where the estate is undoubtedly solvent. The exclusion of demands brought in after that period, of course refers to insolvent estates, and bills so dilatorily rendered are to be postponed in payment; giving the preference to those which came in within the specified time. Persons indebted to the estate of a deceased person, are not intitled to any delay of payment, but may be immediately sued.

The executor or administrator is, first, to collect and reduce into money the personal estate of the deceased, as far as it is necessary for paying debts; and he can only call in the real estate for this purpose, when the personal estate proves insufficient. The order of priority in payment appears to be 1. Funeral charges.—2. Expences of administration. (act of 1758. 1 P. L. 11.)—3. Charges of physicians, surgeons, and nurses, for attending the deceased in his last illness.—4. Crown debts.—5. Mortgage debts and judgments docketted in the life time of the deceased.—See 2d vol. Epitome, 261, 276. All other debts and demands to share the residue of an insolvent estate, in proportion to their respective amounts. The executor or administrator is not obliged to distribute the estate or pay debts, until the expiration of two years and six months as mentioned in the act. The widow's dower, and mortgage debts as well as judg-

ments, attach upon the estate, independantly of the proviso in their favor, being real incumbrances or liens on the landed property, and in the same way rent in arrear, will attach as a lien upon the moveables of the deceased which are found on the demised premises, although not named in the proviso; and so an attachment levied on the estate real or personal, would have a preference, if levied before the death of the defendant. Legacies and the shares of the heirs of an intestate, are secondary claims, and should be postponed until all debts are satisfied, and if the executor or administrator pays them, he will be responsible for the amount to the creditors.—2 Roberts. on Wills, 221.

An executor or administrator has a property in the goods of the deceased, and is considered to hold them as a trustee for the heirs, legatees or creditors. He may use the same legal remedies to recover possession of them, as the owner could if living; and he is authorized (unless when a will points out a different course) to sell personal effects, in order to be ready to pay debts, expences and legacies, 2 B. C. 510. When there are several executors or administrators jointly appointed, the act of one will be considered the act of all. It was thought formerly that this was only applicable to co-executors, but the distinction has been overruled. Toller on Ex. 407, 2 Ves. 267. If there be several executors, and a suit be brought against them, they must all be sued in case they have all administered, but those who have not acted may be omitted. No executor is liable, further than the amount of the estate that comes into his hands. If another executor waste the property, he is not responsible, unless he has contributed to the loss. Toller 471. If there be several executors or administrators, in case any of them die, the power and office will devolve on the survivor or survivors. Toller 114, 407. and a new grant of administration is unnecessary. ib.

*Of legacies.*

A legacy is a bequest or gift of personal property by a will. It is either *general*, as of a certain sum of money, or *specific*, as of a certain horse, book, ring or the like, or *residuary*, as where, after various bequests, the testator leaves whatever surplus or residue there may be, of his personal estate, to a particular person.

*Lapse.* If the legatee die before the testator, the legacy is lapsed, and sinks into the general fund or residue of the estate ; (Toller on Ex. 303.) but a legacy to two or more persons will vest in the survivor. ibid. A legacy given upon a contingency will be lapsed, if the legatee die before the condition be performed, on which it's vesting in interest depends. ibid 304. but where a legacy carries interest in favor of a minor, or is '*payable*' to him on his coming of age, it will be considered as vested immediately. ib. 304, 5.

*Assent.* No legatee can have an absolute property in his legacy, until the executor assents to it. The reason is, that as the right to legacies is subordinate to the claims of creditors, the executors should first ascertain the condition of the estate, before they pay any legacies. If the estate, after payment of debts and expenses, should not prove adequate to paying off all the legacies, the *general* legacies must be diminished in equal proportions, but *specific* legacies are not liable to diminution, unless there is no other means of paying off the debts. Toller 339, 2 B. C. 513. If the legatee take possession of the thing bequeathed without the assent of the executor, he is liable to an action.—Toller 307. Nor can an express direction of the will authorize it, because the restriction is for the benefit of creditors.—ibid. In a deficient estate a legatee may, in some cases, be made to refund, if he has been paid beyond what the rights of other claimants will admit.—ibid. 340, 1. If a creditor appoint his debtor to be his

executor, this at law is a release of the debt, but a court of equity will not so consider it to the detriment of creditors, nor if it appears that such was not the intention of the testator.—ibid. 347. If the testator make no disposition of the residue of his personal estate, the executor will be entitled to it, unless circumstances shew that he was not intended to have it,—but if it appear by the will, either expressly, or by implication, that the office only, (and not the beneficial interest) was intended for him, he will be considered in a court of equity, a trustee for the next of kin, or for those who would be entitled in case of an intestate estate; for if there be any part of the testator's property not disposed of by the will, he is intestate as far as that part of his estate is concerned.—Toller on Ex. 350. If a certain sum of money or a legacy of any kind be left him in the will for his trouble, this will exclude the executor from any right to the residue.—ibid. 352. If a married woman be an executrix, her husband has a right to administer for her, and she can do nothing without his concurrence, but he may act without her's, as he is personally responsible.—ibid. 357.

*Courts of probate.*

The form of proceeding before a judge of probate, is usually by petition, for letters of administration, or probate of a will, But if a *caveat* or objection be entered, he then proceeds (under the accustomed forms of the civil and canon law, used in the ecclesiastical courts in England,) to call the necessary parties before him by *citation*, and the suit is conducted by *allegation, defensive allegation, &c.* See 3 B. C. 100. So where the widow and next of kin do not apply for letters of administration, he may (at the instance of any party, who has an interest and is desirous to be appointed administrator) cite the widow and next of kin before him, and if they refuse to act, may grant administration according to his judicial discretion.—(Under act of 1758, 32 G. 2, c. 11. s. 12, 1, P. L. 11.)

## BOOK III.

## *OF THE CIVIL COURTS OF COMMON LAW.*

### CHAPTER I.

### *Of Jurisdiction.*

---

The authority of the government, the reciprocal rights and duties of men as members of the community or of particular families, and the rights of liberty and property, originating in the dictates of nature and reason, sanctioned by the pure precepts of religion, are rendered more fixed and intelligible by the written enactments of the legislature, and more precise and minute by the precedents and treatises of law writers. Were men all wise and benevolent, they would have little difficulty in conducting themselves according to the principles of morals, and the fixed laws of society, so as to require no judiciary establishments to interpret and apply the laws to their disputes. Constituted as human nature really is, there is a constant

succession of crimes and controversies, calling for the intervention of judges, and the courts serve as safety valves to carry off much of the surplus steam of vindictive and covetous feelings, which would otherwise lead the irritated parties, to seek satisfaction for a real or imaginary grievance, by some gross violation of the laws of peace and humanity. These causes have made the courts of justice an essential and indispensable portion of the fabric of civilized society, as it is at present constituted.

Jurisdiction, in its application to courts of justice, means a power conferred upon judges, to inquire into and decide upon crimes and controversies, and to carry into effect the decisions they have given. Jurisdiction is called *proper or ordinary,* when exercised by the judge himself, in virtue of his office. It is called *delegated* when exercised by a deputy appointed by him to act in his stead. In the English law it may be taken as a general rule, that a judge cannot delegate his authority to a deputy. The judicial office is given to him in consequence of his personal qualities of mind, and it comes within the scope of the general axiom of law, that a delegated power cannot be transferred by the delegate. There are some instances however, in which judges in our system may substitute others in their place for certain purposes. Thus the sheriffs of counties who act in many respects, as judicial officers may in most instances, hold their courts by deputy. So the provincial act of 1829.—10 G. 4 c. 6, empowers the judges of the supreme court to appoint commissioners in such places as they think necessary to take the depositions of witnesses, and the provincial act of 1768, 8 G. 3 c. 7, 1 P. L. 140, authorized them to appoint commissioners to take affidavits of debt and recognizances of bail in country places. In those courts however, whose rules and proceedings are modelled after the civil law, the power of appointing a substitute is frequently given either by express grant in the commission of the judge, or by usage.

It appears however that the general rule of the civil law, resembled that of the common law, inasmuch as it allowed of no inherent right of delegation in judicial officers when not expressly given, unless perhaps a right to appoint a deputy for a particular cause, when the judge was sick himself, or necessarily absent. A common law judge cannot even appoint another in his place, for the smallest matter appertaining to his office, unless under some express authority of statute or precedent.

In the court of chancery, the master of rolls and the other masters seem originally to have been substitutes of the chancellor, holding their office by delegation from him, and although their powers are now those of judges personally appointed by the government, yet the manner of their exercising jurisdiction, resembles in most points that of delegates, the masters especially, not acting in any matter until it is referred to them, by order of the chancellor or the master of the rolls. So the jurisdiction of the court of probates was at first wholly vested in the governor of the colony, but has been transferred by him to *surrogate* judges in every country. The judge of vice admiralty also possesses the power, by his commission, of constituting a surrogate or deputy judge.

Jurisdiction again, may be considered as either *inquisitorial*, or *decisive*. Obvious examples of the first, are the proceedings of a coroner's inquest, of a grand jury in a criminal proceeding by indictment, of the attorney general in exhibiting an information, and of a court of inquiry in military law. In these cases one tribunal has the charge of making the preliminary inquiry, while the decision and judgment appertain to another, to which the cause principally belongs.—3 B. C. 24. Jurisdiction is either *criminal* or civil. *Criminal* jurisdiction extends over all such moral guilt and delinquency as the laws of the land have declared punishable, and also over all such acts in opposition to the law, as are punishable by penalties of a pecuniary kind;

or by imprisonment, or by any other mode designated as offences against the government or public welfare. *Civil* jurisdiction embraces the determination of all private controversies, that concern the rights of individuals only. The power of enforcing the execution of its sentences or judgments is usually attendant on every court, and so is the power of punishing those who by contumelious language, or interference in obstructing the execution of its decrees, shew their disrespect for the law and its officers. Jurisdiction is *exclusive* where one tribunal is alone authorized to try a cause—it is *concurrent* or cumulative where several courts have power to try it. Where there are concurrent jurisdictions, the prosecutor has the option in which he will seek redress. Jurisdiction is *original* when a court has the power of commencing and deciding a cause. It is *appellate* when a court has power to revise the decision of an inferior tribunal upon an appeal. It may be added that there is a kind of jurisdiction *by removal*, as where a cause is transferred by *certiorari* from the inferior to the supreme court before trial. Jurisdiction is *final* when it admits of no further appeal or removal of the cause. It is *final in the first instance*, where no appeal or removal is allowed by law from the court in which the cause is first tried. Courts are limited in various ways in their jurisdiction. By fixing a *minimum* or *maximum* of the sum respecting which they can proceed in pecuniary questions. By limiting them to particular forms of action, or excluding certain kinds of action from their cognizance. By fixing territorial limits of a province, district or county, &c. over which they can act. Questions belonging to landed estate necessarily belong to the local tribunal; but individuals are subject to the tribunals of the place where they are domiciled or sojourn. Some courts have a mixed jurisdiction, both civil and criminal, and both original and appellate. We will consider the subject of courts and their rules of proceedings, the forms of actions, judgments, and appeals,

rules of evidence, &c. under the two general heads of titles of—1. civil jurisdiction,—2. criminal jurisdiction.

*Of civil jurisdiction.*

Civil jurisdiction, as contradistinguished from criminal, embraces 1. all actions and proceedings relative to real and personal property, in which their ownership is brought in question on the right of possession is disputed. 2. All pecuniary claims between debtor and creditor. 3. And all claims for damages in consequence of injury, done by one private individual to another.

*Of the common law courts of civil jurisdiction.*

*Supreme Court.*—During the first 6 years of this colony, viz. from 1749 to 1754, the general jurisdiction over criminal causes, was exercised by the Governor and Council who sat under the name of the general court, and whose jurisdiction and records were transferred in 1754 to the supreme court. The general court proceeded according to common law rules and forms, and grand and petit juries were impannelled under it's directions to try questions of fact. Civil suits were brought first in the county court, and by appeal to the general court.—See act of council, 14th January, 1750. The supreme court consists of a chief justice, three assistant justices and one associate justice.* The chief justice is usually appointed by his majesty, and the others by the governor's commission. The chief justice receives a salary of £850 sterling,

* The act of 1824, 4 & 5 G. 4 c. 38, sec. 7, 3 P. L. 199, enacts "that in case a vacancy shall happen in the office of "associate circuit judge of the supreme court, it shall not be "lawful for the governor, lieut. governor, or commander-in-"chief for the time being, to appoint any other person in the "said office until after the sitting of the Assembly which shall "meet and be held next after the happening of such vacancy."

out of the annual grant of the British parliament. The assistant justices receive £600 per annum each, from the provincial treasury, under the provincial act of 1822. 3 G. 4, c. 33, 3 P. L. 141. The associate judge £400 per annum, by act of 1816, 56 G. 3 c. 2, sec. 5. 2 P. L. 197. Each judge is entitled to £1. 3. 4. a day for travelling expences* while on circuit, and they receive besides certain fees on law proceedings, which will be detailed under the general head of "*Fees.*"

Every assistant judge must "have been regularly sworn and admitted an attorney" of the supreme court, ten years prior to his appointment, "and also have been in the practice "of his profession of an attorney and counsel in the said "court at least five years next before the said appointment." act of 1809, 50 G. 3 c. 15. sec. 7. 2 P. L. 59. The same qualification is required in the case of the associate judge, by the act of 1816, 56 G. 3 c. 2, sec. 3, 2 P. L. 197.† The supreme court sits at Halifax on the 2d tuesday of January, the 3d tuesday of April, the 2d tuesday of July, and the 3d tuesday of October in each year. The terms are called Hilary, Easter, Trinity and Michaelmas respectively,

* By the act of 1805, 46 G. 3, c. 13. Sec. 4. 2 P. L. 5. payable by the governor, under warrant on the treasury, by act of 1801, 41 G. 3 c. 18. Sec. 16. 1 P. L. 454, continued annually in the appropriation act.

† It is declared unlawful for any assistant justice of the supreme court, to hold any other situation except that of a master in chancery or of a member of council, or to receive the salary or fees, or emoluments of any other situation.—Act of 1809. 50 G. 3 c. 15, sec. 8. 2 P. L. 59. The 9th sec. makes an exception in favor of the two (then) judges enabling them to continue to hold any office previously in their possession, and the act of 1816, 56 G. 3 c. 2. Sec. 3, 2 P. L. 197, forbids the associate circuit judge to practice in any court of law or equity in the province, to hold any situation but that of a master in chancery, or member of council, or to hold a seat in the house of assembly. The puisne judges may be removed at the king's pleasure, or by the governor on the joint address of the council and assembly.—Act of 1789, 29 G. 3 c. 12. sec. 2, 1 P. L. 274.

and it sits 14 days in each. The court can prolong the term if they think it necessary, and have power also to establish as many return days in each for writs as they choose. The return days established are, the tuesday on which each term commences, and the tuesday subsequent, being the 1st and 8th days of term—(acts of 1768, 8 & 9 G. 3, c. 5. 1 P. L. 149, 1774, 14 & 15 G. 3 c. 6. 1 P. L. 188, 1780, 20 G. 3 c. 1. 1 P. L. 219, 1793, 33, G. 3 c. 17. 1 P. L. 329, 1766, 36 G. 3 c. 1 P. L. 367, 1809, 50 G. 3 c. 15, 2 P. L. 58, 1829. 10 G. 4 c. 2. 1832, 2 W. 4 c. 21.) In the July or Trinity term, the grand and petit jurors are not to attend, unless a special order be made by a judge for the purpose, (that term being no longer used for jury trials, except in case of prisoners and trials by mutual consent,) —act of 1825, 6 G. 4, c. 23. 3 P. L. 213.

*Western spring circuit, Windsor.*—Last tuesday of May. *Kentville,* (in Horton, King's County.) 1st tuesday of June. *Annapolis.*—2d tuesday of June. *Lunenburgh.*—Last tuesday of June. *Liverpool.*—1st tuesday of July. *Shelburne.* —2d tuesday of July.

*Western Autumn, or fall circuit, annapolis.*—2d tuesday of September. *Kentville.*—3d tuesday of September. *Windsor.*—4th tuesday of September.—acts of 1816, 56 G. 3 c. 2. sec. 1, 2, P. L. 197.

*Eastern spring circuit, Pictou.*—Last tuesday of May. *Truro.*—1st tuesday of June. *Amherst*—2d tuesday of June.—act of 1816, 56 G. 3. c. 2, sec. 1, 2 P. L. 197, and act of 1830, Sess. 1, 11 G. 4 c 4, s. 1, 2.

*Cape Breton circuit, Sydney.*—Last tuesday of August. *Arichat*—1st tuesday of September.—act of 1820, 1821, 1 & 2 G. 4, c. 5, sec. 2, 3, P. L. 101. [by act of 1830, 2d session, 1 Wm. 4, c. 25, the Sheriff may adjourn the court at either Sydney or Arichat, from day to day, for three successive days, if the judges have not been able to get there in time.]

*Eastern autumn or fall circuit, Dorchester*—2d tuesday September. *Pictou.*—3d tuesday September. *Truro.*—4th tuesday September.—act of 1820, 1821, 1 & 2 G. 4 c. 5, sec. 15. 3 P. L. 103.

The circuit court is limited not to exceed 5 days sitting at each place by the act of 1816. 56 G. 3. c. 2 s. 2 P. L. 197, except in Sydney county, and Cape Breton, where each sitting is directed not to exceed 4 successive days, by the same act and the act of 1820, 1821, 1 & 2 G. 4 c. 5. sec. 2, 3 P. L. 101. The writs to the circuit courts are to be made returnable on the day appointed for opening the court.—See act 1809. 50 G. 3 c. 15. sec. 5. 2 P. L. 58. Writs of execution are to be returnable in 60 days from the issuing thereof, when taken out from a circuit court—act of 1799. 39 G. 3 c. 5. sec. 3, 1 P. L. 406. Any two of the judges of the supreme court may hold the court at any place in the province.—act of 1774. 14 & 15 G. 3, c. 6. sec. 2. 1 P. L. 189. But the associate judge is debarred from exercising any of the functions of a judge at Halifax, by the act of 1816, 56 G. 3 c. 2. sec. 4. 2 P. L. 197. So that he cannot be counted as one to constitute a court in that place, being only a judge for the circuit business.—ibid. sec. 3 & 4. If after the judges have commenced any of the circuits, one of them should by "*sickness or unavoidable accident*" be prevented from attending, the other judge may go on and finish the circuit business alone.—act of 1809, 50 G. 3 c. 15. Sec. 4, 2 P. L. 58, act of 1816. 56 G. 3 c. 2, sec. 8. 2 P. L. 197, 198. The terms of the circuit court are named from the months in which they begin, respectively—May, June, July, August, and September terms.

The supreme court at Halifax, is empowered by the act 1768, 8 & 9, G. 3 c. 9. s. 2 1 P. L. 151, 152, to try persons charged with committing felony ' in any county situate " on the sea coasts of this province, or to which there is " no communication with the town of Halifax by land."

The first section authorizes the justice of peace, before whom the accused may be brought, to commit him to the gaol at Halifax, and bind the witnesses by recognizance to give evidence at the next supreme court, to be held there. An act of 1758, 32 G. 2 c. 27, 1 P. L. 39, confirmed and ratified all past proceedings in the different courts of justice in the province, and those of justices of the peace. The supreme court by the act of 1769, 9 & 10, G. 3 c. 1. sec. 3, 1 P. L. 155, is (by the name of the judges of the assize) empowered to *amerce* the counties, where the grand juries neglect to present the necessary sums for the repairs or rebuilding bridges, and the same power is thereby given to the sessions.

In England there are three superior common law courts viz. the courts of king's bench, common pleas, and exchequer. The supreme court by the commission under which it was established, obtained, and exercises the powers of all these three courts.—See 1 P. L. 188, preamble to act 1774, 14 & 15 G. 3 c. 6. where it is called "a supreme court, court of assize, and general gaol delivery." All justices of the peace (except those who are justices throughout the province, members of council, or judges of the common pleas,) are to be summoned by the sheriff in each county, 14 days before the supreme court sits, and are bound to attend from day to day on the court until they obtain leave to depart for the term.—Act of 1799, 39 G. 3 c. 10. sec. 3. 1 P. L. 410.

*Inferior court of common pleas.*

This was at first established at Halifax as the county court, and in 1752 took its present name. Besides the supreme court, it was early found necessary to establish in each county and district a court of concurrent jurisdiction, to try civil causes, as the terms of the supreme court were then unfrequent, the circuit going hardly once a year to many of the counties. These courts consisted originally of

a few individuals in each county, not educated to the law. Generally the oldest of the justices of the peace were appointed. The court was called the inferior court of common pleas. 'Inferior,' probably because the causes tried there were liable to be removed into the supreme court by *certiorari*, and "common pleas,' because like the English court of common pleas, its jurisdiction was was only in civil cases. It's proceedings in general were taken from the English common law practice, as those of the supreme court were also. It's jurisdiction is limited by the provincial act of 1795, 35, G. 3 c. 1 sec. 12. 1 P. L. 347, which enacts "that no writ of *mesne* process, issuing from the "inferior court of common pleas, shall hereafter be di-"rected to any sheriff within the province, except to the "sheriff of the county or district for which such inferior "court shall sit, and belong to; and no person or persons "whomsoever, shall be hereafter sued before any inferior "court of common pleas, within this province, unless such "person or persons shall be actually resident within the "county or district where such inferior court shall sit, and "belong to."

A separate commission is issued by the governor for each county and district, (the largest counties being divided into several districts) naming several judges for the court of the particular county or district. The gentlemen so appointed hold their commissions at the pleasure of government, and were entitled to certain fees, of which hereafter. Shortly after the reannexation of Cape Breton to this province, it was thought necessary to appoint a chief justice of the inferior court of common pleas in that Island, which forms a county of Nova-Scotia, on the ground that the supreme court could not adequately discharge the duty increased by an additional circuit. The act of 1823, 4, G. 4 c. 36, 3 P. L. 173. accordingly authorized the governor to appoint "one fit and proper person," who should have "been regularly admitted and sworn as an attorney of H.

" M. supreme court of this province," and who should have " practised as an attorney of the said court for at least five " years after such admission, to be chief justice, of the in- " ferior court of common pleas for the said county of Cape " Breton, and president, or first justice of the court of ses- " sions, in and for the said county."—Sec. 1st. The 2d section gave the person so appointed the power of presiding as *first justice* in all courts of common pleas and sessions to be heldin the county. The 3d section fixed his salary at £400 currency per annum, and £100 currency per annum in addition in lieu of travel fees and incidental expences making £500 Halifax currency, per annum, in all, as his compensation. This system was in the following year extended over the whole province except the district of Halifax, proper. The act of 1824, 4 & 5 G. 4 c. 38. 3 P. L. 198, 199, by sec. 1, dividing the country into to three divisions. *Eastern*—to comprize county of Sydney, districts of Pictou and Colchester and county of Cumberland. *Middle*—counties of Hants, Kings, Lunenburgh and Queens. *Western*—Annapolis and Shelburne counties. It proceeds to authorize the governor " to ap- " point one fit and proper person for each division." The person appointed must be an attorney of the supreme court, who has practised in his profession for at least ten years. He is to act as " first justice of the inferior court of common pleas, and president or first justice of the of sessions" in his division.—Sec. 1 & 2. He is disqualified from sitting, or being elected to sit, in the House of Assembly, and it is made illegal for him " to vote at, or interfere in any election," and this disqualification and prohibition is extended to the chief justice of common pleas in Cape Breton also.—Sec. 5. Sec. 8. requires each of the three first justices appointed by this act to reside within the district to which he is appointed.—Sec. 3 & 4. Fix the salary of the three first justices at £400 per annum each, and allow them 20*s.* per diem

travelling fees, while actually employed. But no one is to receive above £50 in a year on this score. Sec. 6. Directs that the first justices shall receive no fees. The former first justices to receive their fees as long as they attend as judges of the court. The same clause puts the first justices under disqualifications, by enacting that none of them " shall practice as an attorney, solicitor or proctor " in any court of law or equity within the province, nor " shall he hold any other place, appointment or situation " of profit, under government."

Since the passing of these acts the Courts of Common Pleas throughout the Province have assumed a new character, by the introduction of lawyers of respectability in their profession, who each perform a circuit in their respective divisions. The court of each county and district is separate and unconnected as before, in all other respects, having its separate judges, records, &c. but the one chief justice acts in each court of his division. Opinion was much divided as to the propriety of these acts in 1823 and 1824, and there are still very many who think, the Supreme Court might be rendered efficient enough to dispose of all the civil business of the country, without the existence of a concurrent jurisdiction, and that there is something incongruous in calling on private gentlemen, not lawyers, to decide as assistant justices of the common pleas, on questions of a legal character. There can, however be no doubt, that the gentlemen appointed to these new judgeships have put their courts on an improved footing, and given very general satisfaction to the country, in the performance of their judicial functions. It is also admitted universally, that as presidents of the general sessions, their services are most necessary and valuable to the Province. Much of the statute law is carried into effect through the intervention of the sessions in each county and an important and indispensable criminal court, which the sessions undoubtedly is, demands the aid of a profession

al president of legal education and experience. The name of Inferior may be well dispensed with, since these courts have been so improved, and they may be properly termed civil district courts. The disqualifications annexed to these offices seem at (first view) hard and severe, but as they are not marks of disrespect or distrust, but intended to place the office beyond the suspicion of improper influence, they rather add to its value, as far as dignity and comfort are concerned. It seems desirable that all judges should be removed (as far as possible) from the hopes and fears of political life, and the strife of business,—that their minds may be undisturbed by any passions that would bias their judgment, and their attention be given without any distraction to the duty of their office. It is also a fair principle of constitutional governments, to require a thorough separation of the judicial, the legislative and the executive powers, in order that they may mutually keep each other within the natural boundaries of authority, to which each seems entitled.

### *Terms of the Common Pleas and Sessions.*

HALIFAX DISTRICT, held at *Halifax*.

The Quarter Sessions, on the 1st tuesdays of March, June, Sept. and Dec. Act of 1758, 32 G. 2, c. 27, s. 1, 1 P. L. 39. (see Mr. Uniacke's index, tit. 20 page 17.)

The Common Pleas on the 2d Tuesdays of March, June, Sept. and Dec.—Act of 1812, 52 G. 3 c. 12. 2 P. L. 90.

*Eastern Division.*

*Spring.—Dorchester*, (upper district of Sydney county.) 1st tuesday of May.* *Guysborough*, (lower district of Sydney county) 2d tuesday of May.—Act of 1825, 6 G. 4 c. 34. 3 P. L. 217, Sec. 1.)

---

* This is stated in the Almanacks as the last tuesday of May.

*Summer.—Amherst*, (county Cumberland,) last tuesday of June.—Act of 1823, 4 G. 4, c. 35. sec. 1. 3 P. L. 173. *Truro*, (district of Colchester,) 2d tuesday of July.—act of 1824. 4 & 5 G. 4 c. 25, sec. 1, 3 P. L. 190. *Pictou*, (district of Pictou,) 3d tuesday of July. —Act of 1825, 6 G. 4. c. 34. sec. 1, 3 P. L. 217.

*Autumn or Fall.—Dorchester*, 3d tuesday of October. *Guysborough*, 4th tuesday of October.—Act of 1825. 6, G. 4 c. 34 sec. 1 3 P. L. 217.

*Winter.—Amherst*, 1st tuesday of January.—Act of 1823, 4 G. 4, c. 35, sec. 1. 3 P. L. 173. *Truro*, 2d tuesday of January.—Act of 1832. 2 W. 4 c. 33. *Pictou*, 3d tuesday of January.—Act of 1832, 2 W. 4 c. 33.

*Middle Division.*

*Spring—Windsor*, (county Hants,) 1st tuesday of April. —Act of 1786, 26 G. 3 c. 2. 1 P. L. 246. *Lunenburgh* (county Lunenburgh,) 2d tuesday of April.—Act of 1767, 7 G. 3 c. 5, 1 P. L. 126. *Kentville*, (Horton, county of King's,) 2d tuesday of April.—Act 1805, 46 G. 3 c. 14 s. 2. 2 P. L. 5. *Liverpool*, (Queen's county,) 4th tuesday of April.—Act of 1830, 2d session 1 Wm. 4 c. 17.

*Autumn—Lunenburgh*, 2d tuesday of October.—Act of 1767, 7 G. 3 c. 5. 1 P. L. 126. *Liverpool*, 3d tuesday of October.—Act of 1830, 2d session, 1 Wm. 4 c. 17. *Windsor*, last tuesday of October.—Act of 1786, 26, G. 3 c. 2, 1 P. L. 246. *Kentville*,* 2d tuesday of November.—Act of 1825, 6 G. 4 c. 34, sec. 2 3 P. L. 217.

*Western Division.*

*Spring.—Annapolis*, 3d tuesday of April.—Act of 1805, 46 G. 3 c. 14, 2 P. L. 5. (County of Annapolis,) eastern

* The court at Kentville in the Spring is stated in the Almanacks, to sit on the 3d tuesday of May, but I have not found any act of that kind.

district of the county, boundary at Bear River. *Tusket*, (for the district of Yarmouth and Argyle, in the county of Shelburne,) on the first tuesday of May—by act of 1824, 4 & 5 G. 4 c. 25. s. 1. 3 P. L. 190. *Shelburne*, (county Shelburne,) 2d tuesday of May, by same act of 1824, c. 25.

*Summer.—Digby*, (west district of Annapolis county,) 2d tuesday of June.—Act of 1803, 43 G. 3 c. 2. sec. 3, 1 P. L. 468.

*Autumn—Shelburne*, 2d tuesday of Sept. *Yarmouth*, 4th tuesday of Sept.—Act of 1824, c. 25 above quoted.

*Winter.—Annapolis* 1st tuesday of Nov. *Digby* 3d tuesday of Dec.—Act of 1800, 40 G. 3 c. 5 sec. 1. 1 P. L. 422.

*Island of Cape Breton.*

*Spring—Sydney*, (for the northern district of the county,) 2d tuesday of March.

*Arichat*, (for southern district of the county,) 2d tuesday of April.

*Port Hood*, (for western district of the county,) 3d tuesday of April.—Act of 1828, 9 G. 4 c. 28, sec. 1.

*Autumn—Sydney*, 4th tuesday of October.—(act of 1823, 4 G. 4, c. 33. sec. 2, 3, P. L. 171.) *Arichat*, 2d tuesday of November, (by temporary act of 1827, 8, G. 4 c. 34, continued by act of 1832. 2 W. 4 c. 22. *Port Hood*, 3d tuesday of November, (act of 1828, 9 G. 4. c. 28.)

The inferior Court and Sessions are limited to a term of ten days in every place but Halifax, where it may continue for fourteen, and power of adjourning from time to time is given, as business may require. Act of 1805, 46 G. 3 c. 15, sec. 1, 2 P. L. 6.

A court of civil jurisdiction is established at Halifax, for the trial of small claims under £10; where the whole dealing does not exceed that sum, and the transaction arose wholly in the township of Halifax, to which it's ju-

risdiction is confined. The suits subject to this jurisdiction cannot be brought in the Supreme court or common pleas, except by way of appeal or rehearing. In other parts of the Province the justices of the peace hold courts in cases of debt under £5.* The commissioners' court and magistrates courts will be hereafter described more particularly. They mark at present the line, below which the jurisdiction of the superior courts does not go. The Supreme court and common pleas are unlimited in other respects, as to the amount of a demand, being equally entitled to jurisdiction, over the largest amount of property or claim that may be brought in dispute before either.

---

* See 3 Prov. Laws, 134, 193, 210.

## CHAPTER II.

### *OF ACTIONS.*

---

The most extensive and various jurisdiction in civil matters belongs to the superior courts of common law, that is, (in this province,) to the supreme court, and the courts of common pleas. Postponing the description of courts using the forms and institutions of the common law, but confined in their jurisdiction to some particular objects, or to the trial of questions of trifling amount, and the view of the chancery and other courts which borrow most of their rules and forms from the civil law,—we will notice the method prescribed by the common law, for giving legal redress to an individual, who complains that a wrong has been done to him, or that a right has been withheld from him.

He that has a just cause of complaint, is generally entitled to seek redress, by bringing an action against the party who has caused the injury or inconvenience. Forms were early invented to distinguish one kind of complaint

from another, and parties have been ever obliged to take a form of complaint (or action) corresponding with the facts of their case. This is thought by the learned Sir Wm. Blackstone, to be a rule founded in good sense, and to have a tendency to simplify legal transactions, and render them more precise.

An action is defined "the lawful demand of one's right, "*jus prosequendi in judicio quod alicui debetur*;" "a de-"mand regularly made and insisted in, before the judge "competent, for the attaining or recovering of a right." 3 B. C. 116, Inst. 4, 6, pr. Erskine's Inst. Book 4, tit. 1. sec. 1. An action in the common law courts is often called a suit at law. It is usually applied to a regular and formal proceeding in one of the superior courts of common law, where the party seeking a remedy calls the defendant into court by a writ, and goes on by written pleadings, to make a formal statement of the injury done him. Actions are divided by English lawyers into real, personal, and mixt. Real actions are such as relate to freehold interests in land only. These are almost all obsolete. Personal actions are such as are not connected in their nature with landed property, but arise from some contract, some personal injury, or some disputed claim to moveable property. Mixed actions are such as partake of the nature of both a real and personal action.

*Personal actions.*

1. **Trespass** *vi et armis*. This is the form of action necessary, when the party complaining has been struck at or beaten by the defendant. The attempt to strike is called an assault,—the actual beating is termed a battery. An action may be maintained for an assault, though no blows were actually given, the threatening gesture being considered a high breach of the law. An injury of this kind may be punished both criminally and civilly. The same form of action is proper, to obtain redress for illegal de-

tention of the person, called in our law false imprisonment. So the abduction of the wife, or the child, will give to the husband, parent or guardian respectively, a right to an action of trespass *vi et armis*. So will the husband be entitled, in this form of action, to recover against the seducer of his wife. A master will be entitled to this action, where his servant is beaten or taken away from him, if he has sustained actual loss in consequence. The parent, whose daughter has been seduced, will by legal fiction be entitled to bring this action, stating himself as the master, and his daughter as the servant, and that he lost thereby the benefit of her services. See 2 Bos. & Pul. 476.

When one's moveable property is taken, out his actual or virtual possession, in an unauthorized manner,—if done with criminal intent, it will of course be a theft or a robbery, and cannot thus be the subject of a civil action. It is a rule that a civil injury of this kind, is merged and swallowed up in the more serious charge of crime ; but if not done with such an intention, the owner is entitled to seek redress by this form of action of trespass *vi et armis*. All *direct* injuries to a man's person and the persons of the members of his family, form the subject of this action. So will any blows, or acts of direct injury, to his cattle or moveables.

2. *Trespass on the case*. This action lies for any injury done to one's person, property, or character, not attended with force or violence *directly* applied. In this as well as in trespass *vi et armis*, the plaintiff is entitled to recover a sum of money, by way of compensation for the injury he has sustained, and this sum is called the damages. If the injury be occasioned by the act of the defendant at the time, or the defendant be the immediate cause of the injury, trespass *vi et armis* is the proper remedy ; but where the injury is not direct and immediate on the act done, but consequential only, there the remedy is by action on the case. 3 East. 600. 2 Bl. Rep. 892. This

action is maintainable, against any one who has sold a person unwholesome food, or wines, by the use of which they have been injured—against a medical man for grossly improper or unskilful treatment of his patient; against the author or promoter of verbal or written slander; against the malicious prosecutor, who from private hostility uses the forms of criminal law, to harrass and injure his neighbor; against him who inveigles away one's servant before his contract has expired; against a public officer, who causes a loss to a private person, by neglecting his official duty; against the advocate or solicitor, for gross negligence: and generally against any artist or tradesman, failing to perform his work in a business like manner. It is also sustained against an innkeeper, who unreasonably refuses admission or proper accommodation to a traveller. So it is the proper mode of redress against any one who acts deceitfully or knavishly, in any ordinary contract or dealing; and he who warrants an article he is selling to be good, is liable in this form to make compensation in damages, if it should not be equal to what he describes it. So it may be brought for a nusance to *real* estate, as for disturbance in the rights of common,—for darkening windows, &c.

This action in most of the faregoing instances, is grounded upon some actual injury committed against the person, property or reputation of the plaintiff. Such the law calls a *tort* or *delict* which is essential in the action of trespass, or that of trespass on the case *for consequential damages.* There is a large class of claims, maintainable under the form of an action on the case, originating not in tortious injury but in contracts. When the action on the case is brought to enforce performance of a contract, or to obtain a compensation for its non-performance, it is usually called an action of *assumpsit*, from the assumption or undertaking, stated to have been made be-

tween the parties. Assumpsit and trover are both (in form) actions of trespass on the case.

3. *Replevin.*—When the goods of any person are taken under distress, he is at liberty to take out a writ of replevin, under which,—on his giving adequate security to the sheriff, they are restored to him, and the party distraining has an opportunity of proving his distress to have been legal and regular, on the trial of the suit.*

4. *Detinue.*—This action lies at the suit of the owner of a personal chattel or particular moveable, from whom it is unlawfully detained, and if he succeeds the judgment is, that the article shall be specifically restored to him, or that he shall receive certain damages in lieu of it, with damages also for the detention. This form of action, owing to many inconvenient rules attending it, has been superseded in practice by

5. *Trover.*—This is an action on the case grounded on a legal fiction. The plaintiff in the form of this action states, that the defendant *found* certain goods of his, and *converted* them to his own use. The alleged *finding* of the goods need not be proved, nor indeed need the conversion of them to the defendant's use. It is sufficient for the plaintiff to prove,—1. That he (the plaintiff) had either an absolute or special property in the goods, at the time the defendant obtained them, and that this property was accompanied with a right of possession. 1 T. R. 56, 7 T. R. 398, 7 T. R. 9, 13.—2. That the defendant has assumed a property wrongfully in the goods, either by tortious taking. (1 Stark. N. P. C. 173) by using or disposing of them as his own. (6 East. 540,) or by a refusal to deliver them to the owner, when required to do so.

This action may be brought, in many cases where tres-

* Though usually for goods distrained, yet it would seem that it may be brought in any case, where goods are unjustly taken and detained. See Shannon v. Shannon, 1 Sch. & Lef. 327.

pass would lie.—Cro. Eliz. 824. Cro. Jac. 50. and it is very generally used, as a means of trying the ownership of moveable property, where a doubt or dispute exists about it. The plaintiff recovers damages for the injury he has sustained.

6. *Debt.*—The action of debt lies, to recover any fixed and ascertained sum of money due to the plaintiff. If due upon a bond (or other instrument under seal) it is called a *specialty* debt, or debt due upon a specialty. If arising under verbal contract or writing, not having the solemnity of a personal sealing, it is called a debt upon *simple contract.* In the case of specialty debts, this is the proper and usual form of action, but it is rarely used in the case of a simple contract, the action of assumpsit affording a more convenient remedy. The provincial act of 1768, 8 Geo. 3, c. 4, sec. 8, 1 P. L. 138, gives an action of debt for rent, against tenant for life.

7. *Covenant.*—An action of covenant lies, to obtain damages for the breach of a covenant (either express or implied) entered into by a deed under seal. No precise form of words are necessary, to constitute an express covenant; any expressions clearly indicating an agreement are sufficient, to found an action upon.—1 Selwyn. N. P. 461. Where a person demises land for years by deed, there is an implied covenant in the word '*demise*' that he has good title, so far that if the lessee should be evicted by another person, by rightful title, he may maintain an action of covenant against the lessor.—ib. 469.

8. *Assumpsit.*—This is an action of trespass on the case, in which damages may be recovered, for the non-performance of a parol or verbal contract, and all contracts in writing not sealed as a deed, are included under the term *parol.*

The contract, on which assumpsit will lie, may be either express or implied. To entitle one to bring this action, the contract must be made upon a sufficient *consideration*

that is to say, there must have been some equivalent given to the defendant as an inducement, in return for which he made the promise. This equivalent may consist in goods, labor or service performed by the defendant for the plaintiff, or in any benefit conferred on him (or on another at his instance) by the plaintiff, as a motive for the defendant to make the promise;—or it may be some detriment or inconvenience the plaintiff has undergone, at the request of the defendant. Some *consideration* of the kind must be actually proved by the plaintiff, to entitle him to this action. In debt on a bond or other sealed instrument, and in covenant, a promise may be enforced, without the plaintiff's being obliged to show in evidence the consideration, on which the instrument was made, and this rule extends also to bills of exchange and promissory notes. In all these cases, the formality of the documents induces a presumption, that they were not given without motive or consideration; but in assumpsit (except on a bill or note) the plaintiff must first give proof of the consideration, as well as of the promise, before he can recover. The civil law calls a contract deficient in solemnity, a *nudum pactum*, or bargain not clothed with the proper forms; and the English law borrows the terms *nudum pactum* 'naked contract' and applies it to all parol undertakings not founded on a sufficient consideration. Whatever weight such promises may or may not have, on the honor or conscience of the contracting party, the law treats them as nullities, and will not suffer any action to be maintained to enforce them, or punish the violator. We may find a reason for this rule, when we reflect on the many engagements, a man must of necessity incur. Spontaneous promises, from which he derives no return or benefit, if fulfilled, most frequently lessen his means of fulfilling his contracts with creditors, or impair his funds. The claims of a family or kindred should be paramount to false no-

tions of ostentatious generosity. The principle came under our notice, in treating of deeds of gift and voluntary settlements, and is applicable to this question; for what is a promise to give a sum of money to a person from whom you derive no reciprocal benefit, but a deed of gift of what perhaps you have not yet acquired; and thus it seems even more objectionable (in a legal point of view) than the ordinary deed of gift.

9. *Account.*—This is a form of action fallen into disuse, since the courts of equity have become the general resort of suitors, in extensive and complicated transactions of a pecuniary nature. It was limited at common law, to claims against bailiffs or receivers, and guardians in socage, and accounts between merchants. Statutes afterwards gave the same remedy, against the personal representatives of those who were liable to the action themselves, and also to joint tenants and tenants in common, against their co-tenants. English stat. 13 Ed. 3, c. 23, 25. Ed. 3, c. 5. 31. Ed. 3, c. 11, 3 & 4 Ann c. 16, The first judgment is, that the defendant should account with the plaintiff. This is an interlocutory judgment, and the court thereupon appoints auditors to take the account. The final judgment is, that theplaintiff do recover so much as the defendant is found to be in arrear. 3 Wils. 73. We may also name the action of 'deceit,' and that of 'rescous,' both fallen into long and complete disuse, and our limits will not admit of dwelling on them. There is an antiquated action called "annuity," to recover an annuity or yearly payment of a certain sum of money, granted to another in fee for life, or years, charging the person of the grantor only. This form of action is superseded by the action of debt or covenant.

*Actions connected with real estate.*

Many forms of action, of this class, in modern times have become obsolete entirely, and some are very

their right to make the lease) is the only remaining point to be tried. If this title be established, judgment follows against the defendant, and the execution gives the possession of the premises to the claimant. The damages in this action are a trifling nominal sum. This action can only be maintained where the title of the claimant is accompanied with what the law calls a right of entry, and as no entry can in fact be made in the case of an incorporeal hereditament, such as a common, a rent or the like, this action will not lie for them.

A landlord may dispossess a tenant, who obstinately holds the premises denied to him after his term is expired, by bringing an ejectment, and the rule in such cases is, that the tenant cannot dispute the title of the landlord to the ownership of the property, as the contract of hiring was an admission on his part, of the right of the landlord to demise it. Where real estate has been wrongfully withheld from the owner, on his recovering in ejectment, he is entitled by an action of trespass, to recover the anual profits or rents of the property while he has been kept out of it, and this is called an action for the *mesne* profits.

*Trespass*, q. c. may be used to try a contested title to real estate, but then the claimant must have done some act, which the person in possession chooses to treat as a trespass and sue for. The claimant in his defence sets up his own title to the property, which being established, the plaintiff must fail in his action. This method is used sometimes by consent of both parties, in order to bring the question of title to an adjudication. As the recovery in ejectment does not prevent the losing party from bringing suit after suit, to retry the title to the same lands, the courts of equity will interpose, after a title has been repeatedly tried and satisfactorily ascertained to prevent the losing party from continuing a senseless and endless course of litigation.

3. *Dower.*—This action is given to the widow, to recover her dower in the lands of her husband. It is regu-

lated in this province by the act of 1768, 8 Geo. 3 c. 8. 1 P. L. 141, 142. The first clause entitles her to bring her suit if "the heir or other person having the freehold shall "not within one month next after demand made," assign and set out to her her dower, "in all houses, lands," &c. "whereof she is dowable at the common law, to her satisfaction, according to the true intendment of law." The same clause gives the form of the writ of dower to be used. The second clause enacts "that upon judgment be-"ing given for any woman to recover her dower, in any "estate of houses and lands, and other hereditaments, "which were her husband's, reasonable damage shall "also be assigned to her from the time of the demand "made," and prescribes the form of the writ of seizin or execution. The third clause directs the sheriff to cause the dower to be set out, under the writ of seizin, by five freeholders of the neighborhood, ("three at least to agree) "who are to be sworn before a justice of the peace, to set "forth the same equally and impartially without favor or "affection, as convenient as may be; which oath every "justice of the peace is hereby empowered to administer." 4th clause, "That of inheritances that be entire, where "no division can be made by metes and bounds, so as a "woman cannot be endowed of the thing itself, she shall "be endowed thereof in a special and certain manner, as "of a third part of the rents, issues or profits thereof, to "be computed and ascertained in manner as aforesaid." It proceeds to forbid her committing waste on her dower estate and makes her liable to an action for any strip or waste done or suffered by her.

4. *Partition.*—This is an action which may be brought by one or more co-proprietors of landed property, to compel a division, or as the law calls it, a partition of the premises in which they are interested. At common law co-parceners only were entitled to this action. It was not allowed to strangers in blood, therefore joint tenants and ten-

rarely used. In the colonies the antique forms of action, especially those called real actions, have never been resorted to*. As the object of this work is, to give a succinct view of as much of the laws actually in use in the colony, as can be compressed into a moderate and portable size, rather than to trace the subject historically, I am relieved from the necessity of entering into the details of a branch of jurisprudence, of little value to the general reader. The student of law will find it easy to follow out his enquiries as to real actions, taking the 10th chapter of 3rd B. Com. and Roscoe on real actions, as his guide.

The chief actions in practical use, respecting personal rights having been defined, let us now attend to those connected with landed property. viz.—1. Trespass *quare clausum fregit*. 2. Ejectment. 3. Dower. 4. Partition. 5. Waste.

1. Trespass, *quare clausum fregit*, or trespass for breaking and entering a close. This action may be maintained against any one, who unwarrantably enters upon the land of another, however trifling the damage done, even to the treading down a blade of grass, the plaintiff will be entitled to recover a compensation in damages. To be entitled to maintain trespass, the plaintiff must have an exclusive property or interest in the soil, or in the crop growing on it. This interest may be limited as to time, so the action may be maintained by a tenant for years, &c, but the possession must be exclusive, 1 T. R. 430, and therefore tenants in common must unite to bring this action. Com. Dig. abatement, E 10. This possession must be actual, for what is called a legal or constructive possession will not entitle the plaintiff to recover, 2 B. C. 210. This action also lies against a man whose cattle break into his neighbor's fields, the law holding him responsible for any mischief they may effect.

* See note at the end of this chapter.

2. *Ejectment.*—Since real actions have been disused, the title to lands is usually tried by an action of *trespass and ejectment*. This action proceeds upon a legal fiction. The person who actually claims the premises, is stated to have made a lease of them for a certain term of years to John Den, or some other imaginary party, and another fictitious being usually designated, Richard Fen, is accused of having entered with force, and arms, upon the house or grounds, and of driving John Den out of the possession, which he had taken under the supposed lease. Next a suit is commenced in the name of John Den against Richard Fen, for the imagined aggression. Then notice is given to the parties in actual occupation of the property, by which notice they are informed that Fen, the defendant, (or casual ejector, as he is also termed), having no title or claim on the property, does not mean to resist the claim made to it by Den, but will suffer him to proceed to judgment, and to recover possession of the land,—and advising the parties in possession, if they have any right to the premises, to come in and defend it. If there be no parties in possession to receive this notice, or if on receiving it, they do not think proper to defend their title, judgment passes against Fen, the casual ejector, and possession is given by the sheriff, under the execution, to the lessors of the plaintiff, that is to the real claimants from whom the fictitious plaintiff, John Den, is stated in the proceedings of the suit, to have received his lease for years of the property. But if the party in possession applies to be made a defendant, in lieu of the imaginary Richard Fen, he is then at liberty to defend his title to the premises. He is by the rules of practice obliged to admit the supposed lease to John Den,—Den's entry in consequence of it and further to confess that he who is now made defendant ousted and turned Den out of possession. These three things, viz—*lease*, *entry*, and *ouster*, being admitted, the title of the lessors of the plaintiff, (i. e.

given by the officer to the "tenants or occupiers of the "lands, or if they can not be found, to the wife, son, or "daughter, being of the age of 21 years or upwards of the "tenant or tenants, or to the tenant in *actual possession*, "by virtue of any estate of freehold, or for term of years, "or uncertain interest or at will."

Judgment by default to be given against all persons so notified, who neglect to appear, and final judgment against all who were present at the time of executing the writ. Those against whom the judgment by default has been given are allowed 15 days after notice of the judgment has been served on them, when if they have not shewn "a "good and probable matter in bar of the said partition, "the said judgment by default shall be confirmed, and "final judgment entered." But if the parties concerned in the partition can "shew to the court any inequality in "the partition, the court may award a new partition to be "made," instead of giving final judgment in favor of the first return. The "second partition returned and filed," is to "be good and firm forever against all persons except" *infants, femes covertes, persons* of *non sane* memory. These may within one year after disability removed "shew," "probable matter in bar of the said partition," when it may be set aside and a new writ awarded which shall then be final.

2. *Persons absent*. These are to be notified of the judgment by three weekly advertisements in the Gazette, or some public newspaper, and a year is given them, within which they may shew probable matter in bar, &c. as infants may.

3. On a second writ being issued, no proprietor is to be deprived of the improvements on cleared land allotted to him, but the equality is to "be made out of the unimproved lands." The second clause enacts, that no plea in abatement shall be admitted "in any suit for partition, "nor shall the same be abated by reason of the death of

"any tenant; and that in all cases where the former judg-"ment shall upon appeal* be confirmed, the person or "persons so appealing shall be awarded to pay costs." (References by C. J. Belcher, F. N. B. 137, R. Lit. sections, 246, 256, 257, 258. Co, Lit. 167, 168. 169, 170, 171.)

At common law under the forms of the writ, the partition must be made on the lands to be divided. The provincial act of 1768, 8 & 9 G. 3, c. 10, 1 P. L. 152, enacts that it may be executed "in any place within the county "where the lands shall be, by a jury of the said county." (This act mentions the provost marshal or *his deputy*, but not the two justices of the peace.) The damages are recoverable in an action of partition, nor does the common law or any English statute give costs to the party prosecuting it. See Alinatt, 75, 116, Calmady v. Calmady, 2 Ves. Jun. 569.

It is owing to this circumstance, among other causes, that actions at law for partition are rarely brought in England, and when resorted to, it is generally by consent of parties and confessed. Alinatt, 74. The Provincial act of 1773, 13 and 14, G. 3. c. 2. 1 P. L. 178, 179 enacts "all accounts of charges and expences"—"for the obtaining and executing writs of partition"—"until final judgment thereon" shall be laid, before the supreme court, and when approved by the court, two or more assessors shall be appointed by the court to assess the amount among the proprietors "in due proportion on each several share"—"and be levied out of the profits and other extendible "goods and chattels thereon or belonging to such proprie-"tor, or person in possession of the same, or any part "thereof, and shall be paid to the person or persons ap-"pointed by the court to receive the same." The 2nd clause authorizes any justice of the peace to issue a warrant of distress, against any one failing in payment of his

* *Appeal*—This is used here to denote any proceedings to set aside a former partition.

ants in common could not bring partition.—Lit. 6, 290, 318. The English statute 31 Hen. 8, c. 1, gave the action to all joint tenants and tenants in common of any estate or estates of *inheritance*, and the 32 Hen. 8, c. 32, extended the same remedy to joint tenants and tenants in common for term of *life or years*, and also where some held shares for life or years, and others estates of inheritance in part of the property, providing that the heirs of those who made partition under this last act should not be affected by it—but only themselves, their executors or assigns. The writ under the 31 Hen. 8, c. 1, need only be in general terms, but under the 32, Hen. 8, c. 32, it must be special in shewing the particular estates held by each cotenant.—Alinatt. on partition, 57 Cro. Eliz. 759. Moor *v.* Onslow. But where one estate was in fee, and the other was for life, a general suit against the defendant was held good. —Cro. Eliz. 743.. Tenant by curtesy is entitled by the equity of the 32 H. 8. to this writ.—Alinatt, 59, and so is the tenant by elegit in England. ib. 61. All the cotenants must be parties to this action and have a share set out to each.—ib. 64. *Femes covertes*, owning land (with their husbands) and infants may be made plaintiffs or defendants in partition and will be bound finally by the judgment.—Co. Lit. 171, a. Alinatt. 64, but see 8 & 9. W. 3. c. 31. There are two other English statutes, on this subject, viz. 8 & 9, W. 3 c. 31, s. 1 & 3 & 4, Anne, c. 18, s. 2, but they relate only to certain forms of process in cases where the defendant does not appear.—Alinatt. 67.

These acts of Hen. 8. Wm. & Anne have not been re-enacted in this province, but we have a series of provincial acts embracing the subject of partition generally, which I will briefly point out. The first is the act of 1767, 7 & 8 G. 3 c. 2. 1 P. L. 130—132. The preamble mentions that in the settlement of the province, townships had been erected, and grants had been made of each of those townships to a number of intended settlers, many of whom

had never arrived in the country, nor had they taken possession of their shares. That the townships having been granted to them as joint tenants, or tenants in common, their legal division was retarded, as many of them were not present to be served with writs of partition, and then the act (in imitation of the acts of Wm. & Anne, which provided for the case of defendants not forthcoming) goes on in the 1st clause to enact—" That upon the " petition of any one or more of the inhabitants in each " township, to the supreme court,"—the court should " award a writ* of partition in the usual form to the *provost* " *marshal* to be executed by him or his deputy‡ in the " presence of two justices of the peace, the lands actually occupied and improved were to be set off and assigned to the proprietors who had actually occupied and improved them. The unimproved land was to be divided " into shares, according to the number of grantees in each " township," each number shall be written on separate " papers and rolled up and placed in a box from whence " each grantee present, shall in the order wherein he is " named in the patent of grant to the township, draw out " one of the said papers, in the presence of the jury at- " tending"—the lot drawn thus is to be named in the inquisition, and be assigned in the return—and be confirmed to him by the judgment of the court. The act further adopting in substance the provisions of the act of Wm. directs forty days notice of the executing this writ to be

* The writ meant by this act, is the writ of execution in the action of partition and not of summons.

† By subsequent acts " the Sheriff."

‡ The Sheriff at common law must have attended the execution of a partition in person—the English statute 8 & 9, Wm. 3, c. 31, enables in his absence the under sheriff and two justices of the peace to proceed, and the high sheriff to return the writ, as if he had executed it in person. This act most probably intended the same thing, and not to require the two justices where the sheriff himself was present.—See Alinatt. 71.

proportion so assessed, for the sum due and charges on prosecution. The 3rd clause authorizes the letting the land of absent proprietors to pay their share of the expences. This power is increased to that of selling them at auction, by act of 1791, 31 Geo. 3, c. 1, 1 P. L. 283, on complaint of the person appointed to collect the amount, to the supreme court. See Epitome 2nd vol. p. 269.

Finally the provincial act of 1797, reciting, that doubts had arisen whether the act of 1767 extended to and enabled persons who are copartners, joint tenants, and tenants in common, other than the proprietors of townships, to make partition of lands to them belonging; enacted, "That the said act, and all acts heretofore made in amend-"ment thereof, shall be construed to extend to all per-"sons who do or shall hold lands in coparcenary, joint-"tenancy, and tenancy in common."

Having thus pointed out the acts on this subject, it may be first observed that the preamble of the provincial act of 1767, 7 & 8, G. 3, c. 2, 1 P. L. 130, when speaking of joint tenants and tenants in common, states that no summons "could be legally served, as against such absentees "upon writs of partition." From this we may conclude that the framers of the act considered the two English statutes of Hen. 8, (which give to joint tenants and tenants in common, a right to bring an action of partition which they did not possess at common law) to be in force in this province, as the absentees in question could not have been sued for a partition, except under those acts of Hen. 8. Such being the tenor of the act of 1767, we may be allowed to consider it as a legislative recognition of the validity of these acts, viewing them as incorporated with the old common law, and forming a part of it, and as such

*It has been held in England that the statute 8 & 9; Wm. 3. c. 31, applies only to those cases where the tenant does not appear. Dyer v. Bullock, 1 Bos & Pul. 344.

introduced into the colony from its foundation. In ordinary cases therefore, the first process in our practice will be by summons in partition, and on confession or verdict, the first judgment will be as in England, that a partition take place, whereupon the writ of execution issues, and when returned, the judgment is, that the partition so made shall be confirmed forever. See Alinatt 70, 74, 75.

The Provincial act of 1767, while it provided specifically for the division of the townships by ballot, in which each grantee had an equal share or right, did in substance re-enact all the clauses of the act of 8 & 9 Wm. 3, c. 31, so that the law of this Province, on the subject of this action, will in general be the same with the English. The two acts, by one of which it is rendered unnecessary to go upon the lands that are to be divided, and by the other the costs of partition are to be borne by all the parties, in proportion to their shares or interests in the property, have a tendency to facilitate the partition by writ, in a more convenient manner than it can be done in England, and in most cases will render it unnecessary to apply to a court of equity. The forms of proceeding in confessed and defaulted cases, are to be found in 3 Chitty on Pleading 1390. Those in cases where a defence is set up, are not to be met with in modern collections of forms. There are two judgments in partition, with which I have been acquainted in the Supreme Court at Halifax—the first is Gardiner v. Carroll, argued in Mich. 1823—in that cause the jury had awarded a sum of £100 in money to one cotenant, to be paid by the other, in order to make the shares proportionable, and that this sum should constitute a charge on the share of him who was to pay it. The Chief Justice observed that he thought the court "could *not* get over the "money composition. It would make the partition bad "in part, but it would be good as to the rest, and might be "sent back to be amended." The other case is that of Knodel & al. v. Little, in Mich. T. 1826, in which the de-

fendant disputed the right of the plaintiff by the plea *non tenet insimul*, which is the general issue in partition. In the last action, being the counsel and attorney of the plaintiff, I found it necessary to refer to Coke's entries, 414, and to Rastall's entries, and the *officina brevium*, in order to prepare the record. The court in that case were satisfied, that the action of partition lay between tenants in common—the forms adopted were the English precedents and judgment was given without difficulty.

We may therefore conclude from a view of all the acts, 1. That the action lies as in England, and with the same rules and forms in defended cases. 2. That in undefended cases the act of 1767 is to be taken as the guide of proceeding, as far as its provisions are applicable. 3. That the province laws establish the principle, that the costs of partition are in all cases to be borne rateably by the several owners. 4. That it is not necessary (in this province) that the jury should go upon the land to make partition, but that they must be jurymen of the county, and the partition must be made in the county. 5. That the supreme court alone is named, to have cognizance of partition, in the cases mentioned in the province acts, but that the inferior court is not excluded from jurisdiction in partition by any direct law. In ordinary cases, I should conceive there can be no doubt, that both courts have a concurrent jurisdiction in partition. (It is said that partition will not lie for a tenant by the curtesy, though it will against him.) Booth's real actions, 244, 3 Bac. Abr. 699. Joint tenants, &c. (I) 7.

5. *Waste.* At common law the tenant in dower and the tenant by the curtesy, were answerable for injuries done to the inheritance, to the person who had the immediate estate of inheritance in reversion or remainder, who by this action was entitled to be recompensed for the injury done to his estate by the destruction of timber, the ruin of houses, and similar injuries, which come under the legal term waste.

The statute of Marlebridge, 52 Hen. 3, c. 23, anno. 1267, enacted, that "Farmers, during their terms shall "not make waste, sale, nor exile, of houses, woods and "men, nor of any thing belonging to the tenements, that "they have to farm, without special license had by writing "of covenant, making mention that they may do it; which "thing if they do, and thereof be convict, they shall yield "full damage, and shall be punished by amerciament "grievously." The statute of Gloucester, 6 Ed. 1 c. 5, anno. 1277, provides "that a man henceforth shall have "a writ of waste in the chancery, against him who holds "by the curtesy of England, or otherwise, for term of life, "or for term of years, or a woman in dower. And he that "shall be attainted for waste shall forfeit the thing which "he has wasted; and moreover shall recompense thrice "so much as the waste shall be taxed at."

The statute of Westminster the Second, 13 Ed. 1 c. 22, Anno. 1284, gives an action of waste to one tenant in common of the inheritance, against another, who makes waste on the estate held in common. This statute is extended by construction to joint tenants, and under its provisions the defendant must either make partition, and take the place wasted to his own share, or give security that he will not commit further waste. The penalties of the statute of Gloucester, however, do not fall on joint-tenants and tenants in common, who have the inheritance, being limited to tenants for life or years. 3 B. C. 227, 228. The statute 20 Ed. 1 st. 2, anno. 1291, gives an action of waste to the heir, for waste done in the time of his ancestor, as well as for waste done in his own time.

Pulling down houses, or suffering them to decay, from the want of ordinary care, cutting the timber of an estate unnecessarily, opening mines, or changing one species of land into another, are considered as a wasteful destruction of the inheritance. 4 Kent. Com. 74. Waste is a spoil or destruction in houses, gardens, trees, or other cor-

poreal hereditaments to the disherison of him that hath the remainder or reversion in fee simple or fee tail. Co. Lit. 53, 2 B. C. 281. It may be divided into *voluntary* and *permissive*, or in other words, active and passive waste. Whatever does a lasting damage to the freehold is considered as waste, and formerly, the removal of any fixtures (although they had been erected by the tenant,) was considered waste, and punished as such by action of waste, or action on the case for the damage that resulted. But in favor of trade and manufactures, the rules in this respect have been much relaxed. Tenants for years may take down, such useful and necessary erections as they have put up, during their term, for the benefit of their trade or manufacture, they may (see Miller v. Chipman, at the end of this chapter,) remove ornamental marble chimney pieces, wainscots secured by screws, cider mills and corn mills, brewers vats, &c. but erections for agricultural uses do not come within the rule, but the tenant must remove the articles before his term expires, as he will not have a right afterwards to go upon the premises for that purpose. If a house be destroyed by storm or lightning, it is not waste; but at common law, the lessees were not responsible if a house were burnt by accident, or even by negligence. See Fleta. lib. 1, c. 12, s. 20, p. 15. Edition 1735, and Lady Shrewsbury's case, 5 Co. 13. But the statute of Gloucester before quoted, has been extended by construction, to give an action of waste against a tenant for life or for years, if his house was accidentally burnt by fire, this being a species of negligent or permissive waste, and even a tenant for half a year comes under this rule. See Co. Lit. 54, b. 2 Inst. 302.

But a tenant for term of years is not bound to make general repairs on the property demised, though he is obliged to use the premises in a husbandlike manner. Holt's. N. P. C. 7, 5 D. & E. 373. A tenant from year to year is within the statute, but a tenant at will is not liable for per-

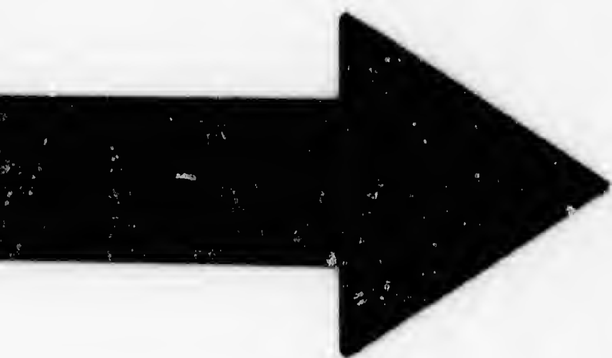
missive waste. Cro. Eliz. 777, 784. By the English statute, 6 Anne, c. 31, the ancient common law is restored in this respect. That act, sec. 6, provides, " that *no action*, " suit or process whatsoever, *shall be had*, *maintained*, or " prosecuted, *against any person in whose house or chamber* " *any fire shall accidentally begin*, or any recompense be made " by such person for any damage suffered or occasioned " thereby. This was temporary, but made perpetual by 10 Anne, c. 14, s. 1. But where the tenant by his own agreement and act, covenants to repair generally, or to leave the premises in good repair, neither the common law nor this statute will exempt him from the liability to rebuild, if the premises should be destroyed by fire, unless he has taken the precaution of excepting fire and accident in his covenant, for *modus et conventio vincunt legem*, the express agreement of the party may alter his legal rights, or increase his liability. He who has made a covenant of this kind is therefore bound to rebuild. See Wms. n. 2 Saund, 422, (2), Walton v. Waterhouse. For the same reason, if a lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, fall down, or be destroyed by any other inevitable accident, yet he is bound to repair it within a reasonable time, or rebuild it. Paradine v. Jane. Al. 27. Pym. v. Blackburn, 3 Ves. 34. See also Bullock v. Dommitt, 6 D. & E. 650. The cutting down or destroying timber is waste at common law. Oak, ash, and elm are accounted timber every where in England, and some other trees by local usage where they are planted to be used in building.

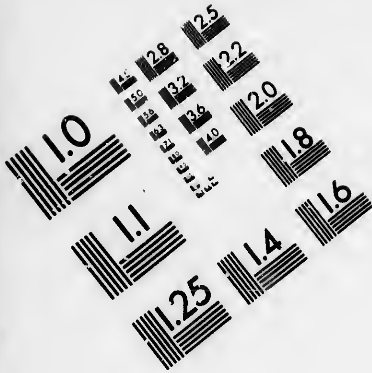
This does not interfere with the right of the tenant to cut underwood, or to use the wood necessary about the dwelling and farm (see Epitome vol. 2, p. 90, 91, 107.) Converting arable, meadow or pasture into woodland,—or turning arable, or woodland into meadow or pasture, are also waste in England; and so is opening land to search for mines. But the different cir-

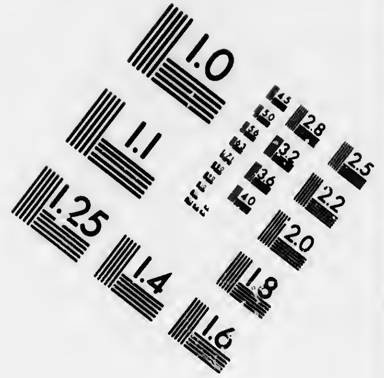
"during her term, and leave the same so at the expiration cumstances of a new country should be attended to, as there are many things to be modified in adapting the doctrine of waste to our situation.* The destruction, for example, of a piece of wood in England, an object of use and ornament, must deteriorate the general value of the inheritance, and so would an injudicious alteration of the system of cultivation adjusted to the size and situation of a farm; and among the oldest and best cultivated setttlements in the provinces, a similar rule might be not improperly applied. In such parts of this country as are in the earlier stages of improvement, it is evident that the object of the agriculturist is to bring as many acres as possible into arable or pasture, leaving sufficient wood for the use of fuel and fencing only.

Besides the action of waste, there is at common law a preventive remedy, by a writ of *estrepement*, which lies after a recovery in a real action, to prohibit waste, and during the pendency of a suit, by the statute of Gloucester 6 Ed. 1. c. 13. See 3 B. C. 225, 226. This, however, is now practically superseded in England, by the injunction from chancery to prohibit waste, issuing on a bill filed complaining of waste. An action on the case will not lie for permissive waste. 5 Rep. 13. Hale MSS. This form of action is usual, instead of that of an action of waste. The only provincial act I have met with respecting waste, is the provision in the act of 1768, 8 G. 3, c. 8, s. 4. 1 P. L. 143, the words of which are "and no woman "that shall be endowed of any lands, tenements or other "inheritances as aforesaid, shall commit or suffer any "strip or waste thereupon, but shall maintain the houses "or tenements, with the fences and appurtenances there- "of, with which she shall be so endowed, in good repair

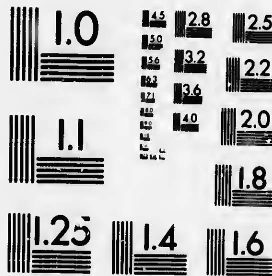
*This modification of the doctrine of waste has been adopted in several American decisions, particularly as to the right of cutting timber, and clearing the land. See. 4 Kent 75.

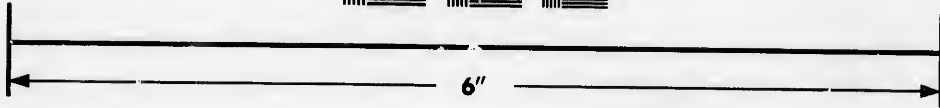


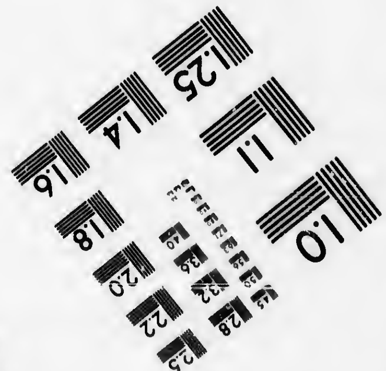




# IMAGE EVALUATION TEST TARGET (MT-3)







Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

"thereof; and shall be liable to action for any strip or "waste by her done, committed or suffered."

But the ancient writ of waste is superseded, in modern practice by an action on the case for the damage committed, in which neither the place wasted nor the treble damages are obtained, but only the actual damage which the property has sustained. The statute of Glocester is considered by the best American authorities, as forming part of the old common and statute law, imported into the early colonies.—(see 4 Kent. Com. 77—79, and the authorities there cited.) And the common law rule as to permission, revived by the statute of Anne, before mentioned, has been adopted in their courts, (ibid. 80). Mr Kent doubts the rule that an action on the case will not lie for permissive waste, but states that if that rule be correct, the old action of waste must in certain cases be still resorted to. (ibid 78).

*Nuisance.* A private nuisance is defined to be "any "thing done to the hurt or annoyance of the lands, tene- "ments, or hereditaments of another," 3 B. C. 210. Thus building a house so that the roof overhangs that of one's neighbor, and thus throws the rain on his roof to the detriment of his property,—obstructing by a new erection the light from the windows of another, which have been there for twenty years previous—corrupting the air, by noisome smells, so as to render him uncomfortable, are nuisances which affect a man's *dwelling*. Other nuisances may injure his *lands*, such as turning, corrupting, or choking water courses. *Obstructing* a right *of way*, is also a nuisance to incorporeal hereditaments. Public nuisances will be considered under the general head of criminal law, in the next volume. As to private, a man is permitted to take down and remove or abate, any nuisance which injures his property, provided he does it peaceably, and so any man may abate a public nuisance.—3 B. C. 5. But as no breach of the peace is to be permitted ft is most-

ly necessary, and almost always adviseable for the party injured to abstain from using the right of abatement or removal which the law gives him. The usual remedy in these cases is by a special action of trespass on the case, whereby damages may be recovered by the injured party, against the person who causes or continues a nuisance. He must abide by his election as he cannot pursue both courses of abating and suing at the same time.

The ancient legal remedy for a private nuisance was by an assize of nuisance, a species of real action. It is out of use in England, but it is the only suit which gives a legal mode of compelling the abatement and removal of

---

* Supreme-Court at Halifax, Easter Term, 1823. Miller v. Chipman. A rule *nisi* had been obtained before, in this cause, to set aside the verdict given for defendant. It appeared that Nock had been the owner of a tenement where he carried on a manufacture of beer, candles, and soap, and also had various implements and utensils fixed to the premises for the purposes of this business—that he had given to the plaintiff a mortgage of this tenement, which did not contain any covenant to deliver up possession to the mortgagee. That subsequently, Nock had failed in business, and one of his creditors had taken out an attachment against him,—that under this writ the sheriff had caused the implements and utensils to be attached, Nock being the occupier of the premises at the time of the levy. The mortgagee had brought this action against the sheriff, and the jury having found for the sheriff, the rule was now argued to set aside the verdict. *Mr. Archibald, K. C.* (now atty. gen.) for pltf. attempted to distinguish this case from that of a tenant, and also cited Lord Rolle as to tenants not being at liberty to remove fixtures. *Chief Justice Blowers* said, that in order to be more clear in this case, he and some of his brethren had visited the manufactory. They had found the building itself "to be a mere shell, and those goods were valuable implements of business, fixed in different parts of the place. "That all the learned king's counsel had advanced, might "have been very good law in Lord Rolle's time; but that "since, the increase of trade, commerce and manufactures "had been so great, as to induce the courts to hold more favorable views with respect to chattel interests,—especially "since personal property (once so small, compared with "real, in value) had come into competition with landed pro-

a nuisance, by means of which suit, as well as another antiquated writ called *quod permittat prosternere*, the nuisance complained of may be adjudged by the court to be abated. The right of bringing actions on the case (one after the other) for fresh damages, as long as the wrong doer keeps up the nuisance, and the criminal proceedings where the injury is both of a public and private nature, are adequate in most cases to produce complete redress. However, Judge Blackstone considers the ancient remedies still in force, in case the singular obstinacy of any person should render them necessary. As they form a part of the ancient common law, it may be concluded, that although not used, they might be resorted to here, in case of necessity for so doing, especially as the arm of justice would be weakened, if a wrong doer could be permitted to keep on foot a nuisance, by paying damages. See on this subject generally, 3 B. C. c. 13.

---

"perty. Lord Hardwicke, and every judge since, had followed a policy very different from the old law, and for the "benefit of commerce, every utensil, made use of in trade, "commerce, or manufactures, was considered as personal estate. Lord Mansfield had held this doctrine, and Lord Kenyon had carried it so far, as to allow a gardener the liberty to tear up and destroy the ornaments, natural and artificial, that he had placed on the grounds he hired. But "this was carrying the principle too far, and accordingly, Lord "Ellenborough had decided that it was not law. That the "creditors of a man in trade trusted him on the visible security of his stock and utensils, and it would be a cramping measure if they were deceived. He conceived that no "correct distinction existed between this case, and that of a "landlord and tenant, especially as there was no covenant to "deliver up possession,—the mortgage resembling what "were called Welsh mortgages. He therefore was of opinion, that the plaintiff was not entitled to his action." The "other three judges concurring in this opinion, the rule was "discharged.

The supreme court of New Brunswick in the recent case of Lyons v. Gorum, held that title to land could be tried in replevin, but it hardly appears yet settled.

"No real actions have ever been used in the colonies, "except actions of dower, for all titles to land have been tried "either by ejectment, trespass, or replevin." Stokes on col. law. 257, 258.

## CHAPTER III.

### *OF DISTRESSES.*

---

A distress, in its most usual sense, is the taking of a personal chattel of the tenant by the landlord, to be sold to satisfy arrears of rent. The term distress is also applied to the seizure of a horse or other beast, found trespassing on the grounds of an individual, and this is called a distress *damage feasant*. A variety of statutory enactments also direct penalties to be enforced by warrant of distress, and sale of the offender's goods. This last is more analogous to a writ of execution. If a man find the beast of a stranger wandering in his grounds and treading down or consuming his grass or grain, he may seize it and commit it to the pound. See Epitome vol. 1. p. 154—156. In distresses, the owner of the goods, if he will give sufficient security to the sheriff of the county, and sue out his writ of replevin against the distrainor, may in that action contest the regularity or right of the distress. Certain things are partially exempted from distres. Thus the ax in a man's hand who is using it, or

any other such article in actual use cannot be legally distrained. A horse with a man riding him cannot be distrained, even in distress damage feasant. 6 T. R. 138. The tools and implements of trade or agriculture are not to be distrained, unless there is not enough of other moveables to pay the rent due. Generally whatever goods are found upon the demised premises, are liable to be taken and sold for the rent. Thus the goods of an under tenant may be taken, although he have paid his rent to the principal tenant. Cattle sent to pasture (or in law phrase *agist*) may be taken for the rent of the land. And the landlord may take personal property found on the premises, although he has all along been aware that it did not belong to the tenant. Even horses and carriages kept at a public livery stable, are held distrainable for the rent. 4 Burr. 1498. But this rule will not allow a landlord to distrain a horse sent to the smith's shop for shoeing.—a traveller's horse or baggage at an inn—cloth left at a tailor's to be made up,—or grain sent to the mill for grinding—or cases of a similar kind. 3 B. C. 8.

Distresses for rent were at common law in the nature of pledges, and could not be sold but only detained, until the rent or other feudal service was performed ; and in the forms of ancient law proceedings, a similar distress is often referred to, as a process to enforce the appearance of a defendant, who could not be attached in person, that is arrested. The feudal landlords, as well as the stewards of the crown, had perverted this power of distraining into an engine of much oppression, in consequence of which the statutes 51 Hen. 3, *de districtione scaccarii*—anno 1266, and Marlebridge 52 Hen. 3. c. 2, anno 1267, regulated distresses. The latter act directed that all distresses should be reasonable, and an action will lie on this statute for taking an excessive distress, 3 B. C. 12. It also forbade the driving the distress out of the county, or making a distress upon a public highway, and gave a remedy by writ of re-

plevin. A landlord may distrain by his own authority; but it is most usual and prudent in practice for him to appoint some deputy of the sheriff, or constable, who is in the habit of levying distress to act for him on such occasions, lest he should make some mistake in the legality of his proceedings, and also, as he must apply to them if he goes on to appraise and sell the goods. No writ or warrant is necessary in distraining for rent in arrear. There are several English statutes on the subject, viz. 2 Wm. & Mary, st. 1, c. 5, 8, Ann c, 14, & 11 G. 2 c. 19. which are in substance re-enacted by the provincial statute of 1768, 8 G. 3, c. 4, 1 P. L. 136,—139, of which follows an abstract.

Sec. 1. Where goods are distrained for rent, if the tenant or the owner of the goods after 5 days " notice there-" of (with the cause of such taking) left at the chief man-" sion house, or other most notorious place on the premi-" ses,"—" replevy the same with sufficient security to be " given to the sheriff, according to law," the person distraining with the sheriff, deputy sheriff, or constable of the town or place, may cause the articles " distrained to be " appraised by two sworn appraisers." whom any justice of the peace of the county where such goods shall be distrained, or such sheriff or deputy sheriff may swear, " *to appraise the same truly, according to the best of their un-" derstandings*"—after such appraisement they may sell the goods " for the best price that can be gotten for the same," —towards satisfaction of the rent " and of the charges " of such distress, appraisement and sale, leaving the " overplus, (if any) in the hands of the sheriff, deputy sheriff, or constable for the owner's use." The 2nd section gives power to take as a distress " sheaves or " cocks of corn, or corn loose or in the straw, or hay lying " or being in any barn, or upon any hovel, stack, or rick or " otherwise upon any part of the land or ground charged " with such rent." It directs articles of this description to

be locked up or detained " in the place where the same shall be found," until replevied or sold at the end of the time appointed in the first clause, and forbids the person distraining from removing it in the mean time.

In the eyes of the common law, any crop growing on the land, and not cut down or severed from the soil was considered a part of the freehold, and therefore not liable to be distrained. The 11 & 12th sections of the act, authorize the landlord or his agent " to take and seize all " sorts of corn and grass, hops, roots, fruits, pulse, or other " product whatsoever," growing on the premises, " as a distress for arrears of rents," to cut the grass, &c. harvest the crops in the barns on the premises, or if there be none on the land, as near as convenient—and to proceed to appraise and sell, but not until the crop is properly made and cured—giving notice of the place where the crop is lodged within one week after lodging it there to tenant, or leaving the notice at his last place of abode.

The statutes of Marlebridge, &c. 52 Hen. 3, c. 12, 3, 4, 15, 9 Edw. 2 st. 1. c. 9, forbid the taking unreasonable or excessive distresses and also forbid distresses to be made in the king's highway, the common street, or the ancient fees of the church. The principle formerly was, that distress for rent was limited to what the landlord could

* The first clause is intended to give the power of sale which did not exist at common law as to distresses, and the preamble recites that inconvenience. The second clause is intended to meet an exception made at common law, as to grain, &c.—" Cocks and sheaves of corn, were not " distrainable before the statute. 2 W & M. c. 5, which was " made in favor of landlords, because they could not be " restored again in the same plight and condition that they " were before upon a replevin; but must necessarily be " damaged by being removed. Simpson v. Hartopp. Willes 515. The preambles to each of these clauses speak of the common law rules on the subject as in force in this province, and profess to alter them, evidently not viewing the act of Wm. & Mary, as having been in force in this province before 1768, the date of the act.

find on the demised premises.—2. B. C. 11. But the 11th clause of the act authorizes landlords and their agents "to "take and seize as a distress for arrears of rent any cattle "or stock" of the tenant, feeding or at pasture "upon any "common appendant or appurtenant, or any ways belong- "ing to all or any part of the premises demised or holden." "The sixth clause provides, "that in case any lessee for "life, or lives, term of years, at will or otherwise, of any "messuages, lands or tenements, upon the demise whereof "any rents are or shall be reserved or made payable, "shall *fraudulently* or *clandestinely convey* or *carry off*, or from "such demised premises *his goods*, or chattels, *with intent* "*to prevent the landlord* or lessor *from distraining* the same "*for arrears of such rent*, so reserved as aforesaid," the landlord or his agent may seize them, wherever they shall be found, at any time within *twenty one days* after their removal, and act by them as if they had been taken on the premises. Provision is made in the 7th clause, that if they have been sold in good faith *(bona fide,)* and for a valuable consideration, before the seizure, they are not to be held as a distress. A mortgage of goods has been held not to be a sale within the meaning of the clause, in the American courts.—3 Kent. Com. 385. The English and New York statutes, give the landlord the right to seize within *thirty* days, and add heavy forfeitures, of double the value of the articles, against the tenant and his abettors, but our act has only given the power of following the articles* during twenty one days as above. The 9th & 10th clauses authorize distresses for rent to be taken after the determination of the lease for life, lives, years or at will, provided it be done within six months after, and the land-

* "If the interest in the tenant in the term has ceased, and "the tenancy ended, and the tenant with his goods removed "from the premises, a distress for rent cannot thereafter be "made, though it be within 30 days from the termination of "the tenancy."—3 Kent. Com. 386.

lord's interest or title be continued, and the tenant still in possession. The 13th section excepts the interests of the crown, from being in any way affected by the provisions of the act.

The 3d section gives a "*special action upon the case*," with "*treble damages and costs of suit*," to the party injured by "*any pound breach* or *rescous of goods* or chattels *distrained for rent*," against the offender, offenders "*any or either of them*," or "against the owner of the goods distrained, "in case the same be afterwards found to have come to "his use or possession." The 4th section gives "an "action of trespass, or upon the case" to the owner of goods distrained, "his executors or administrators," with right to recover double the value of goods, and "full "costs of suit against the person or persons so distraining, "any or either of them, his, or their executors or ad- "ministrators," where "any such distress and sale" shall "be made by virtue or color" of the act "for rent pretended "to be in arrear and due" where "*no rent*" is due. The 5th section enacts that goods are not to be taken in execution and disposed of, until the landlord of the premises satisfied for his arrears of rent. If however, they amount to above a years rent, he is only to have a years rent, when the creditor may take the goods. The sheriff is to levy for the rent so paid by the creditor, as well as for the execution money. With respect to beasts taken, damage feasant, the party distraining has no right to work or use them. —3 B. C. 13. Beasts of the plough may be taken in distress, under statutes which partake of the nature of executions.—4 Burr. 589.

## CHAPTER IV.

### *LIMITATION OF ACTIONS.*

The law requires every action to be brought within a reasonable period after the time of the injury being committed, which it is intended to redress. This limitation or prescription of actions is regulated by several provincial statutes. The English statute 31, Eliz. c. 5, sec. 5, limits the bringing of *penal* actions where the forfeiture is given to the king only—to *two* years after the offence committed,—where the forfeiture is divisible between the king and the informer, to *one* year, or in two years after that the king alone may sue ; but where a shorter time is limited by the statute which imposed the forfeiture then the action to be brought within the shorter period. This statute is held to have a prospective effect, and to extend to statutes of subsequent date giving forfeitures. But it is not held to extend to forfeitures given by statute to the aggrieved or injured party. 1 Tidd's Pract. 13, and cases there cited. It has not been re-enacted in Nova Scotia, nor have we any similar act, we may therefore consider it as not in force here, and where forfeitures are given by provincial statutes (for penal statutes of the mother coun-

try are not in force here at all, except where the colony is named) unless a time of limitation be named in the act, it would appear that the action may be brought within any reasonable period. It seems desirable that some enactment similar to the act of Elizabeth, should be made to regulate the time within which penalties and forfeitures may be sued for.

1. *Limitation of suits for the recovery of real estate.*

The provincial act of 1758, 32 G. 2. c. 24, 1 P. L. 34—37, is the chief act of limitations, and in many parts it is transcribed from the English statute of limitations. 21 Jac, 1 c. 16. The first clause of our act, 1 P. L. 34, enacts "that all actions or suits either in law or "equity of or for any lands, tenements, or other heredita-"ments whatsoever," after 20 years from 1758, should "be sued and be taken within *twenty* years next, after the "title and cause of action first descended or fallen, and "at no time after the said twenty years." The 2nd clause which corresponds with the first clause of the English act, limits the right of making "any entry into any lands," &c. to *twenty* years next after the right to enter descends or accrues, and if entry be not made within that period, the party and his heirs are disabled from entry afterwards. The 3rd clause provides in favor of minors under 21 years, femes covertes, persons "*non compotes mentis*, imprisoned or beyond the seas," by giving to the party having a title, or his heirs, the right to sue or make entry at any time within *ten* years after the disability is removed. The expression "beyond the seas" is rendered clear by the co-relative words "coming into this Province," used in the same clause; so that "beyond the seas" there means *out of the province.* The English stat. 4 Anne, c. 16, s. 16, enacts that no claim or entry to be made upon any lands, &c. shall be of any force to avoid a fine levied with proclamations according to the statute, or a sufficient entry within the statute of limitations, unless upon such entry or claim

an action be commenced within one year after the making of such entry or claim, and prosecuted with effect. (See Adams on Ejectment, 93.) But this act has not been re-enacted here. By the English law the widow's action for *dower* is not within the operation of the statutes of limitations, nor is she barred by statute there from claiming *mesne profits* from the time her title accrues by any limitation, as to the time of suing. The general terms of our act used in the first clause seem to include dower, although the writ of dower is given by a subsequent act of 1768, 8 G. 3, c. 8. 1 P. L. 141, 2, 3. I should therefore presume that dower could not be recovered after 20 years neglect to sue. See 4 Kent, Com. 68, 69.

Prosecutions under the general trespass act of 1822, 3 G. 4 c. 32, 3 P. L. 136, are limited to one year after the act committed by the amending act of 1824, 4 & 5 G. 4 c. 8. sec. 3, P. L. 182. The provincial act of 1773, 13 & 14, G. 3 c. 4, sec. 3, 1 P. L. 180, gives to minors, femes covertes, persons *non compotes* imprisoned or absent from the province, *six* years after impediment removed within which they may may sue for and recover "any lands or tenements within this province to which they are entitled," that have been sold under execution by virtue of the Provincial acts.

*Limitation of suits in personal actions.*

The time for bringing these is limited by the 4th clause of the provincial act 32 G. 2. 1758, c. 24. 1 P. L. 35, as follows, viz.

| | |
|---|---|
| Trespass *quare clausum fregit* | 6 years |
| Replevin for taking away of goods and cattle | |
| Trespass | |
| Case (except slander)* | |

* The provincial act of 1768, 8 G. 3 c. 2, s. 2. 1 P. L. 135, which enacts the stat 3 & 4 of Ann, c. 9, making promissory notes negotiable) directs the limitation of actions on notes to be the same with that in actions on the case, in the above act of 1758, that is six years.

| | |
|---|---|
| Account (except merchants accounts)<br>Debt on any lending or contract without specialty<br>Debt for arrearages of rent *<br>Detinue. | 6 years. |

" Within 6 years next after the cause of such actions or suits and not after."

Assault and battery wounding and imprisonment, within one year after cause of action. †

Action upon the case for words, within 6 months next after the words spoken.‡

The 5th section (taken from the stat. 21, Jac. 1, c. 16,) gives a plaintiff one year to recommence his suit, in any of "the said actions or suits," where judgment for him has been reversed by error, or where a verdict in his favor and judgment arrested, and given against him, or where the defendant in a suit by original has been outlawed and reversed the outlawry. (Neither the action by original nor outlawry are in use in this province, and they have been inadvertently transcribed into this act, from the statute of James 1.) There is no saving in case of nonsuits.

The 8th & 9th sections (taken from the stat. of James, and stat. of 4 Ann. c. 16, sec. 19,) provide in favor of minors, &c. that they may commence their suits within the same periods, to be reckoned from the time when their disability ceases, and in the case of absent defendants that they may be sued within the same periods after their return—See Rotschilt v. Leibman, 2 Str. 836.) Under the absent debtor act, 1761, 1 G. 3 c. 8. sec. 8, 1 P. L. 71, the defendant is entitled to a re-hearing of the cause within three years after judgment.

---

* This does not bar the claim if due on a lease by indenture. 2 Saund. 66.

† The English statute gives 4 years.

‡ The English statute gives 2 years.

*Limitations of actions against public persons.*

Connected with this title is the act of the province of 1776, 16 Geo. 3 c. 3, 1 P. L. 202, 203, sec. 3, directing "all persons having claims or demands against this" (that "is the provincial) "government, either for work done, "goods supplied, or services of any kind"—to bring them in "either before or within the first week of each session "of the general assembly. Sec. 4, enacts, "that no "such accounts shall be admitted, or paid by the treasurer "of the province, where the same shall not have brought "in, within the time limited by this act."—see Epitome, v. 1. p. 110.

*Justices of the peace and constables.*

The provincial act of 1814, 54 G. 3 c. 15, sec. 9, 2 P. L. 123, (in substance the same with the British stat. 24 G. 2 c. 44, sec. 8.) enacts that no action shall be brought "against any *justice of the peace* for any thing done in the "execution of his office, or against any *constable* or other "officer or person acting as aforesaid," (that is, by order and in aid of any constable, in obedience to a warrant under the hand and seal of any justice of the peace) "unless "such action shall be commenced within six calendar "months after the act complained of, shall have been "committed."*

*Militia laws.*

The provincial act of 1820, 1821, 1 & 2 G. 4 c. 2, sec. 86, 3 P. L. 94 directs that any action "against any person "or persons for any thing done in pursuance of this act," (the militia act) "shall be commenced within *three* months "next after the fact committed and not afterwards."

---

*It seems the months are to be reckoned *inclusive* of the day of committing the act, See 1 Tidd. Pract. 19. A distinction is made between acts done under color of office and those done by virtue of office, but in an irregular and improper manner.—ibid.

*Highway act.*

The provincial act regulating the power of commissioners of highways and streets, passed in 1826, 7 G. 4 c. 3. sec. 26. 3 P. L. 243, limits actions for any thing done in pursuance of the act to "*six* calendar months next after the fact committed. Quarantine act 1832, 2, W. 4. c. 13, sec. 33, limits actions to 6 months in the same way.

*Sheriffs.*

The provincial act of 1829, 10 G. 4, c. 33, sec. 7, directs "that no action or suit shall hereafter be brought "against any sheriff, for or on account of any act, neglect "or omission in his office of sheriff, unless the said action "or suit shall be commenced within *three* years after the "neglect or omission done or complained of."

*Custom-house officers.*

By the British statute, 6, G. 4, c. 114, sec. 64, actions against officers of the customs for any thing done by them in the execution of their duty must be commenced within three months after the cause of action has accrued.

If the statute of limitations once attach, and the time of limitation begins to run, it continues to run notwithstanding any subsequent disability. 1 Wils. 134. Thus if a title to land accrue to a person of full age in the country, his going abroad afterwards will not excuse his neglecting to take proper steps to claim his property, and in the case of a female, of full age at the time her title accrues, her subsequent marriage, will not excuse her from proceeding within the proper period. See 4 T. R. 311.

An English act 9 G. 3, c. 16, sec. 1—10. (See also 21 Jac. 1, c. 14,) has established *sixty* years possession as an effectual bar against the king or his patentees, as respects real estate. This act has not been re-enacted here, but it

would probably be considered as a legislative declaration of the proper period at which the presumption of title as as against the crown must necessarily arise, or as an abandonment by the crown of any claims that were of longer standing, and as affording a rule for our courts to govern themselves by. Where an action has been brought in time, but abates by the death of the plaintiff, and the time is expired, the practice of the English courts allows a year to the personal representatives within which to bring a new action. Archbold on pleading, 32. A reasonable time is also allowed when the suit abates by the death of a defendant, or by the marriage of a *feme sole* plaintiff, ibid. 33.

The statute of limitations was held not to affect proceedings in the admiralty or spiritual courts. (6 Mod. 25, 26, 2 Salk. 424, 420. 2 Ld. Raym. 934, 1204, 3 Salk. 227.) The English act of 1705, 4 Ann. c. 16, sec. 17, limited suits in the admiralty court for seamen's wages to 6 years. Though another section of the same act was copied in framing our act of limitation of 1758, this was passed over, so that it would not seem to be in force here. The statutes of limitation are considered not to extend beyond the actions specified by name in them. Therefore, covenant, annuity, debt on specialty, *scire facias*, account on merchants current accounts not stated or settled, are not within the scope of these acts. 1 Tidd. Pr. 15. In assumpsit an acknowledgment of the debt, at any time within six years before the suit is commenced, is sufficient to entitle the plaintiff to recover, although it be of much longer standing. ibid. 21, and cases there cited, and this acknowledgment may be written or verbal. A suit commenced in due time, and regularly continued, will keep the claim alive. A legacy is said not to be within the statute of limitations. 1 Vern. 256. It cannot be sued for at common law, except upon an express promise by the executor. Toller 164. (but see p. 40 of this volume.) An

executor is not bound to plead the statute of limitations.—ibid. 343, 429. Debt for an escape, 1 Saund. 37, 1 Lev. 191. debt on an award, 1 Sid. 415, 1 Lev. 273, are not within the statute. And where lands are devised to pay debts generally, they may be paid though barred by the statute. 1 Salk. 154, 2 Vern. 141.

# CHAPTER V.

## *PRELIMINARY STEPS BEFORE ACTION. PARTIES—ATTORNIES.*

*Proceedings necessary before action, in certain cases.*

1. *Notices of action.*—In actions for trespass, *quare clausum fregit*, it is provided by the provincial act of 1758, 32 G. 2, c. 24, sec. 6, 1 P. L. 36, that the defendant may plead in his defence, that he disclaims title in the land, that the trespass was by negligence or involuntary, and that he had tendered sufficient amends for the damage before the action was commenced. (This, of course must be put into the written pleadings of the cause) That if it be proved to be a true plea on the trial, the plaintiff shall be non-suited and deprived of any further action for the trespass. (See English stat. 21, Jac. 1, c. 16, sec. 5.) The 7th clause directs that in all suits for trespass, assault, and battery, or slanderous words, if the damages given by the jury are under 40*s.*—the costs recoverable by the plaintiff from the defendant are not to exceed the same sum, except in assault and battery, if the

judge who tried the cause certifies "under his hand, on "the back of record, that the assault was sufficiently "proved," or in trespass "that the freehold and title of "the land mentioned in the plaintiff's declaration was "chiefly in question, or that the trespass was voluntary "and malicious." In these excepted cases, the plaintiff may recover full costs though the damages found are under 40s.*

The additional act of 1796, 36 G. 3, c. 4, 1 P. L. 368, recites that in negligent and involuntary trespasses, actions were frequently commenced before the party had an opportunity of tendering satisfaction agreeable to the 6th clause of the former act. It therefore requires that in all "actions of trespass *quare clausum fregit*, wherein the *title of "lands is not chiefly in question*, hereafter to be prosecuted, "the plaintiff shall, at least *seven days previous* to the issu-"ing of *process*, *serve* the *defendant* with a *notice in writing*, "to be left at the defendant's house, or place of abode, of "his intention to commence such suit, unless the defend-"ant shall, within that time, render reasonable satisfac-"tion for the injury committed, and if on the trial of any "such actions, the plaintiff shall not prove due notice to "have been given as aforesaid, he shall recover no more "costs than damages."

### *Notice of Action. Justices of the Peace.*

The Provincial statute of 1814, 54 G. 3, c. 15, s. 2, 2 P. L. 121, directs that in actions at the suit of a subject, against "any Justice of the Peace for *any "thing done by* him *in* the *execution of his office*"—"*no-"tice* of such intended writ, summons or process," shall be

* "If the action be of a mixed nature as for words and "conspiracy or any other wrongs, the case is out of the stat. "of limitations and the plaintiff shall have costs as usual. "Cro. Car. 141, 163, 307. 1 Salk. 206." C. J. Belcher's Note, 1 P. L. 36.

"delivered to him or left at his usual place of abode at "least *one calendar month* before the suing out or serving "the same, in which notice shall be plainly expressed the "*cause of action*, which such party has, or claims to have "against such justice, and the party or his attorney shall "affix his name and place of abode to the said notice.* The 6th section, 2 P. L. 122, requires the evidence given on the trial to be confined to the cause of action stated in the notice. And the act regulates the tender of amends and payment of money into court, which will be noticed by and by.

*Custom-house officers.*—The British statute, 6 G. c. 114, s. 63, directs that no writ is to issue or be served on any officer of customs, navy, &c. for any thing done in the exercise of his office under the laws of customs, "until "one calendar month after notice in writing shall have "been delivered to him or lefs at his usual place of abode, "by the attorney or agent to the party who," sues. The "notice must "clearly and explicitly" express "the cause "of action, the name and place of abode of the person "who is to bring such action, and the name and place "of abode of the attorney or agent." The evidence on the trial is to be confined to the terms of the notice. If plaintiff do not, on the trial, prove the giving this notice, the defendant shall have a verdict with costs. Sec. 64, limits actions against officers to 3 months after cause of action and gives *treble costs* to defendant, if judgment be given for him on non-suit, discontinuance, verdict, or demurrer. Sec. 65, 66, 67, give the officer power to tender amends; and if the judge certifies "probable cause" in favour of defendant, he is not to pay dam-

---

*This is the same as the English stat. 24 G, 2, c. 44, sec. 1, except that the English clause adds a fee of 20s. to the attorney, for preparing and serving the notice.

ages or costs, beyond second damages—nor to be fined more than one shilling.

*Constables.*

The same act, sec. 7, forbids any action to be brought against any constable or other officer, or any person aiding a constable or officer, for any acts done in obedience to any warrant under hand and seal of a justice of the peace, unless the defendant refuse to show his warrant, and permit a copy to be taken of it, after six days notice in writing, under the signature of the plaintiff or his attorney, demanding perusal and copy of the warrant, has been served and left at his usual place of abode.* Gaolers, overseers of the poor, and churchwardens, have been held entitled to the protection of this clause, as well as constables. 1 Tidd. Pr. 32. Actions of replevin, and for money had and received, have been held not to come within the intent of this clause, as it only embraces trespass and tort. ibid.

*Commissioners of Streets and Highways.*

These Commissioners, in the several towns of the Province, subjected to the act of 1826, 7 G. 4, c. 3, viz. Halifax, Annapolis, Windsor, Liverpool, Lunenburg and Pictou (named in the act,) Bridgetown (act of 1827, 8 G, 4, c. 28,) Dartmouth (act 1828, 9 G 4, c. 27,) and Digby (act of 1829, 10, G. 4, c. 24.) Dorchester (Sydney, Co.) act of 1829, c. 47. Falmouth 1832, 2. W. 4 c. 36, are protected as are also their subordinateagents and workmen by the 26 section of the act of 1826, 7, G 4, c. 3, 3, P. L. 243 which forbids the commencement of any action or suit "against "any person or persons for any thing done in pursuance of "this act, until *twenty* days notice thereof shall be given "in writing to one or more of the said commissioners."

* This is taken from the English stat. 24 G. 2. c. 44, sec. 6.

*Of the parties to actions.*

1. *Plaintiffs.*—The person who seeks a remedy in the common law courts for an injury done to him, is called the plaintiff. The person of whom he complains is called the defendant.

The situation in which persons are placed with respect to each other, sometimes precludes them from being made parties to an action at law. Thus if the matter in dispute be purely *equitable*, they must sue for it in the court or Chancery, that being our only equity court, except in cases of small co-partnerships where the whole dealings have not exceeded £500, in which case a jurisdiction is given to the supreme court by temporary act of 1829, 10, G. 4.c. 28, passed for 5 years.

On the same principle an ejectment for lands held in a trust estate, must be brought in the name of the trustee and not that of the party for whose benefit he holds it, (called the *cestui que trust*,) because the *legal* estate is vested in the trustee. Nor is a trustee liable to be sued in a common law court by his *cestui que trust* for a breach of trust, though he may for money which he has received and refuses to pay over, in the action of trespass on the case in the assumpsit for money had and received. Archbold, Pleading, 35.

*Joint-tenants and tenants in common* may sue each other for waste by St. Westm. 2, c. 22, 2 Inst. 403, Co.Lit. 200, b. The English statute 4 & 5 Ann. c. 16, enables them to sue each other in *account* for receiving more than their proportion of the profits of the estate, but this act has not been re-enacted here, and at common law this action will not lie except where one has been made bailiff or receiver for another. Co. Lit. 172, a. 186, a. 200 b. So if one eject the other, or withhold possession from him, by an actual disseisin, such as turning him out of the premises, he may recover in ejectment, Co.Lit. 199, b. 3, Bur. 1895, and

and if one destroy the joint personal property the other may sue in trespass. Bull, N, P. 34,35. Joint tenants should join in all real and mixed actions and also in trespass and personal actions where they have a joint interest, and in ejectment the demise by them should be joint.

*Partners* cannot in general sue each other, for any matter connected with their joint interests, but must resort to a court of equity for an account; but if their union be dissolved and a balance admitted to be due, it may be sued for at common law like any other debt. 2 T. R. 479. Tenants in common must join in trespass *quare clausum fregit*, in case for nusance, in debt or covenant for rent, they may join or sever. Carth. 289. Tenants in common cannot recover in ejectment upon a joint demise. Archb. Pl. 48.

*Joint contractors*. One of two, who are jointly bound in an engagement to a third party, cannot sue the other for a non-performance of the contract. 2 B. & P. 124 n.

*Husband and wife*. No action at law can be maintained by a husband against his wife, or by a wife against her husband. 17 Ed. 3, 20 b. In personal actions for any thing due to the wife, before marriage, and for damages done to her person or personal property before marriage, the husband and wife must jointly sue; but as her personal property vests in her husband on the marriage, he alone can bring an action for any injury done to it during coverture, she cannot even be joined with him as plaintiff in such an action. Archbold. Pl. 37, 38, 39. For the recovery of real estate of the wife, they should both be joined as plaintiffs. 1 Chitty Pl. 63. For trespass committed on her land after the marriage, the husband alone or the husband and wife may sue. Arch. Pl. 38. In forcible entry and detainer they may join. ibid. and generally they may join, or the husband may sue alone, for matters relating to the wife's real estate, where the cause of action accrues after the marriage. ibid. The husband may sue alone for the pro-

duce of the wife's labor. ibid. 39. In actions for injuries done the wife's person or character, they should be joined as plaintiffs. But if the wife have a cause of action as an executrix, she must join in the action with her husband. 1 Salk. 282.

*A factor or auctioneer,* who sells the goods of another person on commission, may sue the buyer in his own name for them. Arch. Pl. 44. So a *master of a ship* may sue for the freight, or sue in trespass for detaining the ship. ib. 45.

*Assignees.* If a reversioner assign his reversion, the assignee may have an action of debt for rent. 3 Mod. 338. or covenant on such covenants as are with the land. 1 Saund. 237. So the purchaser of goods is entitled to sue in all actions relating to them, after the sale is completed by delivery. Arch. Pl. 45. The assignee of a chose in action, as e. g. of a bond or debt, cannot sue for it in his own name; but the assignee of a bail bond may by the provincial statute of 1778, 18 G. 3, c. 6, s. 3, 1 P. L. 211, in accordance with the English act 4 Ann, c. 16, sec. 20. (So in England may the assignee of a replevin bond. by 11 G. 2, c. 19, s. 23, but that provision has not been re-enacted in Nova-Scotia.) So by the law merchant a bill of exchange may be sued for by the endorser in his own name, and so may a promissory note by the provincial statute of 1768, 8 G. 3, c. 2, 1 P. L. 134. (copied nearly verbatim from the 1st and 2d clauses of the act in England of 3 & 4 Ann c. 9, made perpetual by 7 Ann. c. 25, sec. 3.) So assignees of a bankrupt may sue in their own names for his choses in action, by 1 Jac. 1 c. 15, s. 13.

*Executors or administrators* may sue in their own names as executors, &c. wherever the intestate or testator might have sued, except for injuries to his person or freehold.—Archb. Pl. 46.

In actions on contracts all the persons with whom the contract was made, must, if living, join in bring-

ing the action at law to enforce it. So in cases of bailment all those who bailed the thing detained, must join in bringing detainer, and in actions of covenant the rule is the same.—Archb. Pl. 48 49. So in actions *ex delicto* all the parties injured by the tort should join, if the injury were joint, but if they are interested in different degrees as tenant and reversioner in case of a nusance, they cannot join, nor can they in trespass for cutting down trees, but must sue separately. So if goods be taken out of the possession of a bailee, the bailor and bailee cannot join in the action of trespass for them.—Ibid. 50. Two persons whose several goods are distrained together, cannot join in replevin for them, nor can two join in assault and battery or false imprisonment, nor in slander.—Ibid. 50, 51. Partners must join in suing respecting the partnership property, even though one be an infant.—14 East. 210. If one die, the surviving partner or partners only, can sue, but a dormant partner need not join in a suit. Executors or administrators must all join in suing, even executors who have refused to act or are under age.—Archb. Pl. 51.

In personal actions one of several jointly interested, may bring an action in the name of all, yet any of the others may release the action and so render his proceedings fruitless.—7 Taunt. 421, and his only remedy will then be an action on the case against the releasor for the damage he has thereby sustained, except in the case of co-executors. A plaintiff joined in an action without his own consent, may apply to the court to stay the proceedings until he be indemnified as to the costs that might fall on him, in case the action should prove unsuccessful.—Archb. Pl. 53. In real or mixed actions however, the release of a joint plaintiff, will only affect his own share in the property.—ibid.

2. *Defendants.*—In the action of waste, the suit must be against the immediate tenant who occupies the land, and by whom the waste has been committed. So in the

old real actions the immediate tenant of the *freehold* (that is a possessor or claimant of a freehold interest in the land) must be defendant, though a tenant for years were in possession. In personal actions *ex contractu*, that is, on contracts, all the persons who made the contract with the plaintiff must be sued. This rule will apply even when one is an infant, unless his contract was legally void as on the acceptance of a bill of exchange, (But if one of two bound jointly for a debt by bond or parol promise be dead, the plaintiff may sue the other alleging the death in his declaration,) and this rule requires all the contracting parties to be made defendants, altho' the form of the action be *ex delicto* as in an action on the case against a carrier for not safely carrying goods.—Archb. Pl. 54, 64, 5, 6. In mixed or personal actions in form *ex delicto* the person doing the injury either personally or by his agent, is in general to be defendant. Infants are liable to be sued for torts or delicts committed by them, that is for every injury they may wilfully do to any person, as much as if they were adults, though not generally liable in actions on contracts. A married woman is also liable for torts actually committed by herself. Corporations are also liable to be sued for private wrongs. Judges are not liable to be sued for any acts done judicially, unless they exceed their jurisdiction, nor public officers for acts done ministerially within the scope of their official authority, and in general a person acting *bona fide*, in the discharge of a public duty will not be liable; but if he act, arbitrarily, carelessly or oppressively, the injured party may bring an action against him for damages. All who aid or direct those who commit an act of trespass, are in general liable to be sued for it. A principal is in some cases liable to an action *ex delicto* for injurious acts of wilfulness or negligence committed by his agents or sub-agents, and a master for those done by his servants.-See Epit. v. 2. p. 9–12. The owner of tame domestic animals is liable for mischief done by them, if occasioned

by negligence or misconduct on his part, but otherwise he cannot be sued.—1 Chitty on Pl. 64—70. If a contracting party be known to be only an agent in the contract of another, and acts avowedly in that capacity, he will not in general be liable to any action for non performance of the contract, but he may make himself liable by exceeding his authority. He will be personally responsible, if the non performance be caused by his own improper act, not authorized by his principal. There are also cases where he may incur liability, by paying over money to his principal, on which a claim is made by a third party, after receiving notice of such claim and a request being made of him to retain it. Auctioneers and stake holders are bound to retain money, until it is clear to which of the two parties it belongs, as they are in law the agents of both. Agents of government and public officers are not liable in general to be sued, for such contracts as they enter into on behalf of the public service. They may however make themselves personally responsible, when they enter into express and unqualified undertakings to that effect, and the public money passes actually into their hands for the purpose. If credit be given to the agent himself, he will be liable, and he alone will be liable in general to sub-agents employed by him, with whom the principal has had no bargain or privity of contract. 1 Chitty on Pl. 25 to 28. Dormant partners must be joined as defendants, though they need not join as plaintiffs, but the partners who were such at the time of the contract being made, and not the previous or subsequent members of a firm, are the proper parties to an action. In a suit against executors, you *must* include all who proved the will if they are living. So with administrators, all who have administered must be made defendants. You *may* include all the executors named in the will. If one executor die, the action must be against the survivor or survivors only.—Archb. Pl. 67, 68. Heirs who have lands descending to

them are liable at common law in the mother country to to be sued on bonds, &c. where heirs are named in the obligation, and to answer to the extent of the value of the estate descended, but the statute law of the province has arranged the payment of debts, by authorizing the executor or administrator to apply for the sale of the real estate, where the personal is not sufficient to discharge the debts due by the deceased. The possession of the legal (real) assets, and their disposal for the purpose of liquidating debts, being thus transferred from the heir to the executor or administrator under the direction of the governor and council, the liability which the common law imposed upon the heir can hardly be thought to affect him Nova Scotia. The reason of that liability in England appears to have been partly owing to the heir's being there, the only representative of the deceased as to his lands, as the executor or administrator is as to his goods. In this province the executor or administrator is not the mere personal representative of the deceased, but equally represents him in the administration of real estate and the fulfilment of such obligations as are charged upon it in general. It may be thought that an action might lie against the heir here, where no administration or probate existed; but it would seem preferable in such cases, and more consonant with the stat. of 1758, that the creditor should apply for administration to force the sale of the real estate, if the heir were backward. It may also be remembered, that the heir at common law is not exactly the same as the heir under our statute in intestate estates, and should not be considered as subject to every liability of the heir at common law, but but only to such as are consistent with the altered situation in which the act places him.

*Of Attornies.*

In the early stages of the common law, every party in a suit was obliged to appear in person in court to prosecute

or defend it. Exceptions were first made, by the king's granting special licence to an individual to act in a cause by attorney. The statute Westm. 2 c. 10, 13, E. 1. anno. 1285, enabled persons having lands in different counties, to constitute attornies to act for them at the circuit courts This being found convenient, and the stat. of Merton. 20, Hen. 3, c. 10, anno. 1235, having given persons in general liberty to act by attorney in the county courts, courts baron, and other inferior jurisdictions, the usage became general. The multiplication of business established them into a regular calling, and their numbers increased rapidly. Several acts of parliament were passed to regulate them. (See 4 Hen. 4, c. 18, & 33, Hen. 6, c, 7.) The courts also made rules to the same effect. The stat. of 1604, 3 Jac. 1, c. 7. required that no attornies should be admitted to practice in the courts at Westminster, unless they possessed a professional training, and a character for skill and integrity. There are many other acts of parliament, in this subject passed in the reigns of Geo. 2, 3 & 4, but they are of course not operative in this province. The admission of attornies was regulated by rules of the supreme court at first. The term of study was then three years. It was afterwards lengthened by another rule of court. The Provincial acts of 1811, 51 G. 3, c. 3, 2 P. L. 63, and the acts of 1818, 58 G. 3, c. 19, 3 P. L. 29 & 1824, 4 G. 4, c. 5, 3 P. L. 181, (the titles only of the two last are printed in the 3rd vol.)—were passed for regulating the admission, &c. of attornies. These statutes have all expired, and the subject is now provided for by the rule of the supreme court of 1826, which requires 5 years clerkship, and certain examinations to be undergone, before any student can be admitted as an attorney, and he must post up a notice in the prothonotary's office, at Halifax, for a month before the term in which his admission is to be moved for. It is also required that the attorney so admitted should attend the sittings of the supreme court at Halifax, during one year, after which he

may be called to the bar. Those who can produce a degree from any university, are allowed admission as attornies after only four years clerkship, and are also called to the bar at once on such admission. English barristers can be admitted to our bar on application. Attornies of the courts of Westminster Hall, are entitled to be admitted attornies here, and after one years attendance on the Halifax Court, are called to the bar. Colonial attornies and barristers are admitted *ad eundem*, if the rules of court of the colony in which they have studied, are such as require a regular course of instruction. The admissions all take place at Halifax. A student must be regularly articled and registered, when he begins to serve his time,—and his name, parentage, and education, must be reported to the committee of the bar, and approved of by them, before his indentures can be registered, or his service begin to be computed in his favor. Every attorney on admission has to take the usual state oaths to the government, and also to swear that he will act with fidelity to his clients. Besides these rules the members of the bar form a society, governed by very strict regulations, for the purpose of keeping up their honor and character as a body. They have collected a valuable library at Halifax, which will probably contribute more than any other circumstance, to raise the profession to the station it deserves to fill in an enlightened community. It contains a copious collection of ancient elementary law writers, besides a considerable number of works useful in practice, an extensive series of reporters in all the courts, most of the best works in the civil law, especially the older authorities, and a series of the lords and commons journals, and statutes at large. Access to it is very liberally extended, to all who are the least inclined to the serious study of their profession.

The fees of attornies are regulated by the provincial acts of 1787, 28 G. 3 c. 15, sec. 1. 1 P. L. 262, and 1822, 3 G. 4, c. 30, sec. 5. Counsel fees on trials by the provincial

act of 1794, 34 G. 3 c. 10. sec. 8, 1 P. L. 341, and the fees of solicitors and counsel in chancery by provincial act of 1820, 1821, 1 & 2, G. 4 c. 40, 3 P. L. 119, 120. The particulars of these acts will be given under the general title of *Fees.* The provincial act of 1820, 1821, 1 & 2, G. 4. c. 5, which extended the laws and ordinances of Nova Scotia to Cape Breton on its re-annexation or re-union by 11th clause, 3 P. L. 102, 103 permitted the attornies of that island to continue to act as attornies and barristers within the island only, unless individually admitted as as attornies of the supreme court at Halifax, giving the supreme court at Halifax, power to strike off the roll, any of them it should think not qualified.

The militia law (act of 1820, 1821, 1 & 2 G. 4 c. 2. sec. 11, 3 P. L. s. 2,) exempts attornies at law from militia duty, except they afterwards accept commissions in the militia. An attorney being an officer of the court and presumed by law to be in constant attendance upon it, is exempted from all offices that require *personal* service, as sheriff, constable, overseer of the poor, &c. (4 Burr. 2109, Dougl. 538, 1 Esp. R. 359. 2 Bl. R. 1126, 8. D. & E. 379.) He has also the general privilege of suing, and being sued in his own court (by writ of privilege.)—1 Tid. Pr. 75. He is also privileged from being arrested in civil actions.—ibid. These privileges, being intended for the benefit of clients as much as that of attornies, will not be allowed to one who has left off practice for above a year 2 M. & S. 605.

The stat. 1 Hen. 5, c. 4, anno. 1412, forbids any attorney who shall be undersheriff, or sheriff's clerk, receiver or bailiff, from practising as an attorney while he holds such office. It is also the rule of the courts at Westminster, that an attorney cannot be taken as bail in any action. 1 Tidd's Practice 79, and for many years past, the usage of the colonial government in conformity with the English statute 5, G. 2 c. 18. sec. 2. has been not to name *practising* attornies as justices of the peace.—

The same system has excluded attornies in practice from acting as deputy prothonotaries, clerks of the peace, or deputy registers of deeds, but the office of judge of probate is sometimes filled by attornies in practice. The chancery fee act just referred to, 3 P. L. 120, forbids a master or officer in that court from holding more than one office therein. An attorney is expected to exhibit care, skill, and integrity in his profession. He is liable to a special action for damages if through palpable negligence or ignorance on his part, his client should be a loser. In cases of gross misconduct, the court in which he practises, will interfere on complaint in a summary way, to compel redress, or punish the party delinquent.

A corporation aggregate, could not appear, except by attorney appointed under their common seal. Co. Lit. 66, b. but see 1 Salk, 192. An infant may sue by his *prochein ami* (next friend) or guardian, he must defend by his guardian. He is of course incapable of constituting an attorney. An idiot must appear in person—lunatics, it is said, must appear if under age by guardian, if of full age, by attorney. (3 B. C. 25, Co. Lit. 135, b. 4 Co. 124, b. Bac. Abr. tit. idiots and lunatics. G. 2, Saund, 333.) Femes coverts should also (when sued alone) appear in person. 3 Taunt, 261.

No person is permitted to appear by attorney in a criminal cause, but it is obligatory on the accused to be personally present, 2 B. C. 25. Attornies were anciently appointed in open court by the party for whom they were to act. 1 Wils. 39, but they may now be authorized out of court by a warrant of attorney. This should in strictness of law, be always in writing, and signed by the client, but for many purposes a verbal authority has been considered good. See Tidd's pr. 1, v. 88. An attorney having undertaken to act in a suit is bound to proceed with it. 14 Ves. 272. His warrant continues in force until a year and a day after judgment, unless countermanded. The at-

torney cannot regularly be changed without an application to the court. The death of the attorney puts an end to the warrant. 1 Tidd, Pr. 90.

The court presumes an attorney to have authority, and if he act without, the party must resort to his action. 1 Keb. 89, but if he be not responsible, the court will set aside the proceedings, 1 Salk, 88, 6 Mod. 16. At common law, the warrant of attorney might be filed at any time before judgment, but the provincial statute of jeofails, act of 1764, 4 & 5 G. 3, c. 1, s. 1, 1 P. L. 101, requires it to be done at the same term with the declaration or appearance, under penalty of £5 to his majesty, which may be recovered from the attorney by action of debt, bill, plaint or information, but the neglect will not affect the validity of the proceeding, if it it be filed at any time before final judgment. 1 Tidd. Pr. 91. The warrant of attorney has become in practice a mere formal paper drawn up by the attorney, and not seen or signed by his client, and this is sufficient probably to prevent the penalty in the statute from attaching. But where a warrant is given to confess judgment, it is signed by the party, and requires much care, and it it often advisable for an attorney to procure some formal authority in writing, especially where the legal claims of his client are to be ceded or compromised, lest his acts should be afterwards disavowed,—or where the client is a weak or illiterate person.

Errors in a warrant of attorney may be amended by prov. act of 1764, 4 G. 3, c. 1, s. 1, if they are clerical errors. 1 P. L. 99, and the want of a warrant is aided after verdict by the provincial act of 1764, 4 & 5 G. 3, c. 1. sec. 1, 1 P. L. 101. Any person who chooses, may either prosecute or defend an action in the common law courts without the intervention of an attorney, and may address the court or jury in his own cause, if he has not counsel engaged. Where counsel are employed in a civil suit the party himself cannot be heard, as he has made his elec-

tion that they should be heard in his stead. In criminal causes a prisoner is permitted to have counsel, who address the court, on the points of law they think available, and who also may examine the witnesses for him, and if the charge does not amount to felony, may address the jury in his stead, but in felonies this is (by a singular anomaly) forbidden, and the prisoner alone can address the jury. Yet he may read his defence, and thus avail himself of the suggestions of his advocate as to the line of argument it should pursue. Counsel are not allowed to sue their clients for any remuneration.

Until the forms of law proceeding and rules of practice can be reduced to the greatest simplicity, prudent men will not avail themselves of the right of dispensing with the services of well informed and careful attornies, whose habits render them expert in all the intricacies of a suit. The assistance of advocates is still more indispensable, and will continue to be highly valued, as long as eloquence and knowledge are at all appreciated. The individual who has business in a court of justice must bear in mind, that by entrusting his interests to talented and experienced members of the bar, he does the best he can to guard them It may be proper here to mention that besides the judges, jurors, barristers, and attornies, his majesty (or the governor for him) appoints an *attorney and solicitor general*, and has also certain counsel to assist them in crown business, who are called *king's counsel*. The duties of these officers are connected with all the courts of common law and equity, but more especially with criminal jurisprudence, in treating of which they will be more particularly adverted to. The *sheriffs* of the several counties are also officers of the superior courts of common law and equity, and carry into effect the writs and orders directed to them by these courts. The *clerk of the crown* and *prothonotary* (offices united by patent,) acts, by a deputy, as the secretary, register, and keeper of records to the supreme and inferior

courts at Halifax, and his deputies perform the same duties respectively in each of the other counties of the province. The supreme court has also a *crier* to make proclamation in open court, and to call the witnesses, &c. The sheriff of the county attends its sittings to preserve order among the bystanders, and to return or receive writs and orders, and the *constables* also attend to aid him in keeping silence and decorum.

## CHAPTER VI.

### *OF THE WRITS BY WHICH AN ACTION MAY BE COMMENCED.*

The general rule of the supreme court, Michaelmas term, 7th year, Geo. 3d, directed, "that all original "actions and proceedings thereon in this court, may be "as near as maybe agreeable to the laws of this province, "and conformable to the courts of Westminster hall, in "England." 1767. The forms used in this province, before and since the rule was made, have necessarily been much varied from those in practice in England. In considering the writs and proceedings by which a suit is begun, it is obvious, that there is much greater simplicity and less expense or delay in the colonial practice, than in that followed in the mother country. The writs issued at a heavy expense under the great seal (called original writs,) which are in certain actions necessary in England, and by which every action there must commence, by the legal fiction which assumes them to have been issued in all cases, and the various and fantastical forms of *mesne process* called bills of Middlesex, *latitats, testatum capias,—quo minus, ac etiam,* &c. all con-

taining legal fictions, and fraught with heavy expenses, are unknown in our law proceedings. "All original "process and even writs of *dedimus potestatem* to commis- "sioners to take renunciations of dower are issued by the "court of common law itself, and tested in the name of "the chief justice, and the chancery issues no writ in the "form of a *praecipe* or *si te fecerit securum*, or any other "process whereon to found the proceedings of the courts "of common law, except writs of *audita querela*, which "must necessarily be issued by the chancellor, and instan- "ces of the issuing of such writs of *audita querela* I have "known in different colonies; but I remember no case "wherein the chancellor issued any other writ to enable "the courts of common law to hold plea; and by reason "*that which in Westminster Hall is mesne process*, viz.: the "summons in dower, the capias in trespass, &c. *are the* "*original process in the colonies.*"—Stokes on colonial law, 257—8. We have derived from our early intercourse with Massachusetts, (anterior to the revolution in America)—a more simple formula of law proceedings, as well as most of the improvements on the law of real estate noticed in the last volume. The mode of proceeding at the commencement of a personal action is threefold.—1. By summons. —2. By arrest, or—3. By attachment of property.

Where the plaintiff and defendant do not reside in one county the writ (in the supreme court) may be issued from Halifax, and made returnable there, by rule of the supreme court—Mich. T. 7 G. 3. If they both reside in one county the writ must be issued from the prothonotary's office of the county, and be returnable at the next supreme court held there. The writ in every case is directed to the sheriff of the county where the defendant is to be found (or in case of attachment against an absent debtor, where the property is to be discovered.) I will show first, the forms of proceeding in actions where *the claims for debt or damages* is above £20. as suits under that amount are conducted

in a different manner, forming, what is called *the summary* jurisdiction of the supreme, inferior, and other courts which requires a separate section.*

*Of summons.*

The provincial act of 1795, 35 G. 3 c. 1. sec. 7, 1 P. L. 346, directs that " all writs of summons, to be issued " from any court of record, within this province shall be " directed to the sheriff of the county within which such " writ is to be served." It goes on to give the form of the writ, and further enacts that a copy of the summons "shall in all cases be served by the sheriff, upon the " defendant or defendants." This writ is dated in the body of it, on some day in term time, whether issued in the term or in the vacation following. The real date of its' issuing is put on it, by the deputy prothonotary, when he affixes to it his signature and the seal of the court. It is witnessed (or tested) in the name of the chief justice of the court from which it issues. These remarks apply as well to attachments and *capiases* as summons, and also to all the other writs or process used in a civil cause. They are all also, by the practice of the court, to be signed by the party, or the attorney of the party at whose instance they issue. Those writs are made returnable on a certain day in the term next, after that from which they bear date, which is either (in the supreme court,) the first or the second tuesday of the term. The summons notifies the defendant to appear at that day in court, and specifies the form of action, and also the extent to which the plaintiff claims damages.

*Of arrests.*

The form of writ of capias, used in the practice of our supreme courts, and courts of common pleas, was ori-

* £50, is substituted for £20, by the temporary act of 1832. 2. W. 4, c. 53. Mr. Roach's bill.

ginally adopted under some laws of the province, since expired or repealed, or acts of council, but it is of less moment to trace its origin, as it is confirmed by long use in its present form, and derives its legality chiefly from the provincial act of 1778, 18, G. 3 c. 6. sec. 1 & 2, 1 P. L. 211. "Be it enacted by the "Lieutenant-Governor, Council and Assembly, that in "all causes where the sum in demand shall exceed three "pounds, the provost marshal (or sheriff,) or his deputy, "may arrest, imprison or hold to bail, any debtor or "debtors, or attach the goods, chattels or estate of such "debtor or debtors, upon the plaintiff in such actions, his at-"torney or agent, making and subscribing an affidavit in "writing, before a judge of the court, from whence such writ "shall issue, or in the absence of such judges, before any "one of his Majesty's justices of the peace, that the defen-"dant is justly indebted to the plaintiff in any sum excee-"ding three pounds, which affidavit shall be filed in the of-"fice of the clerk of the court, from whence the writ shall "issue, and the sum specified in such affidavit, shall be in-"dorsed on the back of the said writ in the form following, "by oath for (in words at length) for which sum so in-"dorsed, the provost marshal, sheriff, coroner, or their de-"puties, shall take bail, or make attachment as aforesaid, "and for no more; any law, usage or custom to the con-"trary notwithstanding."

Sec. 2. "And be it further enacted, that if such action "shall be brought by any agent, factor or attorney, in the "name of his principal, if absent, upon producing an affi-"davit of the debt of his principal duly authenticated, ac-"cording to the laws of England, or the usage and prac-"tice of the plantations in such cases, and upon the said "affidavits being respectively filed as aforesaid, then the "said judge shall indorse the sum so sworn to, and bail "shall be required, or an attachment be made according-"ly.". The affidavit (in the supreme court) may be made

in the country before a commissioner. By the provincial act of 1763, 8 G. 3, c. 7, 1 P. L 140, 141, sec. 1, the chief justice in conjunction with one or more of the judges of the supreme court, may by commissions under the seal of that court " from time to time as need shall require, " impower such and so many persons, other than common " attornies and solicitors, as they shall think fit and neces- " sary, in all and every the several counties in this pro- " vince, to administer an oath in writing to any person " where it shall be necessary to hold any defendant to bail " upon any original writ or process issuing out of the said " court, and to mark the writ for bail accordingly." The Chief justice is authorized " by warrant under his hand " and seal, to appoint in any of the counties of this province, " such fit and proper persons, as he shall think convenient " to be commissioners to take affidavits, to be used in all " causes subsisting, or which hereafter may be instituted " in H. M. Supreme Court." Act of 1794, 34 G. 3, c. 10, sec. 7, 1 P. L. 341.)

An arrest must be made by actually taking hold of or touching the defendant's person, and cannot be made by words only, but if the officer tell the party he arrests him and locks him in a room, this is an arrest. 1. Tidd, Pr. 217. The outer door of a defendant's house cannot be broken to arrest him, but if he has been arrested and fled, it then may. This privilege is confined to the house of the party himself, as no one is permitted to make his house a sanctuary for the protection of his friends. The civil law appears to have even forbidden the service of a summons upon a man at his own house. 2 B. C. 288, 6 Taunt, 246. The act of 1775, 15 & 16 G. 3, c. 4, s, 2, 1 P. L. 198, allowed the affidavit of the debt to be made before a justice of peace when the plaintiff is sick, instead of his going before the judge, Clerk or Commissioner, but it is not clear whether this act is not repealed by the act of 1778.

*Exemptions from arrest.*

The exemptions from arrest in the English law are numerous. The sovereign is exempt from all suit or process, except what is made in the shape of a petition in his courts. His servants in ordinary are also privileged from arrest for debt, unless leave be obtained first from the lord chamberlain.—5 D. & E. 686. The ambassadors of foreign states, or envoys* and their domestic servants are by the law of nations (declared by the British statute. 7 Am. c. 12.) exempt from arrest and they with goods of such foreign minister are protected against the service of any writ or process. Representing the person of the sovereign or state from which he comes, a foreign minister, with his equipage and suite, are not considered amenable in ordinary cases, either to the civil or criminal jurisdiction of the country in which he resides. The reader will recollect that it was thought an act of singular firmness and decision in the protector Cromwell, to cause a member of the Portuguese embassy, to be tried by the English judges for murder, and executed after a clear conviction.

Peers are also in England exempted from arrest in civil suits, and so are peeresses. 1 Tid. Pr. 194. Members of the house of commons during the siting of their house and for 40 days before and after, are protected from civil arrest, which in effect gives them the privilege as long as they continue members. Attornies and barristers are also exempted from arrest for debt.—ib. 195. Parties in a cause, and witnesses, and bail are protected by law from being arrested for debt, while actually coming to, attending on, or returning home from any court of justice in which they have actual business to transact, and this privilege is liberally interpreted.—ibid. 198. This extends to courts martial by the mutiny act.—Sec. 3, G. 4. c. 13. sec. 28. English stat. Executors and administrators are not liable to arrest as such, except in an action of debt on a judgment, after a *devastavit*, or on a personal promise to

pay a debt or legacy. So a married woman is exempt from arrest for debt, though her husband is liable to be arrested in her stead. ibid 196. The non commissioned officers and men of the army, navy and marines, are exempted from arrest except for a debt of upwards of £20, and a particular affidavit is required. This extends to all the King's dominions. 1 Tidd. Pr. 201, 202. Members of a corporation sued as such. Clergymen while actually performing divine service, are also exempted from arrest. So are militia men during days of training, by provincial act of 1826, 7 G. 4, c. 16, sec. 6, 3 P. L. 262. Insolvent debtors can never be again arrested for the same debt from which they have been discharged under the provincial act, unless convicted of perjury in the oath they have taken. Provl. Act of 1763, 3 & 4 G. 3, c. 5, sec. 7 & 8, 1 P. L. 93.

In some actions the defendant cannot be arrested—in debt on a penal statute, in actions against bail, or against the sureties in replevin. Nor for the debit side of an account, where credit should have been given. 1 Tidd. 172, 173. Nor where the defendant has already been arrested for the same cause of action. ib. 174. Nor in an action of debt on a judgment. ib. 177. By the provincial act of 1791, 31 G. 3, c. 3, 1 P. L. 284, which is copied from the English act 29 Car. 2, c. 7, sec. 6. no process of law can be served or executed on the Lord's day, (except in cases of treason, felony or breach of the peace) and an action is given for damages to the aggrieved party for any act of the kind, as if the officer had acted without writ or authority : and this act has been held to render void the service of a notice of plea filed on a Sunday. 8 East. 547. An arrest must be made within the bounds of the county to whose sheriff it is directed. It cannot be made in any place where the King's justices are actually sitting. 1 Tidd. Pr. 217. The English law also forbids arrests within the precincts of any palace or residence of the

monarch. The governor of any colony, while in the exercise of his office, representing his majesty and acting in his stead, should, according to general principles, be considered entitled to the same or nearly the same privileges as an ambassador. It would be manifestly inconsistent with his situation that he should be allowed to prosecute any action in the capacity of a suitor within the courts of his province, and it would be exceedingly detrimental to the service of Government if he could be made a defendant there in any cause. The governor of another colony, while on public duty, although out of the limits of his government, appears equally entitled to exemption from suit or arrest. Members of the general assembly have been held by our Supreme Court to be entitled to exemption from civil arrests during the sitting of the legislature, and for a reasonable time before and after to enable them to return to their counties. The provincial act of 1818, 58 G. 3, c. 11, 3 P. L. 24, 25, enables a plaintiff, from whose execution a member of either house has been delivered by reason of privilege, to take out a new execution after the time of privilege has expired, and relieves the sheriff from any action for discharging any person so entitled to privilege of the assembly.

### *Of attachment.*

There are two descriptions of attachment: the one a writ by which a superior court may direct a person to be arrested who has been guilty of a contempt of court, or of a disobedience to some rule or order of the Court, which is construed to be a contempt. In the court of chancery it is commonly used where a defendant neglects to appear, or where a party fails in making any payment or doing any other thing for which the court has passed an order. The other is a writ of attachment against the goods of a defendant; and this was a kind of process partaking of the na-

ture of a distress, and was like that in use to enforce the appearance of a party. There is also by the custom or local law of the city of London, a writ of foreign attachment, by which goods or credits of a defendant may be attached in the hands of a third person, who is called the garnishee.

The attachment against the person for contempt is in use in our provincial courts. The writ of *attachment and summons* is used as a writ, by which a suit may be commenced in this Province. It is a combination of the summons as already described, with an attachment of the defendant's property to the value of the sum sworn to be due as a debt. It differs from the old fashioned English writ of attachment by which the defendant's goods were seized to compel him to appear, and if he made default were forfeited to the king or lord. (See Kitchin's jurisdiction of courts, 157, 8. Year book, 9 H. 7, fo. 6.) for under our attachment, the real as well as personal property may be taken, and when attached are not forfeited, but remain the property of the defendant, subject to the amount of any judgment which the plaintiff may recover in the suit, which by the attachment is in the nature of an incumbrance or lien on the property. When, however, there have been consecutive attachments at the suit of different creditors levied on the same property, it has been the decision of our courts that if it was not sufficient to pay all the attachments, they should be accounted as having a lien in order of priority as they were received by the sheriff, but only to the amount of the debt sworn to in each. (See minutes of M'Donald v. Kidston ; Mitchell v. Ring ; Mitchell v. Raymur, and Hartle v. Hartle, in the appendix.) Attachments of real estate or rents are required to be registered and the appraisement and description of the property must also be registered without delay, by act of 1832, 2 W. 4, c. 51. The attachment is to bind the real estate only from the registry of the description and appraisement, and its effect to cease in 30

days after final judgment signed.—See 2 vol. Epitome, p. 261—263.

The writ of attachment, as established by rules of court, by usage, and by statutes recognizing it, had a most extensive operation in this province until a very recent date. On a creditor making oath that so much money was due to him from the debtor, an attachment could be taken out under which the real or personal estate of the debtor was immediately seized by the sheriff.* This was attended with much inconvenience. On a slight suspicion that a debtor was about to abscond, or was wasting the funds out of which he was to pay his debts—or upon the creditor being urged for money to force the debtor to pay more quickly,—or perhaps from ill humor towards him—or slight suspicion that his circumstances are declining,—a creditor would attach in order to gain a prior security or to hasten payment. On this, every other creditor who obtained intelligence of it, flew to his attorney, and writ after writ issued, while there appeared any chance of the property meeting the amounts sworn to. Each of those writs usually produced the costs of a suit and judgment, and the fees for custody of the goods, sale expenses and poundage, &c. became often the cause of an insolvency, by adding a weight in addition to to the debts of a party who, under a different system, might have paid all his creditors with a little exertion. But perhaps the worst feature of this system was the precarious and miserable condition in which it kept all persons in trade whose means were small. The anxiety of vigilant creditors to obtain the priority of attachment, where there appeared any risk of loss, kept the terror of this writ hanging over a great number of persons, and many worthy and industrious families were ruined and expatriated by the direct and in-

* In Massachusetts the attachment issued without even an affidavit of the debt, and I believe does so yet.

direct effect of these attachments. As no bankrupt law existed in the colony, and the attachment system had been in operation from an early period, the legislature very prudently hesitated to alter it, when it first was publicly complained of, fearing lest its abrogation might be attended with worse mischief than its continuance, but at length in 1824, the Provincial act of 4 & 5 G. 4, c. 7, sec. 3, 3 P. L. 182, enacted, "that hereafter no writ of attachment "shall be issued in any case except against absent or ab- "sconding debtors, and for the recovery of debts contract- "ed prior to the passing of this act." This by the 5th section was to continue for 5 years, being intended as an experiment. The Assembly in 1829, 10 G. 4, c. 19, extended it to another period of 5 years, and it seems probable, from the general opinion entertained on the subject, that it will be made a permanent law.

I have not had it in my power to make any extensive research into the history of attachments, as a part of the colonial system, having but few of the statutes of the old colonies within my reach.* I find, however, an act of Jamaica in the year 1681, act 19, sec. 11, which authorizes the issuing of attachments against the personal property of debtors leaving the island, or on a return of *non est inventus*, to process against concealed or absconding persons. In an abridged statute of Virginia, act of 1665, c. 1, an attachment appears to be grantable (upon suspicion of the debtor's removal from the country) by any justice of the peace, the debtor being at liberty to replevy the articles taken under the writ; and the creditor (before taking it out) being compelled to give security to pay damages if cast in the action. An act of Maryland, 4 Will. & Mary, 1692, p. 7, directs that no attachment shou'd issue until a summons had first been taken out, and *non est in-*

* There is an attachment of goods in the old forms of the Admiralty. See Clarke's Praxis.

*ventus* returned on it, and the same act authorizes the attachment of the goods of absent debtors.

*The attachment under the absconding debtors act*, as it is called, is now the only attachment in use in the province against the lands or goods of a party defendant. In England if the defendant absconds and cannot be arrested or served with process in person, the only remedy of the creditor is to cause him to be *outlawed* for his supposed contempt of the king's writs, proclamations, &c. His property is then seized into the hands of the king's officers, and the creditor by permission of the crown, receives payment out of the proceeds. (See. 3. B. C. 282. 1 Tidd's practice, 127, 135.) This proceeding is expensive and dilatory, and in lieu of it the attachment issues against the estate and effects of the absent or absconding debtor, on an affidavit of the facts. (There is a proceeding in chancery of an analogous nature, against a defendant who refuses obstinately to appear, or has absconded, by which after many steps previous, a commission of rebellion is issued, and finally the effects real and personal of the contumacious defendant are taken under a writ of sequestration, similar in most respects to an attachment. This tedious and expensive form has been inconsistently retained by the provincial courts of chancery, while the common law process has been so much simplified by abaning the proceedings in outlawry and giving the attachment in the first instance.)—Mr. Stokes, p. 264, says, "Process of outlawry hath never been issued in any colo-"ny either in civil or criminal cases, that I can learn."

The provincial act of 1761, 1 G. 3 c. 8. 1 P. L. 70—amended by the act of 1820, 1 & 2 G. 4 c. 18, 3 P. L. 109, regulates the proceedings in suits against absent or absconding debtors. The first section of the act of 1761, enacts "that it shall and may be lawful for any person "entitled to any action for any debts, dues or demands "whatsoever, against any person absconding or absent

" out of this province, to cause the goods and estate " of such absconding or absent person to be attached, in " whose hands or possession soever, the same are, or may " be found: and the attaching of any part thereof shall se- " cure and make the whole, that is in such person's hands " liable in the law to respond the judgment to be recovered " upon such process, if so much there be, and no further, " and shall be subject to be taken in execution, for satis- " faction thereof, or so far as the value thereof will extend, " and the person in whose hands they are, shall expose " them accordingly." It is of importance to ascertain to what description of cases the proceedings under this act are applicable. The principle of proceeding by attachment against absent debtors has been I believe universally adopted in all the North American Colonies of Great Britain, and has been the general substitute for the process of outlawry. It is evident that the act does not give to the colonial courts any additional jurisdiction, but merely adds the power of seizing the debtor's effects to answer any judgment against him. This does not then give to the court any power of entertaining any suit or passing any judgment, where the relative situation of the parties or the nature of the demand, would prevent it from exercising jurisdiction. In the case of Cavan v. Stewart, 1 Starkie 526, in which the validity of a judgment obtained under the absent debtor laws in one of the West India Colonies, came in question, Lord Ellenborough said " It " is perfectly clear on every principle of justice, that you " must either prove that the party was summoned, or at " least that he was once on the island."—" The party must " be proved to have been upon the island, in order to " make him an absentee. If that fact had been establish- " ed, his absence might perhaps have been inferred from " a return of *non est inventus* to the process issued against " him." See also Buchanan v. Rucker, 9 East. 192. *

So in a case in the vice admiralty court at Halifax, in the year 1811. The treasurer of Greenwich hospital, against the prize agents of the Bermuda. Dr. Croke in his decision says " I think there is some weight likewise in the observation made by the Solicitor General, that a sailor " coming here for a short time, in his Majesty's service, " can scarcely be the person intended by the act, under

---

BUCHANAN vs. RUCKER.

Lord Ellenborough. " By persons absent from the island, " must be necessarily understood, persons who have been present and within the jurisdiction, so as to have subject to the " process of the court; but it can never be applied to a person, " who for aught appears never was present within, or subject " to the jurisdiction. Supposing however, that the act had said " in terms, that though a person sued in the island, had never " been present within the jurisdiction, yet that it should bind " him upon proof of nailing up the summons at the court door " how could that be obligatory upon the subjects of other countries? Can the Island of Tobago pass a law to bind the rights " of the whole world? would the world submit to such an assumed jurisdiction? The law itself however, fairly construed, " does not warrant such an inference: for " *absent from the* " *island*" must be taken only to apply to persons who had been " present there, and were subject to the jurisdiction of the " court out of which the process issued: and as nothing of that " sort was in proof here, to shew that the defendant was subject to the jurisdiction at the time of commencing the suit, " there is no foundation for raising an assumpsit in law, upon " the judgment so obtained."

*Abstract of the case in the margin of the report.*—The law will not raise an assumpsit upon a judgment obtained by default in one of the colonies against a party, who upon the face of the proceedings appeared only to have been *summoned* " by nailing up a copy of the declaration, at the court house door;" it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court at the time of the suit commenced or afterwards: although by a law of the colony, if a defendant *be absent from the island*, and have no attorney, manager or overseer there, such mode of summoning him shall be be deemed good service: for the *absence* thereby intended, is of one who had been *present* and subject to the jurisdiction; though even if had been meant to reach strangers to the jurisdiction, it would not have bound them.

" the description of an absent or absconding debtor. To
" be absent or to abscond implies a previous residence,
" and how can a person be considered as a resident who
" accidentally visits this harbor in one of his Majesty's
" ships, and has nothing like a domicile within the pro-
" vince. In the caser of Sill v. Worswick [1 H. Blackst.
" 690, 691, and Hunter against Potts. ibid. 182, which
" were cited at the bar, provincial laws were held not to
" have a complete operation for the benefit of persons who
" went into a colony merely to take advantage of those
" laws, how then shall such a temporary and involuntary
" visit give them effect to any person's detriment."

The act on this subject in the state of New York is described by Mr Kent, 2 Com. 327, 8, 9. It has been held in the courts there, that " it's provisions do not apply to a " foreign creditor, against a foreign debtor not domiciled " there, and whose debt was not contracted within the " state." ibid. 328, 9. The case of Brickwood v. Miller, 3 Meriv. 279, throws some additional light on this subject. In that case the carrying on trade under a firm established in the colony, was considered as subjecting the partner in London to the effect of the colonial attachment laws. The principle seems to be, that a party may be considered an absent debtor so far as to render his effects liable to attachment, if he either in person, or by his agents contract debts in the colony. The attachment under the first clause of the act of 1761—must be preceded by an affidavit of the debt as in the case of a *capias*, and it appears necessary that the absence or absconding of the defendant should be stated in the affidavit. The usage in all attachments has been for the sheriff, if sufficient security be offered him to deliver up the goods to the defendant, or his agent, and in the case of perishable goods, or live stock, if after three days notice of the appraisement of the articles attached, such security be not given, an application may be sustained for their immediate sale.—Act of 1795, 35

G. 3 c. 1. sec. 9, 1 P. L. 347. The property liable to attachment under the 1st clause of the act of 1761, must be the visible property of the defendant, and real as well as personal effects are liable to be taken. The 2d clause of the act directs the mode of proceeding, to secure for the benefit of the creditor the property of the absent or absconding debtor, not exposed to view, and the sums due to the debtor by third parties or balances and credits in the hands of his agents.

It is required for this purpose, that the party applying for process should make affidavit before one of the judges of the court from which it is sought, (or in the absence of all those judges, before any justice of the peace,) swearing to a specific debt—which is to be indorsed on the back of the writ, and signed as on a *capias*, and also swearing that the person "he is about to summon is the factor, agent or "trustee of such absent or absconding person, or that he "hath goods, effects or credits of such absent person, in his "possession, or under his management and control." Act 1820, 1821, 1 & 2 G. 4, c. 18, sec. 1, 3 P. L. 110. From the act of 1824, 4 & 5 G. 4, c. 7, sec. 3, 3 P. L. 182, which restrains the issuing of attachments, except against absconding or absent debtors, it seems necessary, at least prudent, that the absence or concealment of the debtor should be distinctly shewn by the affidavit of the creditor, that he believes him to be absent or absconding; the return of *non est inventus*, (which appears to have been required in some of the older colonies before an attachment isued) not having been necessary among us.

The 2d clause of the act of 1761, directs the proceedings to be against the agent, "where no goods or effects "of such absent or absconding person in the hands of his "attorney, factor, agent or trustee, shall be exposed to "view or can be come at, so as to be attached." This may be construed fairly, to extend to cases where the visible property is insufficient to meet the demands of the credi-

tor, otherwise the act might be rendered nugatory by a designed exposure of a small part of the effects, where there was a fraudulent concealment of more extensive funds, I should think that a creditor who has attached the visible property of an absent debtor, which on appraisement will not cover his demand, may afterwards proceed to summon agents in order to secure the residue of his debt without waiting for the return day of the process, taken out under the first clause. The 2d clause goes on to direct, that the creditor should file a declaration against the debtor in the common pleas court of the county, where the agent lives. (The supreme court exercises the same jurisdiction, although the common pleas only is named in the act.) The agent, attorney, factor or trustee (under which are comprehended by implication, all persons in possession of effects of the debtor, or indebted to, or accountable to him,) is then to be served with a summons, with a copy of the declaration annexed, 14 days before the sitting of the court. (The filing of the declaration does not seem to have been intended to take place at the time of service of the summons, but at the return.) This is declared to be sufficient to warrant the trial of the cause, without further summons to the party defendant.

Where the debtor is "an inhabitant or hath for some "time had his residence within this province," a copy of the summons with an "attested copy of the declaration "annexed, shall also be left at his dwelling house, lodg-"ing or place of his last and usual abode, fourteen days "before the sitting of the court." If the attorney, factor, agent or trustee so summoned, shall desire it, he "shall "be admitted to defend the suit on behalf of his principal "throughout the course of the law." The courts are in the practice of permitting the defendant, (if he makes his appearance) or his attorney (though not summoned as such by the creditor) to enter an appearance and defend the

suit in an action under the 1st or 2d clauses of this act. Where there is a doubt of the legality of the attaching creditor's demand, the subsequent attachers have in some instances appeared in the name of the absent debtor, without authority from him, as they have an interest in destroying or reducing the demand of the previous attacher; but their right to this benefit has not I believe, been established by any decision, and may be much questioned. The effect of the return of an absent debtor, and his appearing and defending the demand, upon the lien created over his property by the attachment is also an unsettled point. While the general power of attaching was in force, the question could not arise, but it now becomes of some moment. It would often prove hard, if a temporary journey out of the province, where a party is in good credit, could enable a real or pretended creditor to place an incumbrance over real or other property to exist until the demand should be decided, when the general power of attaching has been abolished by law. Where the agent chooses to defend the suit, the act gives a delay of two terms, that the absent party may receive notice from him of the proceedings. At the third term unless "special matter" be alleged and allowed to delay or put an end to the proceedings, the cause must peremptorily come to trial."

By the act of 1820, 1821, the agent is to retain in consequence of the summons only the amount sworn to by the creditor, and a sum not exceeding £30 to cover his own costs and those of the plaintiff, if the latter should obtain judgment. sec. 2, 3 P. L. 110. The 2d clause, act 1761, binds the whole of the "goods, effects, or credits" of the debtor in the hands of the agent at the time the summons is served on him "to the value of such judgment" as the plaintiff may recover in the suit, and forbids his disposing of them to any other purpose. This lien of course is restricted by the act of 1820, 1821, as just quoted. The

proceedings named in the 2d clause, viz. the filing the declaration, the summons and copy of the declaration left at the last residence of the defendant, the imparlance at two terms successively, and the peremptory trial at the third term, have been all considered as applicable to the cases under the first clanse of the act, where no agent was summoned, and so acted upon. The process is often a combination of the attachment under the first, and summons of the agent under the second clause, both united in one writ. In trials under the first clause of the act, the proceeding is *ex parte*, and the courts consider it their duty to see that the plaintiff proceeds regularly in his proof. Thus in the case of M'Rae v. Woodward, Supreme Court, at Halifax, Michs. T. 1823, on the trial, the plaintiff had proved his debt, (one of long standing) but had not proved promises made within 6 years before the commencement of the suit. Judge Halliburton said "As the statute of "limitations, to be taken advantage of must be pleaded; "and in this form of action, there being no defendant in "court to plead; it is the duty of the court to confine the "plaintiff to proof that is not affected by the statute of li-"mitations."

The 3d clause of the act of 1761 enacts, that if the agent come into court at the first term after he is summoned [by the act 1820, 1821, 1 & 2 G. 4, c. 18, s. 5, 3 P. L. 110, the agent may appear at the Supreme Court, at its first sitting in the county where he resides, although the action be commenced elsewhere] and shall submit to an examination upon oath (the 5th section authorizes the Judges to administer this oath) and the court shall be satisfied that he had not any goods, effects or credits of the defendant, a judgment of non suit shall be given in his favor, and the plaintiff shall pay him his costs. The 4th clause of the act of 1761, 1 P. L. 71, and the act of 1820, 1821, 3 sec. 3, P. L. 110, direct that the agent who being summoned does not appear and acknowledge the goods

that may be in his hands, and defend the action or submit to the examination under oath, shall be bound to pay costs to the plaintiff, and be also liable to process for contempt of the court. The act of 1820 and 1821, 4th clause, directs that the agent should, on his appearing in court, if required by the plaintiff, disclose whether he has goods, &c. in his hands adequate to the amount of the creditor's claim, or if less, to what specific amount. The same act, 3d clause, enacts that the plaintiff shall not proceed to the trial of his cause against the absent or absconding debtor, until the agent shall have first appeared in court, and declared that he has goods, &c. of his principal. The 5th clause of the act of 1761, directs that if the agent, after summons, shall "transfer, remit, dispose of or convert" any property or credits of the defendant, so that there be not enough left "to satisfy the judgment," or if he "shall "not discover, expose and subject" them to the execution, he "shall be liable to satisfy the same of his own proper "goods and estate, and as of his own debt; and a writ of "*scire facias* may be taken out of the same court, and served "upon him as the law directs, to appear and show cause, if "any he have, to the contrary," on default of appearance, or neglect to disclose the property on oath, "judgment "shall be entered up against him of his own proper goods "and estate, and execution be awarded accordingly." The 6th clause of the same gives the agent a right to receive costs from the plaintiff, when he the agent has discovered fairly what goods, &c. of the principal he has, and does not prevent their being levied on under the execution. The 7th clause makes the agent acquitted and finally discharged of any claim on the part of his principal, where goods, &c. are taken out of his hands under this act, and if sued by the principal, empowers him to plead the general issue and give the act in evidence. The 8th clause entitles any person, against whom judgment shall be obtained, as an absent or absconding debtor, to a re-hearing of

the cause " at any time within three years after such judg-" ment," and directs that " before any execution shall issue " on such judgment," the plaintiff shall give " sufficient " security to the satisfaction of the court, for the repay-" ment of all such monies as may be levied by virtue of such " execution, in case the said judgment should be revers-" ed on such rehearing as aforesaid."

In the vice admiralty case before quoted, Dr. Croke decided that prize agents could not be considered as agents under the construction of this act. This decision appears to have been chiefly grounded on the words of the prize act, restricting the disposal of prize money in such a manner that it could hardly be considered the property of the seaman until he actually should receive it out of their hands, the prize agents being rather the officers of the admiralty court than agents of the parties, and the money being as it were, in the custody of the court of admiralty. His decision however did not coincide with the ideas entertained by the judges of the common law courts of the province at that time.

In the case of Rule v. Robertson, supreme court at Halifax, Trinity term, 1823, where a copy of the *summons only* was served on the agent, and no declaration filed, a judgment of non suit was given with costs to the agent.

In the case of McDougal v. Hinshelwood, in the same court, Michaelmas term, 1823, the court was applied to on the part of the defendant, for an order to strike out the words absent or absconding debtor, from the proceedings on file, the defendant's attorney at law having filed an appearance in the usual form, but the chief justice (Blowers) refused to grant the rule, as he said that a party might be absconding to day and not so to-morrow. The Court said that the rule of practice was established, that on entering an appearance to an action, commenced under the first section of the absconding debtor act (such as the case under discussion was) by filing common bail, and a warrant

of attorney, and giving notice of appearance, the absconding character of the action was cured and effaced.

If a party has an unliquidated demand resting in contract, he would appear entitled to attach, or to summon an agent, under the expressions of the 1st clause "entitled, to an action for any debts, dues or demands whatsoever," which are also referred to in the 2d clause, and this construction has been put upon the New York absconding debtor act.—See 2 Kent Com. 328. The holder of a security not yet due, will probably be unable to avail himself of the act, as the affidavit must state the debt as due. The acts use the several expressions "attorney, factor, agent, or trustee," throughout their clauses, which are liberally interpreted by the courts, so as to include generally, all persons having possession or control over property of the debtor, and all upon whom he would himself be entitled to make a claim for any sum of money, the act being intended to bring all the available means the defendant possesses within the reach of the law, to satisfy those creditors whose demands he left unsettled in departing.

The New York act is more analogous to the bankrupt laws, as it gives the effects to trustees, for the general benefit of all the creditors, who receive dividends of the proceeds; and the debtor is expressly allowed to come in within 3 months, and contest the fact of his having absconded. Notice is given publicly, after which all sales or assignments made by the debtor are void.—2 Kent. Com. 327, 8. A question of difficult determination has frequently arisen in the American courts, respecting the conflicting claims of English assignees under a commission of bankruptcy, and creditors in America attaching the property of the bankrupt. It appears now to be the settled rule in the courts of the United States, that a prior assignment in bankruptcy under the English laws will not be permitted to prevail, against a subsequent attachment by an American creditor of the bankrupt's effects found in

the United States, as their courts will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them, under their own control. 2 Kent. Com. 330, 331. The English doctrine, however, appears to be different, and the rule there is that the proceeding which is first in point of time is first in point of right, and in a case appealed from the Supreme Court of Nova-Scotia, a few years since (Hill v. Goodall & alt) the King in Council reversed the judgment because it gave the attaching creditor a priority over the assignees who had been previously appointed. The rule appears to have always been that the personal effects of the bankrupt became legally vested in the assignees on their appointment, wherever they might be situated. See Lord Loughborough's remarks in Sill v. Worswick, 1 Hen. Blackst. 690, 691. Brickwood v. Miller, 3 Merival, 279, Hunter & Potts. 1 H. Bl. 182. Royal Bank of Scotland v. Cuthbert. 3 Ves. & Beam. 100. Selkrig v. Davies, 2 Dow 247.

As to real estate in the colonies, it does not appear that the commission of bankruptcy could affect it formerly. It was held in Selkrig & Davies, 2 Dow's Rep. 244, 245. That the commission of bankruptcy does not in itself operate upon heritable or real property of the bankrupt in Scotland, nor is there any legal obligation on the bankrupt to convey his heritable property to his assignees, further than what the creditors are indirectly enabled to enforce by the power which they have of granting or withholding his certificate. See 1 Cooke's Bankrupt laws, 338 8th edition. But the act of the Imperial Parliament, 6 G. 4, c. 16, s. 64, now subjects real estate in the colonies to be transferred by the assignment in bankruptcy. See Epitome, 2nd vol. 287.

---

*Sale of attached goods of perishable nature.*

By Provincial act of 1795, 35 G. 3, c. 1, s. 9, 1 P. L. 347, it is enacted "where goods and chattels of a perish-"able nature, or live stock of any kind, shall be taken by "attachment, and appraised, and the party whose goods "or stock are so taken, shall not, within three days after "notice of such appraisement being made, give sufficient "security for the value thereof, according to law, it shall "and may be lawful for any judge of the court, out of "which such writ of attachment shall have issued, upon "application of the plaintiff, and notice thereof to the de-"fendant, or, if the defendant be an absent or absconding "debtor, to his agent, factor, or trustee, if he have any, "and no good cause to the contrary shown, to order the "goods, chattels or stock, so attached and appraised, to "be sold by the sheriff at public auction; and the mo-"ney arising from such sale, to be retained in the hands "of the sheriff, or paid into court, to respond the judg-"ment to be afterwards given in such cause."

*The Lords day.*

The provincial act of 1791, 31 G. 3, c. 3, 1 P. L. 284. enacts that no person on the Lord's day, shall serve or execute any writ process, order, judgment, or decree, (except in cases of treason, felony, or breach of the peace) and make the service of the same "void to all intents and purposes whatsoever," and gives the party grieved a suit for damages against the person, "so serving or executing the same," as if done without any warrrant, &c.—being a copy of the English act, 29 Car. 2, c. 7, s. 6. This act has been construed to make void the service of any notice on which a rule may be made. After a voluntary escape the prisoner cannot be retaken on a Sunday, though after a negligent escape he may, and bail may take their principal on a Sunday in order to render him. It has been doubted whe-

ther a declaration in ejectment could be served on a Sunday as it is in the nature of process. ibid 526.

Sunday is said in law to be *dies non*, or not a day—as legal proceedings cannot regularly take place on that day. Courts of all kinds adjourn over so as not to profane it by worldly discussions. Deeds should not be made to bear date on a Sunday, or money covenanted to be paid on it. It is in some cases passed over in reckoning the days for expiration of rules, especially if it be the last, and a writ of enquiry cannot be executed thereon. 2 Tidd. Pr. 816.

*Suits against partners and joint debtors where some of them are absent from the province or non residents.*

The provincial act of 1826. 7 G. 4 c. 7, 3 P. L. 253, 254, sec. 1, directs "where co-partners, or others, are, "or shall become *jointly* indebted, by specialty or simple "contract, to any person or persons, and any one or more "of such joint debtors, shall be absent or resident out of "the province," the creditor may proceed by *mesne process* from the supreme court, against all the joint debtors, and if the writ be an attachment, may attach the joint property of all the defendants. Sec. 2 directs that if it shall be made to appear to the court "by affidavit, or plea in abatement" that the names of any of the partners or joint debtors are omitted in the writ, or that any of them who were in the province when it issued, were not served with it, the court may abate the writ or stay the proceedings "as the case may require." Sec. 3, authorizes the plaintiff to *file his declaration against such as were duly served with process*, and *suggest therein the absence of* the others out of *the province and the jurisdiction* of the court, *at the time of issuing the process* and *at the time of filing the declaration*, and proceed to judgment against the defendants served with process as practised in England, where one of several copartners or joint-debtors is outlawed. Sec. 4, authorizes the levy of execution on the joint property of all the co-

partners or joint-debtors, or on the persons, and separate property of those served, but not on the persons or sole estate or effects of the absent defendants.

The same clause empowers the court to grant a "reasonable imparlance allowed in common cases," where "any such defendant shall make affidavit that it is necessary for him to receive instruction or information respecting such suit from his absent partner or joint debtor, and that he cannot safely proceed to the trial of the cause without communication with the said absentee, and that he is not seeking for delay only," or to grant imparlance on "other sufficient cause." This seems to be analogous to the delay allowed, where a commission is granted in the absence of a material witness, and the imparlance intended to be a continuance for a reasonable period. Sec. 5, provides that the absent person, returning into the province before the suit is finally determined, may be permitted to appear and defend it, and the proceedings to be amended conformably to make them regular. Sec. 6, that after final judgment given, but not fully satisfied, any such absent person return to the province, the plaintiff may take out a *scire facias* against him "requiring him to appear and shew cause why execution should not be had against him, his goods, chattels, lands and tenements, to satisfy the said judgment, or whatever may remain due thereon;" such defendant may plead, "in bar to the original suit, or in answer to the said *scire facias*" and the court may try and adjudge "as in other causes instituted" by *scire facias*. Sec. 7 directs that this act is not to be "construed to affect or prevent any proceedings" under the absconding debtor act.

## CHAPTER VII.

### OF APPRAISEMENT, BAIL, & APPEARANCE.

The goods or lands attached are appraised under the directions of the sheriff. That officer is empowered to swear appraisers of attached goods or such as are taken under execution—or to administer an affirmation to them if they are quakers, by the provincial act of 1794, 33 Geo, 3, c. 10. 1 P. L. 321. When real estate is to be attached, the directions of the act of 1832, 2 W. 4. c. 51, must be attended to. See Epitome, 2nd vol. p. 262.

*Of the bail bond.*

The provincial act of 1778, 18 Geo. 3, c. 6, sec. 3, 1 P. L. 211—212, directs that when any person is arrested " by virtue of any writ or original process," the sheriff or his deputy, " upon sufficient bail being offered," to let him go at large on his executing " a bond with two sufficient " sureties" to the sheriff, with a condition " for the per- " sonal appearance only of the defendant on the first day

"of the court to which such writ is returnable." If the "defendant shall not appear accordingly, or give in sufficient bail to abide the final event of the suit, judgment "shall be entered against the defendant by default." The sheriff shall in that case "then and there in court, upon "the request of the plaintiff or his attorney, assign the bail "bond by indorsing his name thereon for the benefit of the "plaintiff, to be in suit or otherwise recover the penalty "thereof." The act declares that this assignment "shall "not debar the plaintiff from proceeding to final judg-"ment and execution, the same court against the defend-"ant or defendants in the said action, as in cases wherein "default is made." If the defendant "appear according "to the tenor of the condition of the bond, and there "abide by the order of the court, or give bail to the satis-"faction of the plaintiff, and approbation of the court, to "abide by the final issue and determination of the suit, or "if the defendant from some impediment shall not appear, "but nevertheless two sufficient persons to be approved of "by the plaintiff and court, shall offer to become and give "bail in manner aforesaid, in such case the bail for ap-"pearance only shall be discharged, and such defendant "or defendants shall be entitled to all the privileges of "law, and in no other case whatsoever, unless consented "to and agreed upon in open court between the plaintiff "and defendant, or their attornies in their behalf."

This act is substantially like the English statute of 27 Hen. 6, c. 9, passed to compel sheriffs to allow defendants, arrested on mesne process to go at large on security. The provincial act is more specific and goes further on its provisions. When the defendant is arrested the sheriff is liable to a special action on the case if he should refuse to liberate him on the tender of sufficient sureties. 1 Tidd, Pr. 221. The sureties must however have sufficient means within the county, or the sheriff may refuse to take them. 15 East 320. The sheriff may, if he

chooses, take one surety, but can insist upon two, 1 Tidd Pr. 221. The sheriff may also accept of the defendants' surrendering himself, on or before the return day of the writ, in discharge of the bail bond.—1 Tidd. Pr. 225.

*Special bail.*

On the return of the writ of *capias*, in order to discharge the sheriff's bondsmen, two or more responsible persons join the defendant in a recognizance or undertaking, that if judgment should be given against him, he shall pay the amount and costs, or render himself up a prisoner,—or that they will pay the amount for him. The sheriff or his bondsmen may put in bail for the defendant, for their own security, without his consent and their bail may render him. The defendant is considered to be the prisoner of his special bail, who may arrest him without warrant, and who are not restrained from making the arrest under circumstances where it would be irregular on a *capias*, as on Sunday for example, but the bail to the sheriff have not the same authority.

Special bail should be freeholders or householders, and they should each be worth double the sum sworn to on the writ, after their debts are all paid. This, if they are objected to, they must swear, or others who can do so must be substituted. An attorney, sheriff's officer, or a party privileged from arrest, cannot be bail. 1 Tidd Pr. 247 An insolvent debtor discharged, is not good bail, because his effects are liable for his former debts. 1 Chitty Rep. 9, 143. Prov. act of 1763, 3 & 4 G. 3, c. 5, s. 7, 1 P. L. 93. Bail should regularly be put in within four days after the return day of the writ. If the writ be returnable into a different county from that where the defendant is taken, 8 days are allowed, (in the C. Pleas, & 6 in K. B.) in our practice 8 days are usually given if the defendant live at any distance. Bail may be put in before the re-

turn day of the writ, for the purpose of rendering the defendant, 8 T. R. 456. Further time will be granted by applying to a judge on summons to the other party and an order, if there is necessity for the delay. 1 Tidd. Pr. 248.

Bail may be put in before a judge of the supreme court in town, or a commissioner in the country, in causes in that court. The act of 1768, 8 G. 3, c. 7, 1 P. L. 140, 141, empowers the same commissioners who are authorized thereby to take affidavits of debt, to receive also the recognizance of bail. The judges of the supreme court are to receive the bail piece taken before the commissioner on affidavit of its being duly taken, made "by some credible person present at the taking thereof."

The 2nd clause of the same act enables the supreme court to make rules and orders for justifying bail, taken before commissioners in the country so that they may make affidavits, and be examined under oath by a commissioner, without being obliged to come to the court, except where they live in Halifax, or within 20 miles of it. This act embodies provisions of the English statute of 4 & 5, William & Mary, c. 4, s. 1 & 2, as far as applicable to the supreme court. It does not authorize the judges on circuits to take bail as the 3d sec. of the English law does. It does not affect the courts of common pleas, so that bail in causes in those courts must be acknowledged before a judge of common pleas. The 3d clause of our act, 1 P. L. 141, makes it felony to personate another person, in acknowledging bail before commissioners, and the Prov. act of 1771, 11 G. 3, c. 3, 1 P. L. 166, makes it felony to personate bail before any of the judges of a court or other persons empowered by law to take bail. When bail is acknowledged in open court, the prothonotary or his deputy, receive the acknowledgment and signs the bail piece. If the plaintiff is satisfied with the bail, it then becomes absolute, but if not he must notify the opposite party,

that he excepts to them, on which it is incumbent on the defendant that his bail should justify—that is, swear that they are each worth double the sum—he may add or substitute others for this purpose. Bail will be rejected if they act under any indemnity, or promise to indemnify them on the part of the attorney of the defendant, tho' an indemnity from a sheriff's officer or from a third person is no ground of exception to them.—1 Tidd. Pr. 269, 270. Bail may also be put in at any time pending the suit, if the defendant be in prison, even after judgment, if he is not yet charged in execution.—1 Tidd. Pr. 280. It was made a doubt whether a prisoner could be bailed in vacation, and the imperial act of 43 G. 3, c. 46, sec. 6, establishes the right which I believe has not been disputed in our colonial courts. In discharge of his special bail, a defendant may render himself, either in open court or before a judge in his chambers.—1 Tidd. Pr. 287. When a defendant is duly rendered, the court will order an *exoneretur* to be entered on the bail piece, which terminates the liability of the bail.—ibid. 291, 2.

If special bail be not regularly put in, the plaintiff may take an assignment of the bail bond and sue upon it, or he may proceed by rule against the sheriff to compel him to return the writ, and produce the body of the defendant. If the bondsmen be good the former course will be safe, but if they are not sufficient, the sheriff will be freed from responsibility if the plaintiff take the assignment.

The following rule was established by the supreme court respecting the liability of special bail. "It is order-"ed that in all cases where the writ of execution against "the defendant in any action, is returned *non est inventus* "and an action is prosecuted against his bail upon their re-"cognizance, they shall be allowed to render their prin-"cipal in discharge thereof, at any time within the first "*four* days after the return day of the process against "them, provided they pay to the plaintiff not only the

"costs of the action against them, but also the taxed "costs in the original action against the principal." By the court, 24, Oct. 1820, Will. Thomson, Cler. Cor. & Proth.—Bail should be careful to render the defendant regularly, before any judgment can be signed against him in the original action.

### *Of appearance.*

This expression (in acts and law works) does not mean the mere personal coming into court of a defendant, but embraces the entry on the records of the court, of his having appeared there in person or by attorney, as well as the filing and entering of bail where required. Where there is a *capias*, the defendant has appeared, in legal phraseology, when he has fully entered and perfected special bail, filed the warrant of attorney (if he employs an attorney,) and given due notice to the opposite party of these proceedings. If he be a prisoner he is considered as appearing in person, but he may act in his defence by attorney, and if he does his attorney must file a warrant, and notify the opposite party that he appears for the prisoner. Where the action is commenced by summons or attachment, the defendant's appearance is made by filing (if the action be in the supreme court) what is called "common bail." This is a merely nominal and fictitious form of a bail piece, by which the defendant is said to be delivered to the keeping of John Doe and Richard Roe, two imaginary characters. This practice is, (unnecessarily) borrowed from the king's bench forms in England. The common pleas form, is a written entry of the defendant's appearance, and this is congruous with the writs of summons and attachment, which the common bail piece is not. Besides the appearance or bail piece the defendant is to give notice of it's being filed to the opposite party. If an attorney appear for him, the warrant of attorney must also be filed and notice given to the opposite party. After a party has employed an

attorney and notice given to his opponent to that effect, all further notices and papers in the cause must be served on the attorney instead of the principal.

## CHAPTER VIII.

### *PLEADINGS.*

*Of the declaration.*

The defendant having made appearance either in person or by attorney—or (in cases under the absconding debtor act, goods or lands having been attached, or an agent summoned,) on the return of the writ being made by the sheriff (or an acceptance of service by the defendant or his attorney, which is done sometimes to save expence,) the plaintiff is bound within reasonable time to file his declaration. In ejectment suits the declaration is the first proceeding, no writ being necessary. The declaration is a written statement of the facts and circumstances that form the ground of complaint or demand, on the part of the plaintiff against the defendant, an assertion of the damage or inconvenience resulting to the plaintiff, and a demand of redress. Such at least the declaration is intended virtually to be. Forms have been established

from early periods of English history, in conformity with which declarations and other pleadings must be drawn.

In *local* actions, such as those concerning real estate, the injuries complained of must be stated in the declaration to have occurred in the county* where the land lies. In actions of a *transitory* kind, (such are those connected with moveable property or personal contracts,) the statement of place is not considered to be material. The action must be brought and tried in the proper county in local actions, but in transitory the plaintiff may commence them in any county he finds convenient. Yet it may be laid down, as a general principle, that the courts would not assist a plaintiff in any attempt to oppress or harrass a defendant in an action, by bringing it in a county where neither party resides—unless there were some reason of convenience for preferring it. If it can be shewn that a fair trial cannot be had, or on other good grounds, the court will change the *venue*, that is the county—for the trial of an action, if it be not local in it's nature. A declaration may consist of one or more counts. Each count should contain a distinct cause of action, properly set forth. These are chiefly used to prevent the plaintiff from failing in his suit, if the proof should not be exactly as he anticipates; by varying the statements of the complaint in each count he is more likely to succeed, as he may recover on any one of his counts being supported in evidence, though all the rest should be unproved. It is also necessary to use several counts, when he has several distinct grounds of complaint against the same party, different in their details. If the plaintiff add unnecessary counts to his declaration, the court on application usually order them to be struck out, and often subject the plaintiff to pay the cost of the application.—Archb. Pl. 152.

* In Nova Scotia the districts of Pictou, Colchester and Halifax are regarded as separate counties, in all matters connected with the practice of the courts.

Where counts are of the same nature, requiring the same process and judgment, they may be joined. A count in assumpsit cannot be joined with one in any other form of action. The same rule applies to covenant and to trespass. ibid. 153, 154. A mis-joinder of counts is a substantial defect and may be taken advantage of by general demurrer,—motion in arrest of judgment, or writ of error. The declaration should in all material respects correspond with the writ, and in actions commenced by *capias* or *attachment* with the affidavit of debt. It is also necessary that it should not be different, in essentials, from the evidence to be produced on the trial. A variance in any of these things may occasion the discharge of the bail, a non-suit, &c.—See Archbold & Tidd. *passim*. Archb. Pl. 78, 119. By the rule of the supreme court, dated 23 Oct. 1810, " where a declaration is filed and served on the defendant " or his attorney in any cause, within the first ten days of " the term in which the writ or process shall be return- " able, the plaintiff may at any time after 30 days from " the expiration of the term, demand a plea of the defend- " ant, and if a plea shall not be filed in the office of the " prothonotary in four days after such demand made, the " plaintiff shall be at liberty to mark a default against the " defendant, and to proceed as in cases where default is " marked on the last day of the term; but where special " pleading shall be necessary in any cause, the chief " justice or any one of the justices, in vacation may allow " a further time to plead, on application made by " the defendant's counsel for that purpose, and a reason- " ble ground shewn for requiring such time." [This rule affords the delay of a term to the defendant, and is only applicable to the town practice, (where there are four terms in the year, in both the supreme and common pleas courts.) In the country practice, the court sits but twice a year, and in some places the supreme court on circuit, but once, and the common pleas but twice in the year. In order to

avoid the delay that would arise there, if the town rule were adopted, the plaintiff serves the defendant with a copy of the declaration, a demand of plea, and a notice of trial in the term to which the writ is returnable, and either for the common pleas or supreme court, if the defendant does not appear and plead, the plaintiff may mark his default on the second day of the term. The delay under this rule is called an *imparlance*. The defendant having *appeared* is entitled to it in a cause to be tried in Halifax; but he need not avail himself of it, but may plead at once (on receiving the declaration) at the return of the writ. In case he is a prisoner for debt, he may immediately notify the plaintiff that he is ready for trial, and it then becomes imperative on the plaintiff to try the cause at the first term in which the writ is returnable, and if there should be any negiigence or omission on his part in bringing it on, the defendant will be discharged from prison. [" Supreme court, " Easter term, 27 G. 3, 1787. The court taking into con- " sideration the great hardship of keeping debtors com- " mitted on *mesne* process in jail, from term to term, do " therefore order that unless the plaintiff shall proceed to " the trial of his cause, the same term in which it is enter- " ed, where the defendant is in jail at his suit, he the de- " fendant shall be discharged on filing common bail the " last day of the term, provided he was ready for trial at " such term."—By the court, 21st July, 1787.]

*Discontinuance and abatement.*

If the plaintiff do not declare, or fail in pursuing any of the subsequent steps of the action incumbent on him, within the time prescribed by the practice of the courts, the defendant may obtain judgment of *non pros* against him for his costs. The plaintiff may retract or discontinue his suit.—If he discontinue he is at liberty to sue again. The death of the king, at common law discontinued a

suit, but this was remedied by statute of 1 Edw. 6 c. 7. So the same act, sec. 6. re-enacted by provincial statute of 1764, 4 G. 3 c. 2, sec. 5, prevents any cause from being discontinued by the issuing of any new commission to judges or justices of any kind, or to commissioners.—1 P. L. 99. The same provincial act, sec. 1. prevents any suit from being abated by the death of either party between interlocutory and final judgment, in case the cause of action was one which would have survived to the personal representatives. By the second clause if there be several plaintiffs or defendants and one die, if the cause of action survives to the other plaintiffs, or against the other defendants, the suit is not to abate, but the death is to be suggested on the record, and the suit to proceed. The third clause directs that the death of either party in an action between verdict and judgment, shall not be alleged for error, " so as such judgment be entered within two terms after such verdict." The 4th clause directs " that where " any judgment after a verdict shall be had, by or in the " name of any executor or administrator, in such case an " administrator *de bonis non* may sue forth a *scire facias*, " and take execution upon such judgment."—See English statutes, 8 & 9. William 3, c. 11, sec. 7. 17 Car. 2 c. 8, sec. 1, 2. In other cases the common law rules must apply, by which the death of a sole plaintiff or defendant before final judgment abates the suit, as to which rules and the exceptions thereto,—sec. 2. Tidd. 965, and cases cited.

### *Default.*

If the defendant should omit to plead within the proper time, the plaintiff may mark a *default* against him, and his neglect or omission is considered the same, as if he had confessed the truth of the allegations set out in the declaration. A judgment by default is *final* in an action of debt—but in an action in which the plaintiff seeks damages, such

judgment is only *interlocutory*, and their amount is ascertained under a writ of inquiry by which the sheriff summons a jury, and he or his deputy presiding, the plaintiff proves the amount of damage he has sustained; the defendant being notified and at liberty then to diminish by proof the sum of damage. On the verdict of the sheriff's jury—a final judgment is entered. If the action be on a bond, bill of exchange, or promissory note, the court will direct the prothonotary to ascertain the sum due and give final judgment without calling a jury of inquiry.—1 Tidd. Pr. 617, &c.

### *Particulars of demand, and oyer.*

The defendant when called upon to plead may obtain a judges summons and order consecutively, requiring the plaintiff to furnish him with a written statement of the particulars of his demand. This is called a bill of particulars and should contain in *assumpsit* both debtor and creditor side of the account. In ejectment it should specify the exact property claimed. (The defendant too, must furnish the particulars to the plaintiff of any account or demands he brings against him as an offset.) The defendant may also demand a copy of any bond or sealed instrument on which the action is brought, and this is called *demanding oyer*. The demand of particulars or of oyer, regularly made, operates as a stay of proceedings. The defendant may also obtain time to prepare his plea, if it be necessary, by application to a judge.

### *The plea.*

The defendant's written reply to the declaration is called his plea. This must also pursue a technical form. It must be filed with the prothonotary or his deputy, and a copy be served on the opposite party.

*Dilatory pleas*—are such as do not confess or dispute the existence of the cause of action. They cannot be pleaded after an imparlance, and by provincial act of 1764, 4 & 5 G. 3 c. 1. sec. 9. 1 P. L. 103, 104. "No dilatory "plea shall be received in any court of record, unless the "party offering such plea do, by affidavit, prove the truth "thereof, or show some probable matter to the court, to "induce them to believe that the fact of such dilatory "plea is true."* Dilatory pleas are, 1. Pleas to the jurisdiction, alleging that the court ought not to entertain the suit, on account of the cause not being within its lawful jurisdiction. 2. To the disability of the party plaintiff, as a plea that the plaintiff is an alien—an infant, *feme covert*, convict, &c. 3. In abatement—as for some misnomer, such as calling the defendant by a wrong name or title, in the writ, or for other defect in form,—or for the death of the party. (In partition no plea in abatement is to be allowed nor shall the suit abate by the death of any tenant, by provincial act of 1767, 7 & 8, G. 3, c. 2, sec. 2 1 P. L. 132.†) If a dilatory plea be disallowed, the defendant is then obliged to answer in a direct manner to the complaint contained in the declaration.

*Pleas to the action.*—The defendant may confess in his plea the whole statement of the plaintiff, or part of it only, or he may deny it in whole or in part.

### *Penalties.*

The provincial act of 1768, 8 G. 3. c. 10, 1 P. L. 144, 45, directs, Sec. 1. that "in every action upon any bond, contract and agreement, with penalty for performance of "the condition," the court on "proof of the just sum due "upon the condition" is to "direct and receive a very edict" for the sum due with such damages and costs as

* In conformity with the English act 4 & 5 Ann. c. 16, s. 11,

† Similar to a clause in English act, 8 & 9 Wm. 3 c. 31.

appear to have been incurred by its breach, "and to cause "satisfaction to be entered upon the judgment," on "pay-"ment of the debt and damages, so to be ascertained "by verdict or otherwise." Sec. 2. directs that in debt "on any single bill, or where debt or *scire facias* shall be "brought on any judgment, if the defendant hath paid the "money, such payment may be pleaded in bar," and in debt on a bond, with a condition or defeazance to be void on payment of a lesser sum, the payment of "the principal and interest due" though not strictly made according to the instrument—may be pleaded as an effectual bar to the action. Sec. 3. enables a defendant in an action "of "such a bond with a penalty," to pay into court, the principal interest and costs and to be thereupon discharged.

If the defendant has made a *tender* of the amount due to the plaintiff before the action was commenced, he may plead it and offer to pay the amount, and if the plaintiff does not sudstantiate a larger demand against him, he will be thus freed from the costs of the action.* So where the defendant admits a sum of money to be due, he may after the action is brought *pay a sum of money into court* including the costs up to that time, and if the plaintiff after this proceeds with his suit, the subsequent costs will fall on him unless he can establish that a greater sum was due him.

So the defendant may admit, that the plaintiff's demands are due, but plead that he has counter demands to set off against them. This is called a plea of *set off*† It is more usually connected with a general denial of the plaintiff's demand, and an offer in case he can prove any part, to set off the defendant's claims against what he proves. This is frequently done in a less formal shape by a notice of set

* A tender should, for caution, be made in British silver or gold, as foreigin coin or paper money might not be considered a legal tender.

† At common law a defendant was obliged to bring a cross action or else to go into a court of equity, where there were mutual demands.

off, attached to the common plea of non assumpsit, in conformity with the English statutes, 2 G. 2. c. 22, sec. 13, & 8 G. 2, c. 24, sec. 4, (see 1 Tidd. Pr. 715.) This is a convenient practice. It appears requisite also that a copy of the notice of set off, should be filed with the plea. The two English acts of Geo. 2, on this point have not been re-enacted in this province, but our provincial act is in many respects similar. It is an act of 1787, 28 G. 3, c. 5, 1 P. L. 254, 255. Sec. 1. provides "that *in all actions* commenced in any court of record, or brought before any "justice of the peace, *on bond, bill, note, book account,* "*agreement in writing, or any other assumption or promise* "whatsoever, the *defendant* or *defendants* in such action *shall file his, her,* or *their account, receipt, or demand, as an offset* against the plaintiff or plaintiffs." It directs it to be filed in court 4 days at least before the sitting, or in suing before a magistrate, with the Justice of the peace at any time before he tries the cause. "On issue joined," the "merits of both demands" are to be enquired into on trial and judgment to be given accordingly.

The 2d clause, provides that if a defendant "for want of evidence, or any other unavoidable accident" be unable to prove his offset, he may afterwards sue for it (if not out of date.) Provided, that at the first trial he notify the court and make affidavit that he has a just offset, which he cannot then establish from "want of evidence then without the jurisdiction of the court." The 3d clause directs that where a party has "had an opportunity of pleading" his demand as an offset under this act, that if he does not avail himself of it, but afterwards brings an action for it, and proves his demand, he shall pay the costs of the suit although a verdict is found for him. The English act of 8 G. 2 c. 24, sec. 4 requires the setoff to be *pleaded* if either debt arises upon the penalty in any bond or specialty, but this distinction is not made in our act. A notice of setoff requires the same kind of care and certainty in its state-

ments as a declaration, being virtually a counter declaration.

*General issue.*

The general issue is a denial of the existence of the alleged cause of action. In actions on *contracts*, it denies that there was any contract between the parties in point of fact, as in *assumpsit—non assumpsit*, he made no such promise; in debt upon simple contract *nil debet*, he owes nothing; in covenant or debt on specialty *non est factum*, it is not his deed; in debt on record or *scire facias, nul tiel record*, that there is no such record.

In actions for *wrongs*, the general issue denies the charge; as in case, not guilty of the premises, in detinue, *non detinet*, he does not detain; in replevin, *non cepit*, he did not take the articles; in trespass *vi & armis*, not guilty of the trespasses. These pleas by a general denial of the allegations of the plaintiff, bring the question to issue, at once, that is, the facts affirmed by the one party are denied by the other, and an issue or question of fact arises on which the decision of the cause will then depend.

*Special pleas.*

Besides the general denial, the defendant may plead any special matter which has the effect of destroying the right of action, or which precludes the defendant from suing. Thus in actions upon *contracts* he may plead any special facts which shew the contract to have been void in law, as *coverture*, &c. or voidable, as infancy, or duress of imprisonment, or he may plead that the contract has been performed, or that there was some lawful excuse for not performing it, or that the cause of action has been discharged by some other matter—as by an accord and satisfaction, arbitrament, release, former recovery, or set off, or that the debt was assigned under the insolvent act, or attached under the absent debtor act, (though this last may

be proved under the general issue,) or that the action is barred by the statute of limitations. If executors or administrators be sued, they may plead that no assets have come to their hands, or that they have fully administered them, or that they are retained to meet other demands having a prior claim. Parties sued as executors or administrators may also plead that they never were so.

In action for *wrongs*, the defendant may justify or excuse the acts alleged, as in libel actions by shewing the truth of the imputation, &c. In *replevin* the defendant may plead property in himself or a third person. In *trespass* to the person, the defendant may plead *son assault demesne*, or that the first assault was made by the defendant, *molliter manus imposuit*, that is that he used no more force than the circumstances justified, &c. In trespass to personal property he may plead that it was his own and not the plaintiff's property, or that he took legally as a distress, &c. In trespass to real estate, that the land is his own or that of a third person who authorized him, or that he acted under some right of entry, way, fishery, or the like, or he may allege defect of fences, the authority of law as an officer, &c.—or inevitable necessity. He may also in actions for wrongs—plead discharge—accord, &c.—arbitration—release—former recovery—or distress—tender of amends for involuntary trespass, and the statute of limitations.

Without pleading specially, the defendant may under the general issue in many cases, prove a variety of matters of defence. Thus in assumpsit, he may prove under this plea—coverture, gaming, usury, infancy, duresse, a release, or discharge before breach of the contract,—or non performance by plaintiff, of a condition precedent, or accord, &c.—an award, attachment, release, or former recovery. But a tender or the statute of limitations, must be pleaded specially and a set off either pleaded or notice of it regularly given. In *covenant* it appears always ne-

cessary to plead the matters of defence specially. There is much nice distinction respecting special pleading, but the above may suffice as examples of most frequent occurrence, where the general issue answers the purpose of a special plea. Public officers are often authorized by statute to plead the general issue, and give the special matter in evidence under it at the trial, and this clause is often extended in statutes to the protection of all persons acting under and by virtue of the act. The provincial act of 1829, 10 Geo. 4 c. 44, (introduced by T. C. Haliburton, Esq. now presiding judge of common pleas, middle district,) directs "that in any action or suit at law, against any "commissioner, magistrate, sheriff, constable, or other "person or persons, whomsoever, for or on account of any "deed, act, proceeding or thing, by him or them done "or performed, under, or in pursuance, or by virtue of any "act or acts of the general assembly of this province, or "of the parliament of the mother country, having force "or effect within this province, already made, or to be "made, (and not under the common law.)" The person sued may under the general issue or "any brief plea "setting forth generally"—that the fact complained of was done under authority of such acts, "and concluding to the country," give the special matter of defence in evidence, as if it had been specially pleaded. At common law the defendant could only plead one ground of defence to the action, and if he failed in this the judgment was given against him, but by the English statute, 4 Anne c. 16, sec. 4 & 5, which our colonial practice follows, he may take several distinct grounds of defence. He cannot however plead *non assumpsit* or *non est factum*, to the whole declaration and tender as to part, these being palbably inconsistent, but he may plead non assumpsit, with the plea of the statute of limitations, or not guilty in trespass, and also a plea of justification. But these and many other matters connected with pleading specially

are so very technical, that I may be excused from entering more fully into them, in a work like the present.

A plea should be conformable with the declaration it undertakes to answer, and it should answer the whole of it's material allegations. Each plea should be single, containing one distinct allegation, and not a variety of statements. It should also be certain and not written in vague and inconclusive language. It should directly allege the ground of defence, and not state it argumentatively or by way of recital or parenthesis. It should be capable of trial, containing a specific point of fact, or law to adjudicate upon. Lastly it should be true. A plea concludes by demanding in a certain established form, a trial by jury. A demurrer by demanding the judgment of the court upon the question of law.

The general issue admits of no further pleading, as it puts the question between the parties in the shape to be examined by a jury, but a special plea may be answered by a *replication* on the part of the plaintiff in which he either may deny the allegation of the plea, or set out new matter in answer to it. To this the defendant may *rejoin*. Then the plaintiff may *sur-rejoin*—the defendant *rebut*, the plaintiff *sur-rebut*, and the several papers or pleadings used in these cases are termed rejoinders, rebutters, &c.

When questions are drawn to a point of *fact*, alleged on one side and contested on the other on the pleadings, an *issue in fact* is said to be taken, and this issue is always by law to be tried by a jury. But on the other hand, it sometimes happens, that one party may in pleading admit the existence of the facts alleged in a declaration or count, or in a plea, &c. on the opposite side, and yet he may conceive, that these facts are not sufficient in point of law to entitle his adversary to bring his action or support his defence. He will in that case *demur*, that is put on the pleadings his request that the legal point may be ascertained and this constitutes an *issue*, or question for the deci-

sion of the judges upon the face of the pleadings. The demurrer may be in general terms, or it may specially state the grounds of legal objection. If the objection be to the form of the pleadings, it must be specially stated in the demurrer, by provincial act of 1764, 4 & 5 G. 3, c. 1. s. 5, 1 P. L. 103, in conformity with the English acts of 27 Eliz. c. 5, s. 1. & 4 & 5 Ann. c. 16, s. 1. The other party then *joins* in demurrer by alleging that his count or plea is sufficient, and thus *issue* is joined in law. While the pleadings of the cause are in progress, and until final judgment, the cause is *continued* from term to term, and those continuances are minuted on the books of the court, by the prothonotary or deputy, and entered on the record by the plaintiff. If the plaintiff choose to *discontinue* or abandon his suit, this is also minuted at his request by the prothonotary or deputy. When a cause has come to an issue, on the law arising in the course of pleading, under a general or special demurrer, or has come to an issue in fact for a jury to decide (and sometimes there are several issues in law and in fact in the same action,) the whole of the proceedings in the cause are written out by the plaintiff's attorney into a roll of paper, called an issue, if on an issue in fact, and a paper book, if on an issue in law. These are prepared to be handed to the judges, who try the cause or hear the argument on demurrer, for their convenient reference to the several parts of the pleadings. In country practice I believe they are not often made up in this province, but I should think the neglect would lead to confusion and error. The issues at Halifax in jury cases, by a general rule of the supreme court, must be filed in the prothonotary's office within the first four days of the term. If this is not done, the plaintiff is not entitled to bring the cause on to trial, and it must stand continued, unless the court shall order otherwise on special application.

## CHAPTER IX.

### *JURIES.*

There are seven species of trial in civil cases, in the English common law, as described in 3 Blackst. Com. 330. 1. By record. 2. By inspection or examination. 3. By certificate. 4. By witnesses. 5. By wager of battle. 6. By wager of law. and 7. By jury. These are all described by the learned commentator in the 22d chapter of his 3d book, but as the first and last of them only have been in use in the colonies, (where issues in fact have been taken in pleading,) it is only necessary to refer the reader to the commentaries for a description of the rest.

*Trial by record*, is only used where a matter of record is pleaded) in any action, as a judgment for example, and the other party pleads that there is no such record in existence;—upon which issue is offered, and joined in this form; " and this he prays may be inquired of by the record, " and the other doth the like." A day is given to the party who pleads the record to produce it, and if he fails in so doing, judgment is given in favor of his antagonist. The *argument* on demurrers is not called in our law lan-

guage a trial, though it is in it's nature one of great importance. Counsel are heard in defence of each side of the argument, and after full deliberation the court give judgment on the legal questions. We now come to the most usual and important kind of trial known in the English jurisprudence, the trial by jury. When an issue is taken on a disputed fact or state of facts, it is done in this form, "and this the said A. prays may be enquired of by the "country, and the said B. does the like."

*Trial by jury.*

When the cause is thus at issue, the plaintiff if he intends to bring it on to trial, is bound to give to the defendant 8 days notice in a town cause, and 14 days notice in a country cause—triable in town. These days must be exclusive and clear, thus notice served on the 1st, for a trial on the 10th of the same month, will give 8 clear days, for the 16th will give 14 clear days notice. If the defendant reside above 40 miles from town it is considered a country cause. These like all other notices in general, in the course of a cause, are served by the attornies of the parties on each other—or if an attorney in the country is concerned in a cause brought to the Halifax court, on his professional agent in town. The defendant will be entitled to recover from the plaintiff, the amount of costs he has been put to by the attendance of his attorney, counsel, witnesses, &c. in case the plaintiff neglects to proceed to trial, after having given notice. But the plaintiff may countermand his notice, by giving 4 clear days notice of countermand in a country, and 2 in a town cause. Besides if he can satisfy the court that the delay was not owing to his neglect, he is entitled to be free from paying the defendant's expences. Such is the rule established in the supreme court. (The common pleas adopts as near as it is practicable, the general rules made by the supreme court.) Either party may, upon shewing good reasons to

the delay, obtain a rule or order for the continuance of a cause after it is at issue. The absence or sickness of a material witness, is a ground for continuing a cause. In the country the rule as to notices of trial in the common pleas or supreme court on circuit, is that the notice should be served 8 days before, if the defendant be in the county or district, and 14 days, if he reside at a distance.

Juries are summoned to attend the court by the sheriff, under a writ directed to him called *Venire facias*, commanding him to cause the jurors to to come at such a time, and place, to try causes. Juries for the trial of causes, are either common or special. (The grand jury is a body which acts as a court of preliminary enquiry in criminal matters.) The mode of constituting juries is regulated by the provincial statute of 1796, 36 G. 3 c. 2. 1 P. L. 365, 366, 367.

Sec. 1. This *exempts* from serving on juries, "The "members of H. M. *Council*, the members of *Assembly*, "the *Treasurer*, and *Secretary* of the province, the *officers* "*of H. M. courts*, the officers composing *the staff of the* "*army*, the *clerks* belonging to the several departments of "the army, the *officers and clerks* belonging to, and labor-"ers actually employed in the Naval Yard," and those "the Civil Departments, of H· M. Ordnance, *officers of* "*H. M. Customs*, the *Register of Deeds*, *Chief Surveyor of* "*Crown Lands*,* *Naval Officer*, *and his deputies*, *Ministers*, "*Attornies*, *Physicians*, *Surgeons*, *Engine Men*, and per-"sons above *seventy* years of age." With these exemptions it enacts, that every person "having an estate of "freehold in the county for which he shall be summoned, "of the clear yearly value of ten pounds," or "a personal "one of one hundred pounds," and having for 3 months been resident in the county shall be "qualified, and lia-"ble" to serve upon the grand juries; and in the same

---

* The naval officer, and his deputies have been done away with.

manner a freehold of 20s. per annum or personalty of £20 within the county, and 3 months residence, makes the party qualified and liable to serve on petit juries. [Petit juries and common juries are terms convertible in practice.]

Sec. 2. Directs the sheriff of each county shall "once "every year, viz. on or before the 10th day of April, re- "turn to the prothonotaries or clerks of the several courts, "in which juries are required to serve, lists of all persons "so qualified and not exempted as aforesaid, who shall "thereupon cause the names of such persons to be written "on distinct and similar pieces of paper, and the same to "be severally rolled up, and put together in a box to be "kept by them respectively, under lock and key for that "purpose." The same clause authorizes the sheriffs to inspect lists of persons assessed or rated, to aid them in making up their lists of jurors.

Sec. 3. The *grand juries* in the several counties to be drawn from the said box, in the supreme court,* by the proper officer thereof in the course of the last term in every year; "and being afterwards summoned and sworn at the first ensuing term in the following year, shall serve as such during the whole of the same. It also directs the prothonotary or clerk in the supreme court, inferior court and quarter sessions in every county "on or before the last day of each term, or sessions, to "draw in like manner the names of a sufficient number to "serve as *petit jurors*, for the term or sessions then next "ensuing. The lists of the grand juries and petit juries being, "respectively made out by the said prothonotary or "clerk, and signed by the chief or first justice presiding "at the time, the said prothonotary or clerk shall, ten days "before the next meeting of the court, issue writs of *venire*

---

* The act provided in this clause that this should be done in the quarter sessions in counties where the supreme court did not go; but since that time its circuit has been extended to every county.

"*facias*, for the summoning the persons contained therein "accordingly."

Sec. 4. Imposes on a grand juror a *fine* "not exceeding 20s." and on a petit juror "not exceeding 10s." for every days absence, when duly summoned and not prevented by sickness or any other reasonable cause. Such fines to be levied if necessary, by warrant of distress and sale, to be paid to the prothonotary or clerk of court, and by him accounted for at the end of the term or sessions to the treasurer of the county, "to be from time to time applied by the justices of the several courts, for the counties use."

Sec. 5. Provides that the court if they find (owing to persons being excused or from other causes) there is likely to be an insufficient attendance of grand or petit jurors "in any particular term, sessions or year," may put back the excused persons names into the box, and "draw others in their stead, who shall be forthwith "summoned by the sheriff and be subject to all the con"sequences of non attendance as before provided." It further enacts that "in every case where a full jury for the "trial of any cause shall not appear, or appearing shall "by challenge of either of the parties, otherwise prove "deficient, a *tales de circumstantibus* shall be awarded, and "immediately returned in manner as has been heretofore "practised." This practice is in conformity with the "English act of 35 Hen. 8, c. 9. s. 6, 7, 8, by which the "judges of assize or nisi prius "upon request made by "the plaintiff or defendant," are authorized to cause the sheriff to return "so many of such other able persons of "the said county, then present at the said assizes or *nisi* "*prius* as shall make up a full jury," Their names are to be added to the original panel, and they are liable to challenges, &c. See 2 Tidd. Pr. 907. So in our practice a *tales* is not ordered but on the request of the plaintiff or defendant.

*Special juries.*

A special jury is nominated by the prothonotary or his deputy, in the presence of the attornies of both parties. The prothonotary makes out a list of 48 names, from the general list of freeholders qualified, by drawing them from the box one by one. Each party obtains a list of these 48, and when they have considered them, each has the privilege of striking out 12 names. The plaintiff striking off one, then the defendant another, and so on alternately till 24 remain. The prothonotary then makes out a writ of *venire facias*, in the cause, directed to the sheriff who "thereupon summons the remaining 24 jurors. The English statute of 3 G. 2. c. 25, s. 15, made a special jury a matter of right on the application of either party in a suit. Before this it was doubted whether it could be had without consent.—See. 2 Tidd. Pr. 843. This act has been held to apply to criminal indictments or informations in cases of misdemeanor, but not to trials for treason or felony, as it would then deprive a prisoner of his right of challenging peremptorily, that is without cause shewn.—See 3 B. C. 358. Christians' note.—21 Viner. 301.

Our provincial act is more general and extensive in it's expressions, than the English statute, though possibly the same interpretation would be given to both acts. The provincial act is the 6th sec. of the act of 1796, 36 G. 3 c. 2, 1 P. L. 367, which we have been considering. It enacts "that it shall and may be lawful for H. M. *supreme* "court,* upon motion made on behalf of any party, in any "cause, civil or criminal, to order a special jury to be "struck before the prothonotary from the list in his office, "according to the course of the common law, for which "he shall be entitled to a fee of five shillings; and the jury

* By act 1832, 2 W. 4, c. 35, (passed for one year,) special juries are to be granted in the courts of common pleas, on motion of either party, under the same rules, &c. as in the supreme court.

"so struck, shall be the jury to be summoned and returned "for the trial of such cause." The 7th clause of the same act directs, that in the "supreme court or any of the inferior courts of common pleas, a *view* shall be allowed "in any cause, six or more of the jurors to be mutually "consented to by the parties or their agents, or if they "cannot agree to be named by the court, together with "two persons, to be in like manner appointed to shew "them the matters in question, shall have the same, and "the said viewers, or such of them as appear, shall be "first sworn upon the jury, to try the cause in which it "shall have been allowed: and in case a view shall either "not have been had at all, or not had by the number appointed, yet the trial shall proceed, and no objection be "received on either side, on account thereof."

These views are granted in actions of *waste*, trespass *quare clausum fregit*, and sometimes in ejectment and other actions. In England the rule of practice in the king's bench, is to grant a view as a matter of course, on motion of either party;—in the common pleas, cause must be shewn by affidavit, except in waste. In the exchequer a *model* is used in preference to a view, wherever it will answer as a substitute.—2 Tidd. Pr. 848. The object is that the jury may be thoroughly acquainted with the situation of the premises or effects, connected with the subject of the trial. In criminal matters a view is not granted unless by consent.—ibid. Juries may be summoned from any part of the county or district (except in Halifax proper, where they are not obliged to attend unless they reside within 15 miles of the town of Halifax, by act of 1827, 8 G. 4 c. 32, sec. 1.) Special jurors are allowed 2s. 6d. each, in every cause on circuit, and liable to the same fine 10s. as petit jurors, by act of 1805, 46 G. 3 c. 15, 2 P. L. 6,—but at the supreme court at Halifax, they are to receive 5s. each, and the fine for non attendance is 20s. each, by act of 1825, 6 G. 4. c. 24, sec. 2, 3, P. L. 214. The 3d clause

of which gives the court in every case, a discretionary power over the costs of a special jury, so that a party who applies for one unnecessarily may lose the extra charge, although he succeed in obtaining a verdict and judgment.

If the sheriff be a party interested in a cause, the *venire facias* is awarded to the coroner If both those officers should be concerned in it, the prothonotary is to name two persons (called *elisors*) to execute it.—2 Tidd. Pr. 779, 780. 3 East. 141.

By rule of the supreme court (of Easter term, 1782,) any party wishing a special jury must move for it on the first day of the term, as the motion will not be admitted afterwards. By a rule of Mich. T. 1810. the plaintiff, when a special jury is allowed, must "procure a *venire facias* to "be delivered to the sheriff at least 4 days before the day "of trial," (special jury causes being set down for particular days in our practice) "and the special jury shall be sum-"moned by him at latest, the day next but one before the "day appointed for such trial."* The rule of the supreme court,(East. T. 1767. 7th. G. 3d,) directed that special juries

---

* In Roast v. Laffin, (supreme court Halifax, Mich. Term. 1832.) the *venire* for a special jury had not issued, until the day but one before, and the jury had not received notice until the day before that for which the cause was set down to be tried, and I believe it appeared that the jury was not struck in time. On calling the jury less than twelve of them answered, and the plaintiff's counsel prayed a *tales* to fill up the number. This was opposed on the part of the defendant, on the ground that the plaintiff was bound to take care, that the *venire* was issued and the jurors summoned, in conformity with the rule of court of Mich. 1810.—It was argued for the plaintiff, that the issuing the *venire* in *our practice*, had always been the act of the prothonotary, (who fills up the writ)—and that the plaintiff ought not to lose by the delay,—and besides that the provincial act (of 1796, 36 Geo. 3 c. 3. sec. 6, 1 P. L. 367)—made it imperative to direct a *tales*, wherever an incomplete jury appeared. Judge Halliburton held that the plaintiff, under these circumstances, was not entitled to demand a *tales:* and the other judges concurring in that opinion, it was refused and the next cause called.

when required and necessary, should be moved for by the attornies, and "struck by the proper officer of this court, "agreeable to the rules and practices in England." The provincial acts on the subject must of course be taken in connection with this rule, and the English practice only be resorted to in explanation,—the common law usage, with our statutes, supplying us with the necessary guide. "Where a fair and impartial or at least a "satisfactory trial cannot be had in the county where the "action is laid," the court will, on sufficient cause shewn by affidavit, order it to be tried in the next adjoining county.—2 Tidd. Pr. 780.

If any new circumstance arises, after a cause has been brought to issue, and continued for a term, which affects the right of action in any way, it may be pleaded at any time before the verdict of the jury be given, though it is of course incumbent on the party using this course to make no delay in pleading. A plea thus given in is called a plea *puis darrein continuance*, i. e. since the last continuance. This being a dilatory plea must be verified by affidavit.—2 Tidd. Pr. 899, 903.

*The brief.*

A cause being at issue, a short abridged view of the pleadings should be prepared, followed by a statement of the facts which can be established and the witnesses and documents to prove them. This it is incumbent on the attorney of each side to prepare with much accuracy, especially if the question be of importance and several counsel are to be engaged in it. He should furnish fair copies to the advocates retained on his own side, at as early a period as possible, and thus enable them to ascertain if the cause requires further evidence, while there is time to seek for it. The principles and cases of law bearing on the cause are then to be sought for by the counsel themselves,

and put in their briefs. It may be added that when the attorney is the only advocate in the suit himself, as sometimes happens in our practice, he should not omit to prepare a regular brief, as it will save him much trouble at the trial, and perhaps prevent some error that might be fatal to his client.

## CHAPTER X.

### *THE EVIDENCE.*

---

Evidence is divided into parol and written; that is to say, into the testimony afforded by witnesses, and that deduced from written documents. The testimony of witnesses in our law is given orally, that is, the witness is personally produced in court and sworn, and there examined on questions stated to him, and he answers by word of mouth. To this there are some exceptions where he is out of the province, or unable from age, ill-health or infirmity to travel to the place of trial, in which case his testimony is committed to paper and read in court.

*Compelling the attendance of witnesses.*

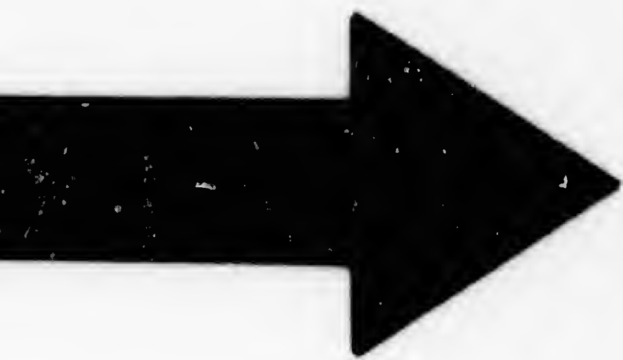
The mode of compelling a witness to attend is by a writ of *subpœna ad testificandum.* [This is issued by the prothonotary or deputy, having been first prepared by the attorney. Four witnesses can be put into one subpœna. They are directed to appear under penalty of £100 each, a *praecipe* or memorandum must be filed in the office. It is served by giving to each witness personally a ticket,

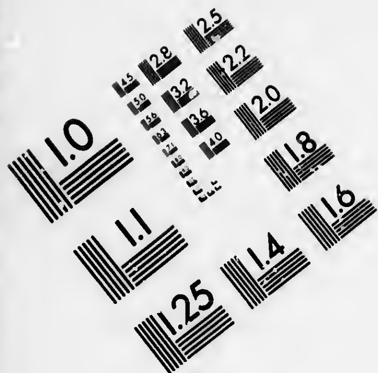
notifying him when and where to appear, &c. Any person except a party in the suit can serve it. The seal of the original writ of *subpœna* should be shown to the witness in giving him the ticket, and the subpœna itself returned into the court, with a minute of service, date, &c.] The reasonable expences* of the witness should be tendered him, according to the distance from his abode to the place of trial, and he should be served within suitable time, to enable him to attend with as little inconvenience as may be. If a married woman be subpœnaed, the ticket must be served on herself, and the tender of expences made to her, and not to her husband, If a witness has the possession of any documents required in evidence, a special clause is inserted in the subpœna requiring him to bring them with him. This is called a *subpœna duces tecum.* If a witness be a prisoner, or on board a ship under a commander who will not let him attend, a writ of *habeas corpus ad testificancandum* may be obtained on affidavit that he is a material witness and willing to attend.—1 Phillips on Ev. 5. This writ should then be delivered to the sheriff or other officer, in whose custody he is, who will be bound to bring him up under it on payment of his proper charges.

But a prisoner of war cannot be brought to the trial without leave of the government. (Furly v. Newnham. 2 Dougl. 419,) though he may be examined on interrogatories, by consent of the parties. Medical men and attornies have been allowed compensation for loss of time besides their charges, but this has not extended to others.

---

* Provincial act of 1784, 25 G. 3, c. 2, s. 3, 1 P. L. 240, "Provided always, that no person shall be obliged to give evidence in any cause, before he or she be paid, or secured to be paid, his or her reasonable charges for attendance, to be allowed of and ordered by the court, justice or justices." (See also English statute, 5 Eliz. c. 9, s. 12.) The same act of 1784, gives also to justices of the peace power to summon witnesses in civil or criminal cases, and gives the form of summons.





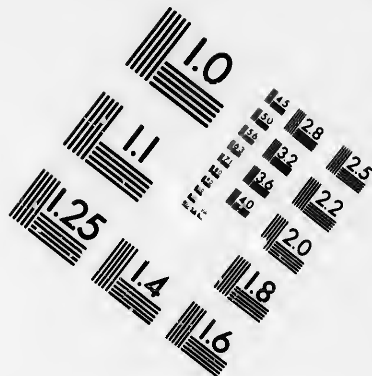
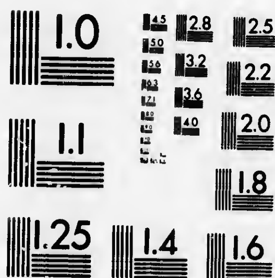
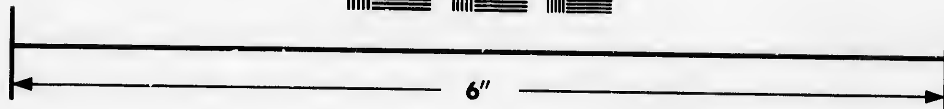
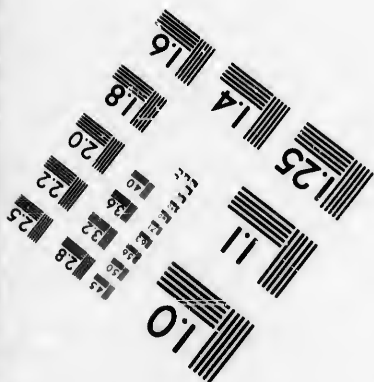
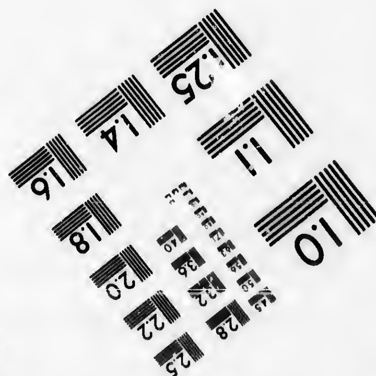


IMAGE EVALUATION
TEST TARGET (MT-3)







Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Moor v. Adam. 1 Maule & Selw. 156. (The payment of expenses is not demandable in the same way in a criminal prosecution. The witness is bound to attend although his expenses have not been tendered.—1 Phillips Ev. 10, 11.) A witness disobeying a subpœna is liable to be attached for contempt, and also to a suit for damages a common law.—ibid. 7.

*Witnesses unable to attend, or going abroad.*

The provincial act of 1774, 14 & 15 Geo. 3, c. 4, s. 1, P. L. 185, directs "that when it shall so 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 and may be lawful for any one of "the judges of the court where the cause is to be tried, "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 persons, 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."

The 2d clause "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." 3d clause. This requires that if the witnesses should "be in the pro- "vince, or able to travel" at the time of the trial, they must attend and give their testimony *viva voce* as if no depositions had been taken. 4th clause, "That all benefit

* The rule of the supreme court, Easter term, 1794, directs that in all cases of depositions taken under the above act, 24 hours notice in writing shall be left with the party against whom such deposition is intended to be used.

"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 clause, admits quakers to be solemnly affirmed instead of taking an oath, under this act. 6th clause, renders every person "wil-"fully, falsely and corruptly" swearing or affirming under this act liable to "incur the same penalties as persons "convicted of wilful and corrupt perjury."*

The act of 1829, 10 G. 4 c. 36, empowers the "justices "of the *supreme court*, to appoint and commission, under "their hands and seals, or under the hands and seals of "any two of them, in such of the counties and districts of "this province, as the said supreme court shall think pro-"per and necessary, one or more commissioners for taking "depositions, *de bene esse*, of witnesses aged, infirm, and "otherwise unable to travel, and of witnesses departing "from the province." 2d section directs, that if the *plaintiff and defendant* in any cause in *the supreme court reside in the county* or district wherein the *venue* is laid, any commissioner appointed in that county or district under this act, may take the examinations, and they shall be equally valid as if taken before a judge, and subject to the same provisions as in the act of 1774, and the same penalties on false witnesses.

### *Witnesses out of the province.*

The provincial act of 1791, 31 G. 3 c. 4. 1 P. L. 284. sec. 1. enacts, "That in all civil causes depending in the

* Supreme court, Halifax, Easter Term, 1823.—Wallace vs. Jenkins. A deposition (of a witness who had been about to leave the province,) taken under this act, was offered in testimony—and its reception opposed until proof should be given that the witness had actually gone abroad. Judge Halliburton was of opinion that such evidence (at least some slight proof,) should be produced, in which Judges Stewart and Wilkins concurred and the plaintiff accordingly gave proof to that effect, on which the deposition was admitted.

" *supreme court* of this province, as well as in any of the " *courts of common pleas* of the same, in which either party " shall be desirous to take the depositions of witnesses *re-* " *siding out of this province*, to be read as evidence in such " causes, it shall and may be lawful for the justices of the " said courts, *upon sufficient cause being shewn by affidavit on* " *behalf of the party desiring the same*, to issue a commission " under the seal of said courts, for taking such deposi- " tions." The court is to regulate the manner in which they shall be taken, and the cost incident to the issuing the commission and executing it, by their rules and orders The depositions to " be read in evidence" unless " the " *witnesses* should be *present in court on the trial.*" The practice of examining witnesses going abroad, or absent from the country, exists in the English courts, but can only be acted upon there, when both parties consent to it. 1 Phillips Ev. 14, 2 Tidd. Pr. 860, 861. With us it has been made a matter of right, that any party in a civil action may obtain the testimony of such witnesses, unless he has by gross neglect deprived himself of it. Our form of proceeding under the act of 1774, is to have the witness examined before a judge or commissioner, by the counsel or attornies on each side, upon questions put by word of mouth, as if he were orally examined in court. The judge or commissioner takes down the substance of his answers, in the shape of a connected statement of what he can prove, and reads it over finally to the witness, who may amend any part of it, and when complete, it is signed by the witness as well as the judge or commissioner. It is then sealed up and filed in court, and not usually opened or published until the trial, though by consent of both parties it may be published before.

The practice with respect to witnesses residing abroad, is borrowed from the English practice. The party seeking the commission must first satisfy the court by affidavit, that he is entitled to it, and then a rule for a commission

is granted him; and, if necessary (as it usually is,) a continuance of the cause. A commissioner is generally named on each side. Interrogatories and cross interrogatories in writing are prepared and exchanged, and the commission, with the written questions and forms of swearing the commissioners, witnesses and clerk, enclosed to the commissioners by the party seeking the evidence.

In the case of Cunard v. Woodward, supreme court at Halifax, Trinity term, 1823, a commision was sought for to examine witnesses abroad, under the act of 1791, and the application was resisted on the ground that the cause was not at issue. It was contended that the cause was not "*pending*" within the meaning of the act. On the other hand, the case of Spalding v. Mure, T. 35, G. 3 K. B. 3 K. B. (see. 2. Tidd. Pr. 864,) was cited where, under the English statute of 13 G. 3 c. 63, s. 44, which authorizes commissions to be sent to India to examine witnesses, a commission had been granted before the cause was at issue. The court after some deliberation granted the commission, and commissions have since been often allowed, before issue joined.

Where a commission has issued, the party who has obtained it, is in general entitled to have the cause continued from term to term, until the return of the depositions.—These are sealed up, &c. as in the case of depositions under the act of 1774, and sent to the prothonotary or his deputy, and not opened till the trial, except by consent. But if there be a want of diligence in expediting the commission or obtaining the depositions, the court will not be inclined to grant continuances. The evidence taken under these acts is considered in the same light with testimony delivered orally by a witness, and it is or is not legal testimony, as it comports with the general rules of evidence.

*Objections to witnesses.*

These are either to their competency or to their credi-

bility. An objection to the competency of a witness, if valid will prevent him from giving testimony in the cause. An objection to his credibility can only be used as the ground of argument with the jury, on the truth or falsehood of his statements. A want of understanding, ignorance of the nature of an oath, a total absence of any religious principles which would make an oath binding on the conscience, a conviction of treason, felony or infamous offences, or an interest in the event of the suit, are grounds of disqualification, and render a witness incompetent to be examined at all in the cause.—See Co. Lit. 6. b. 1 Phillips, Ev. 20 to 82. So a party to the suit is generally inadmissible a witness, and the husband or wife of a party is equally so.—ibid.

The form of the oath taken by a witness is varied according to his creed. Christians are sworn on the New Testament, Jews on the Old Testament. The form varies among christian sects: some kissing the book, and some holding up their hand with the book opened before them. Mahometans, Gentoos, &c. in different forms as their religious principles prescribe. Quakers by the provincial act of 1759, 33 Geo. 2 c. 2, 1 P. L. 48, (conformable with the English acts 7 & 8 W. 3 c. 34, & 22 G. 2 c. 46, sec. 36, 37,) are required (instead of swearing) to make an affirmation, thus "I A. B. do solemnly, sincerely, and truly "declare and affirm," which is to be of the same validity as an oath, and is subject to the same consequences if violated, but the act forbids it to be received as evidence "in "any criminal cases," and requires that the witnesses should have been of that religious profession for a year before they are allowed to affirm. The witness is required to swear or affirm "that the evidence he shall give to the court "and jury sworn touching the matters in question between "the parties at variance, shall be the truth, the whole truth, "and nothing but the truth." Insane persons and idiots, cannot be witnesses, yet a lunatic in an interval perfectly

lucid may be received. A child who fully comprehends the nature and obligation of an oath may be sworn.

A witness having wishes or a bias on his mind in favor of either side, will not affect his competency, nor his being in the same situation with either party. Thus in an action on a policy, one of the underwriters has been received as a witness, he being also the broker.—Bent v. Baker, 3 T. R. 27, 7 T. R. 604. In an action against an administrator, one of his sureties for administering the estate has been received as a witness.—Carter v. Pearce, 1 T. R. 163. Nor will a witness be rejected because he believes himself under an obligation of honor to indemnify bail, though not legally responsible to them.–Pederson v. Stoffles. 1 Campb. 145. The bail for defendant's appearance was admitted as a witness in an action under the provincial statute of 19 Geo. 3 c. 10 act of 1779, 1 P. L. 216, 217. *Den lessee* of administrators of Muirhead vs. Dempsey, in Trin. T. 1823, supreme court at Halifax, where the late judge Stewart overruled the objection. If the verdict in the cause can be used afterwards, as evidence for or against the witness in any future action, he will be considered as interested and incompetent. Those who are liable to pay the costs of the action are incompetent witnesses. Therefore bail are not allowed to be witnesses in the cause.—1 T. R 164. Trustees, guardians, *prochein ami*, executors and administrators where parties (being liable to costs) are therefore generally incompetent. A certain, direct and immediate interest will disqualify a witness, although the verdict cannot be used as evidence for or against him.—1 Phillips Ev. 59. If the amount of interest be ever so small, if it be direct, it will disqualify—ib. 61. If the witness be liable at all events to one or other party for a sum, and the action will only settle to which he is to pay it, he is a competent witness.—ib. 61, 62, 63.

The parties to the suit are rejected on the ground of interest, and as they cannot give evidence in their own fa-

vor, neither can they be compelled to bear testimony against their own claims (though in the courts of equity they may be obliged to give an answer on oath.) But one co-plaintiff has been admitted to disprove the the defendant's liability, with the consent of the defendant.—1 Taunt. 378. And a co-defendant against whom the plaintiff has failed to give any proof whatever, may be used as a witness for the other defendants.—1 Phillips Ev. 68. A co-defendant in trover or in ejectment, who has suffered judgment to go against him by default, may be a witness on the trial for the other defendants.—ibid. 70, 71. No consanguinity or domestic relation will disqualify a witness in civil cases, except that of husband and wife. They are not admitted for or against each other in civil actions at all, nor generally speaking in criminal proceedings. Nor will the dissolution of the marriage for adultery alter the case, they not being allowed to prove any thing which took place during their union. In cases of forcible abduction and marriage, of bigamy, and of forcible violence used to the wife by her husband, she may be a witness. So in proceedings under the statutes of forcible entry, it was ruled in Pennsylvania by McKean, chief justice (in 1782,) that the wife of the prosecutor might be examined as a witness to prove the force; but only the force, for otherwise the statute might be eluded in some cases. (In this case the proceeding was by indictment)—1 Dallas 68, Respublica vs. Shyber et al.

*Credit of witnesses.*

The degree of credit to be given to a witness's statements depends on a great variety of considerations. Mr. Archbold says "The credibility of a witness is com-
" pounded of his knowledge of the facts he testifies, his
" disinterestedness, his integrity, his veracity, and his
" being bound to speak the truth by such an oath as he

" deems obligatory. Proportioned to these, is the degree " of credit his testimony deserves from the court and " jury."—Pleading and Evid. in crim. cases 100.

On the *voir dire*, that is, an oath to answer all such questions as shall be put to him, a witness may (before he is examined in the cause) be interrogated as to his interest, or on any other point which would entirely disqualify him, and this may be done after the examination has begun. He may also on his *cross-examination*, (that is after the party who has called him has examined him in *chief*, as his direct examination is termed) be questioned to elicit from him grounds of objection to his credibility, though he will not be obliged to reply, if the answers may have a tendency to subject him to punishment or infamy. The record of his conviction may be given in evidence to discredit a witness, and for the same purpose witnesses may be produced to speak as to his general character, but not to any particular offence he may have committed. Arch. Crim. Pl. & Ev. 102. A party who produces a witness, and finds his testimony opposed to his interests, is not permitted to discredit the witness he has brought, by proving his general character to be bad. 1 Phill. Ev. 293, 4. A pardon generally in cases of conviction for treason, felony, &c. will restore the competency of a witness. So, under the statute 18 Eliz. c. 7, s. 3, a person who has duly received the benefit of clergy, &c. and undergone the legal punishments, is restored to his competency as a witness. 1 Phillips' Ev. 31, 32, 33. An interested witness may be rendered competent by receiving or giving payment, or a release, which destroys his interest in the suit, and this may be done at the time of trial. See 1 Phillips' Ev. 125 to 131.

*Admissions.*

Admissions made by a party to a cause, adverse to his own interest, are evidence against him. 1 Phillips Ev. 83.

Recitals in a deed are considered as admissions made by the party executing it. ibid. So the admissions of a partner will be evidence in an action to which a firm are parties. ibid. 86. The rule is applicable to joint contracts, but not to co-trespassers. So the statement of an agent, in doing an act within the scope of his authority, is evidence against his principal. ibid. 92. Admissions made in a cause by the attorney are evidence against his client, though casual conversation will not. ibid. 98. Admissions may be inferred from circumstances shewing acquiescence, as well as from express admissions. ibid. 99, 100, 101, 102. But the whole of the circumstances or language attending an admission, must be taken in connection, and its effect drawn from the whole, and not from a partial view. ib. 103.

*Communications to counsel, attornies or solicitors.*

Confidential communications, made by a client to his attorney, solicitor or counsel, are not to be revealed at any period by the party trusted, unless with the client's consent; and a deed, deposited confidentially with an attorney, having been obtained out of his custody, has been rejected in evidence; and this has been even extended to forged papers. But this privilege is not extended to the confidence reposed in one's medical advisers or personal friends, nor to oaths of official secrecy.—ibid. 131,—135,

*Agents.*

Agents are constantly admitted to prove contracts made by them for their principal, although they have an interest in supporting the contracts. So servants and carriers are admissible to prove payments, or the delivery of goods on behalf of their masters or employers, though their evidence tends to discharge themselves. ib. 120, 121, 122, and they are admitted though not released.

*General Rules of Evidence.*

A single witness, if credible, is sufficient, in English law to prove any fact. (There are two exceptions, viz. in cases of perjury and high treason.) The civil law requires two witnesses at the least. The same principle is to be found in the Jewish law. The rule also in courts of equity is, that if the facts proved by a single witness are clearly and positively denied by the answer of the defendant on oath, the court will not ground a decree on facts so proved and so denied. 1 Phillips' Ev. 143.

*Presumption.* Where a witness states a fact from his own immediate knowledge, the proof is said to be positive; but when the fact is to be inferred from circumstances given in evidence, it is said to be circumstantial or presumptive evidence. A presumption is described as a probable inference, which our common sense draws from circumstances usually occurring in such cases. Presumptions may depend upon one chain of circumstances or upon separate and independant facts or series of facts, all leading to the same inference. In considering presumptive testimony, the degree of probability is the chief point of enquiry. Violent, probable and light, are expressions used to mark the degree of weight to be attached to this kind of evidence. 3 B. C. 371.

It is a rule that *innocence* is to be presumed in favor of a party until the contrary is proved. So *legitimacy* is presumed in favor of children born during marriage. So when there is long and undisturbed possession of real estate, a documentary title will be presumed in favour of it. So a receipt for rent to a certain date is strong presumptive evidence that the former rents have been paid. So a bond, after it has been twenty years dormant, will be presumed to have been paid. So possession, as the apparent owner, is presumptive evidence of property, both as to moveables and real estate. So, long enjoyment affords presumptive evidence to establish a right of way or easement. 1 Phillips Ev. 144 to 158.

It is a general rule that the evidence is to be confined to the points in issue in the cause. Such evidence as is relevant to the questions disputed in the suit is alone admissible. For this cause, the character of the parties cannot be proved in civil actions, except when it is distinctly put in issue by the nature of the proceedings. ibid. 164.

The party who affirms a fact on the pleadings is bound to prove it, if it be material; the party who denies it is not bound to disprove it. This rule is the principle of both the English and the Roman law. 1 Phillips Ev. 184. But when the presumption of law is in favour of the defendant's plea, it may be incumbent on the plaintiff to disprove it, although in so doing, he may have to prove a negative. Thus, if the defendant plead payment, in an action, on a bond of twenty years outstanding, the plaintiff must give evidence from which non-payment may be inferred, such as payment of interest, &c. 1 Phillips, Ev. 187. So if the life or death of a person be made a question, he is presumed to be alive, unless unheard of for seven years, and if he has been known to be alive within that period, the party alleging his death is bound to prove it.—ibid.

It is also a rule of evidence that when a party's case depends on a fact which lies more peculiarly within his own knowledge, it is incumbent on him to prove it. ibid. 188.

It is also a rule of evidence that the substance only of the issue need be proved. All material facts alleged in the declaration, and put in issue, must be established in evidence. ibid. 190 to 195.

If the whole of an averment may be struck out without destroying the plaintiff's right of action, it will not be necessary for him to prove it. In an action on a contract, if any part of the contract proved vary materially from that alleged in pleading the action must fail. ibid. 197.

If a contract consist of several distinct and independant articles, it will not be necessary in an action on one part

of it to set out the whole in pleading, provided that the consideration, the act to be done, and the circumstances be distinctly stated. ibid. 198.

The allegation of every material fact in pleading, requires a time and place to be stated on the record, but it is not always necessary to prove the date to be correct. The best evidence must be given of which the nature of the case is susceptible. This rule is understood thus:—That if a party offer to prove a fact by evidence of an inferior description, when it appears to be within his power to furnish proof of a higher and more unexceptionable character, the lesser proof shall not be received. Thus, the contents of a deed are not to be proved by means of a copy, unless it be shewn that the original is lost or destroyed, or that it is in the hands of the opposite party, who after notice will not produce it. I Phillips on Ev. 206, 207. So the registry of a deed may be given in evidence, where the original in the possession of the opposite party is not produced after proper notice. ibid. 207. R. v. Doran. 1 Esp. N. P. C. 127, See also on the rule respecting the best evidence the case of Williams v. the East India Company. 3 East 193, 201. This rule, however, does not extend to require that the strongest possible assurance of a fact should be established. The instance of a deed attested by several subscribing witnesses, and which may be proved by one of them, is an example. 1 Phillips Ev. 209. Handwriting may be proved by witnesses acquainted with it, without calling the party who wrote it. But to disprove an alleged signature, that is to make it out to be a forgery, the party himself who made it should be called, though this has been dispensed with in cases of Bank notes forged. See 1 Philips Ev. 212, 213, 214.

The rule of requiring the best evidence is dispensed with—1. By allowing an entry in a public book to be proved by an examined copy. 2. In the case of public officers—in many cases proof of their appointment has

been dispensed with, it being shown that they acted in such a capacity. 3. The admissions implied from the conduct of the adverse party, often prevent the necessity of giving strict proof of certain facts alleged. Thus, if a lessee acknowledges that he has assigned the lease to a third person, an assignment will be presumed, though the law requires it to be made in writing. ibid 215 to 218.

It is a general rule that a witness is not to be allowed to testify what he has heard other persons say respecting the question or facts disputed. This of course does not apply to admissions or statements made by a party in a suit, which may be used as proof against him, though he cannot give them in evidence in his own favor. The testimony given on a former trial between the same parties, by a witness subsequently deceased, may be proved, if his very words can be precisely repeated by a bystander. I Phillips Ev. 219. Hearsay evidence is admissible when it is used to characterize the acts of any party. Thus, the declarations of a trader, when about to absent himself from home, have been allowed to be proved to show the motive of his absence, when the question was whether he had thereby committed an act of bankruptcy, as the intent is essential in such a case. ibid 220.

So the inquiries of a physician, and the patient's answers, are admissible in an action of assault brought by the patient, to shew the sufferings he received from the blows inflicted. Hearsay evidence is generally discouraged in our courts, it being always thus reasoned, that if the person who is sworn to have made such, or such an assertion, were in court and sworn, a better and more faithful account of the facts with which he is acquainted, could be elicited from him, than can be obtained through the intervening medium of the witness, who repeats his words. There are, however, certain exceptions to this rule.

1. Dying declarations made by a person under the conscious certainty of approaching death, have been con-

stantly admitted in criminal cases, but not in civil actions, with the exception of the dying confession of a person who had subscribed as witness to a forged bond, or will, &c. where it has been admitted as proof of the forgery. In trials for robbery, the dying declarations of the party robbed, are inadmissible. So in a question of pedigree, the dying declaration of a stranger as to the relationship of parties has been rejected.

2. *Pedigree.*—In questions of pedigree, the declarations of deceased members of a family have been received to prove relationship. So descriptions in wills, on monuments, in family bibles, and family registers, are admissible for the same purpose. But the opinions of deceased neighbors or acquaintances are not admissible. The legitimacy of a party, and the time of his birth come under the same rules of evidence. But the place of birth cannot be fixed by proving the declaration of a deceased parent. These declarations are also all liable to rejection, if made on a subject in dispute, or with a view to a suit in agitation at the time.—1 Phillips Ev. 222 to 236.

3. *Public rights.*—Prescriptions, boundaries between parishes, and customs in which the public are interested, may be proved by the statements made by persons deceased, provided that no dispute or controversy was at all contemplated at the time they made such statements. But the subject of proof must be of a general nature, such as a general usage, a public bound between two parishes, and not any particular facts. ibid. 236 to 240.

4. The declarations of deceased persons are admissible in many cases where they have made them against their interest, as entries of credits in their books, &c, bills of lading signed by a deceased master, as evidence of property in the consignee. ibid. 240 to 243. Entries in a tradesman's books by a deceased shopman have been received as evidence of delivery of goods to a customer. ibid 250. An English act, 7 Jac. 1, c. 12, directed that the

shop book of a tradesman should be rejected in evidence in certain cases. This has been re-enacted here by the act of 1771, 11 G. 3 c. 10, 1 P. L. 168, made perpetual by act of 1777, 17 G. 3. c. 2, 1 P. L. 205, but it is unnecessary to detail the provisions of these acts, as they originated in a construction of the law since abandoned, it being now the long admitted and general rule that entries in any man's books, made by himself, are not evidence for him in any case, though they may be used against him. Whatever a witness may have said on other occasions, can be used to shew inconsistency with his present testimony and and thus to weaken the effect of it.—Archb. Pl. and Ev. in criminal cases, 75.

*The examination of witnesses.*

It appears to be in the power of the prosecutor as well as of the defendant in criminal trials, to require the witnesses to be kept out of court, except the one under immediate examination. (In the Scotch law this separation always takes place in criminal prosecutions, the rule being that if a witness has been present in court during the examination of another witness so as to hear his evidence, he will be rejected. The rule adopted in courts martial is the same.) It appears also to be in the discretion of the courts, to use a similar precaution in civil cases. In important criminal cases, it may sometimes be requisite that the witnesses should be placed under vigilant care, during the progress of a trial, to prevent their receiving information as to what is said in court by any witness, and also to prevent any improper interference with them or concerted story being agreed on. Their separation may even be advisable.—See Archb. Crim. Pl. and Ev. 109, 110. 1 Phillips on Ev. 255. When a witness has been regularly sworn in chief, the counsel for the party who produces him, (or the party if he acts without counsel) proceeds to examine him. This is called the

direct examination. When this is finished, the other party's counsel cross examines him, (or the party if he has not employed counsel.) On the direct examination the questions must be relevant, that is, pertinent to the matter in issue in the cause. The questions also, on the direct examination, must not be leading questions, i. e. framed so as to suggest to the witness the answers required; but if a witness is clearly hostile to the party producing him, leading questions are sometimes permitted.

On the cross-examination greater latitude is permitted. Leading questions are there allowed, but they must be relevant either to the cause or to the witnesses credit.—ibid. 255 to 260. When a witness is under the examination of a junior counsel, his leading counsel may interpose and go on to examine.—2 Campb. 280. If any new facts are elicited by cross-examination, the party who produced the witness may re-examine him respecting them, so he may re-examine him to explain any part of the testimony he has given on the cross-examination. So a witness may be brought back and re-examined respecting matters sworn to by another witness, to affect his credit, by shewing him to have made formerly statements inconsistent with his present evidence.—(See 1 Ph. Ev. c. 8. passim, as to examining witness.) The court and the jurors may at any period of the examination interpose and put questions to the witness, and this as often as they think fit. The court very frequently will permit a counsel to put questions after the examination is gone through, which have been accidentally omitted to be put at the proper time, as questions put by the court; but in such case, the court must first be apprized of and approve the question, before it can be put to the witness. The court may detain a witness after his examination, till the trial ends, if they think he may be again required; or in case he has prevaricated or his evidence is suspicious, they may

detain him, in order that if guilty of perjury or contempt of court he may be tried and punished.

### *Privileged communications.*

Agents of police, and those who collect secret information for the use of government, are not permitted to disclose the secrets of their employment. Official communications between a colonial governor and a law officer of the colony or a military officer, are protected from investigation on similar views of public policy. So are reports or letters between an agent of government and a secretary of state, and reports of a military court of enquiry.—1 Ph. Ev. 273, 274. So the advice given to government in a confidential communication by a public man is privileged.

*Memorandum.*—A witness may refresh his memory by looking at memoranda made at the time the fact minuted occurred, or shortly after.

*Opinion.*—A witness cannot be examined as to his opinion, but as to his knowledge of facts. But in questions of science or commerce and the like, the expert and instructed may be questioned as to their opinion.

### *Written evidence.*

*Records*, are properly speaking, the entries of proceedings of the legislature and the superior courts. They are considered of such authority that no evidence is allowed to contradict them.

1. Acts of Parliament, (or assembly)—these are public or private, Public acts need not be pleaded or given in evidence, the courts being bound to take notice of them. If a private act is to be given in evidence, an examined copy taken from the original document is sufficient.—1 Ph. Ev. 364.

2. *Judgments and verdicts.*—"The judgment of a court "of *concurrent* jurisdiction directly upon the point, is as" "a plea, a bar, or as evidence, conclusive between the" "same parties, upon the same matter directly in question" "in another court." So "the judgment of a court of" "*exclusive* jurisdiction, directly upon the point," is "conclusive upon the same matter incidentally in ques-" "tion in another court, between the same parties, for a" "different purpose."—11 State Tr. 261. So privies in blood, estate or in law, are bound by former judgments. 1 Ph. Ev. 307. A judgment in an action for the same cause will preclude a new action. Thus a judgment in an action of debt is a bar to an action of assumpsit on the same contract. If a plaintiff attempt to prove a demand, and fail to do so, he cannot set it up in a new action. A judgment in trespass is decisive as to the right of possession, if the title be the foundation of it. The form of an action of ejectment renders the judgment not final as respects the title attempted to be proved.—1 Ph. Ev. 315, 316. Judgments may impeached, if grounded on fraud or collusion—ibid. 322. Judgments are proved by sworn copies, or (which is stronger evidence,) by copies under the seal of the court. A probate is the only admissible evidence of the appointment of an executor.—ib. 325.

The sentence of a *foreign court* of admiralty of competent jurisdiction, is conclusive evidence of the points upon which it professes to decide. And so the sentence of any other foreign court of competent jurisdiction, directly deciding a question which was properly cognizable by the law of the country, seems to be conclusive when the same question incidentally arises here. 1 Ph. Ev. 327—331.

*A foreign* judgment is *prima facie* evidence of a debt, but it is not conclusive ; it has only the same force as a simple contract between the parties. ibid 331—333.

*A bill in chancery* is not evidence in the courts of law, to prove any facts alleged or denied in the bill. 2 Selw.

N. P. 685. But an *answer in chancery* is strong evidence against the person who makes it, it being a confession under oath; but the whole sense of it must be taken, as it would be unjust to separate a particular admission, without annexing to it the other statements of the defendant, which may modify it.—1 Ph. Ev. 342. But the answer of a minor by his guardian is not evidence against the minor. Nor the answer of one defendant evidence against a co-defendant. *Depositions in chancery*, may be used as testimony in an action at law, upon the same matter, between the same parties or those who claim under them, if the witness be dead or out of the country, &c.—ib. 345.

*Inquisitions of escheat*.—Those taken by the sheriff or *coroner*, are evidence of the facts found, even against third persons. So are inquisitions of *lunacy*.—ib. 356.

*Judgments of inferior courts* are evidence between the same parties, on matters within their jurisdiction, as they do not keep regular records, their minutes are admissible evidence of judgment.—ibid 360, 376. So an *award* is conclusive, as to all matters within the scope of the arbitrators authority and into which they have enquired. If the validity of an award comes in question, directly or indirectly, *both the submission and award* must be proved. ib. 380. An office copy in the same court and in the same cause is equivalent to a record; but in another court, or in another cause, the copy must be proved on oath to be correct, by a witness who has compared it with the original.—ibid. 366, 367. If a verdict be offered in evidence, the judgment on it must be also proved, for there might have been an arrest of judgment or new trial.—ibid. 369. A *sheriff's return* on file is *prima facie* evidence of the fact stated in it, even in a different suit.—ibid. 371.

*Records of council*.—The prov. act of 1781, 21 G. 3, c. 2, makes "the transcript or copy of any vote or proceed-" "ings of his Majesty's council, relating to titles of lands," "attested as a true copy, and signed by the clerk of the"

"council, legal evidence in any cause depending in any" "of his Majesty's courts within this province." The clerk of the council is required and directed to give copies to any party in a suit or the attorney. Fees 1s. for a search, 6s. 8d. for every copy if less than 100 words, and 1s. for each additional 100 words.—1 P. L. 222, 223.

*Register* of marriages, births and deaths. The act of the province of 1761, 1 G. 3, c. 4. 1 P. L. 67, directed (sec. 1.) "in every township within this province," "where no parish shall be established, the proprietors" "clerks" to register marriages, births and deaths, in their respective townships "to take an account of all persons" "that shall be married, or that shall be born, or shall" "die" in their township—"and fairly to register in a" "book their names and sirnames, as also the names and" "sirnames of their parents, with the time of their being" "married, or of their birth and death." Register was to receive 6d. fee on each entry, from the parties married, or the parents, or next of kin of the person born or deceased. A penalty of 5s. to be paid to the register, by any person neglecting to give him notice of a marriage, birth or death for 30 days, on conviction before any justice of peace of the county. If the fine is not paid in 4 days, to be levied by the justices warrant, by distress and sale of offender's goods. Register to receive 1s. for a fair certificate under his hand, which is to be given to any person applying. Sec. 2. enacts "that the registry" "so kept shall be sufficient evidence in any court of re-" "cord within this province."

It being found that in several townships there were no proprietors clerks, the prov. act of 1782, 22 G. 3, c. 3, 1 P. L. 226, 227. sec. 1. substitutes the town clerk of each township, to perform the duty imposed by the act of 1761, on the proprietors clerk, the same penalty on persons neglecting to give him notice. This act raises the fee for each registry from 6d. to 1s. Sec. 2. directs

the town clerks to obtain from the several ministers of each township, a list of the marriages, births and deaths, recorded by them before the making of the act, and from time to time thereafter, and to enter the same in a book kept for that purpose.

*Registry of deeds.*—The prov. act of 1758, 32 G. 2, c. 2. Sec. 13, 1 P. L. 3, enacts "that if any original deed" "shall be lost, and proof thereof in court being made," "that then the registry or record of such deed or deeds," "shall be allowed to be good evidence in any court of" "law or equity within this province." See Epitome v. 2 p. 222, &c.

*Foreign laws* may be proved, if written laws, by copies properly authenticated. If unwritten law by witnesses of competent professional skill. Sir W.Scott names "the opi-" "nions of the learned professors given in the present, or" "similar cases"—"the opinions of eminent writers, as" "delivered in books of great legal credit and weight."— "the certified adjudication of the tribunals of Scotland" as sources to ascertain a question on the law of marriage in that country, giving the highest place to the public decisions.—Dalrymple v. Dalrymple. Dr. Haggard's Rep. v. 2. p. 81. Though text writers are often to be admitted to prove the laws of other states (see Gen. Picton's case, 30 Howell's St. Tr. 492,) yet treaties and other acts of state, must be proved by copies examined with the archives of the government by which they are made.—‡ Campb. 65. The gazette of the government is admitted to prove such acts of government as it announces to the public by *proclamations.* 1 Ph. Ev. 387. such as those respecting peace or war—quarantine, &c. and *articles of war* purporting to be printed by the king's printer are admitted.—ibid.

*Advertisements* in the gazette or other papers are not evidence of notice, unless it be shewn that the party read them, or that they are made equivalent to such notice by some statute law.—1 Ph. Ev. 388.

The *register of a ship* is conclusive evidence to *negative* the title of those *not* named in it, but it is *not* conclusive evidence of title in those who *are* named.—ibid. 391, 392.

The *register of the navy office* has been admitted to prove the death of a sailor—the *book of the master's office*, K. B. to prove a person to be an attorney. The *log-book* of a man of war to prove the time of her convoy's sailing. *Bank books* to prove a transfer of stock. *Entries in vestry books* for different purposes. The *day book* of a *public prison* to shew the time of a prisoner's committal or discharge.—See 1 Ph. Ev. 394 to 397. So books of history have been admitted to prove matters relating to the kingdom at large, of an ancient date.—ibid. 403.

In action by a seaman for his wages, the captain is to produce the articles at the trial without previous notice, by a statute regulation. In other cases if a deed or paper be in custody of the adverse party—if after due notice before hand, he will not produce it, secondary evidence of it's contents may be given, but it's execution must still be proved by the party who would make it evidence. 1 Ph. Ev. 431. If it be proved by a witness that the paper in question was thrown aside as useless, and that he believes it to have been lost or destroyed, this will be sufficient to let in secondary evidence of its contents; but if it be traced into the hands of any person who is still living, he should be called—if traced into the possession of a person who is not alive, enquiry should be made among his papers.—Evidence of the contents should be by an attested copy, though if traced to the adverse party (after notice to produce it,) less strict testimony may sometimes be admitted.—1 Ph. Ev. 439, 440.

The execution of a *deed* must be proved before it can be given in evidence. *Exceptions*.—1. Deeds and other writings 30 years old, where no suspicion arises from circumstances against them, are admitted without evidence of execution. They should appear to have been acted on,

or to have come out of such a place or such hands as they would if genuine, have been kept in.—1 Ph. Ev. 458, 459. 2. By consent of parties in the suit, under a rule of court a deed may be admitted in evidence without proving the execution. 3. Where a party under notice to produce a deed, and who claims under it, has produced it, it need not be proved—and where a sheriff under notice produces a replevin bond, in an action for taking insufficient pledges.—ibid. 431, 2. Every attested writing ought to be proved by a subscribing witness if he can be produced and is capable of being examined. The subscribing witness is alone competent to prove the execution, because the time and circumstances attending the transaction may be probably in his recollection and these often effect the validity and sometimes vary the construction of an instrument. The acknowledgment of an obligor, that he had made a bond, and even an admission of a defendant in answer to a bill in chancery for discovery, will not dispense with the testimony of the subscribing witness.—1 Ph. Ev. 446. If the subscribing witnesses become (after the attestation) incompetent on account of interest, their signatures may be proved instead, so if they be dead, or so long absent, and unheard of, that they may be presumed to be dead. If there be no attestation—the handwriting of the maker of an instrument may be proved, by those who are acquainted with it, by having seen him write or who correspond with him,—but our courts reject comparison as a test of hand writing.—1 Ph. Ev. 471, 474, 475.

*Proof of wills.*—The probate of a will may be admitted in evidence with respect to personal estate, but it is not evidence of a devise of real property. If the original be in existence, it must be produced in proof where real estate is concerned. The devisee will not be obliged to call more than one of the subscribing witnesses in a trial at common law,, if that one can prove all the requisites to establish the validity of the will, though if the opposite

party disputes the regularity of it's execution, he may call the others. But in chancery (and in issues at law directed by that court, the rule is, that all the witnesses should be produced by the party relying on the devise. The subscribing witnesses are not required to have seen the testator sign, provided he acknowledged it to them when they attested it as his will,—and an attestation of the witness by a mark has been held a sufficient subscription, within the meaning of the statute. If however the subscribing witness called cannot prove the whole of the execution, (as will be the case where the will has been acknowledged to them separately,) the others should be produced. Witnesses abroad, to a deed or will, need not be examined, but the proof of their hand-writing is considered as a substitute. Where the subscribing witnesses are dead and their hand writing cannot be proved, it will be sufficient to prove the hand-writing of the testator. Where there has been possession under a will, and it is thirty years old, it seems to be admissible without further proof, as an old deed is, but if unaccompanied by such possession it will require to be proved like any other will. --See 1 Ph. Ev. 475 to 486, 2d vol. of this work, 196, 206.

*Stamps.*

These are not required by the laws of the province on deeds or any other documents,and though a deed be execut- in the mother country, yet if it relate only to property in this province, our courts will receive it in evidence without stamps. But as the laws of Great Britain and Ireland, those of Jamaica, &c. require certain government stamps to be affixed to deeds, agreements, receipts, policies of insurance and a variety of other documents, used in business carried on in those countries. Instruments requiring this formality by the law of the place, where they are made and executed, and to the transactions of which they

belong—must be duly stamped in order to be perfect as legal evidence in our courts. But the party who makes the objection must shew, that such a stamp was necessary by the law of the country whence the instrument comes. —1 Ph. Ev. 488.

*Ambiguity in writings.*

Latent ambiguities may be explained by oral evidence, but if there be a patent ambiguity it cannot. Thus a devise to John Thompson, if there be two of the name who claim, may be explained by evidence, as to which the testator meant, but if there be a blank for the name of the devisee, this being an apparent want of certainty manifest on the face of the paper, evidence will not be admitted to explain it.—1 Ph. Ev. 513, 520, 525, where however, writing is not requisite by law to the validity of an agreement its defects may be supplied by witnesses. Parol evidence cannot be admitted to contradict, to add to, or vary the terms of any will, deed, or other writing.—ibid. 529.

He who is party to a deed is not allowed to allege any condition or consideration, contrary to what is expressed in the deed, except where the consideration has been illegal, or the transaction fraudulent—ib. 532.

As a deed takes it's effect not from the date it contains, but from the real time of its delivery, evidence will be admissible to shew that it was delivered either before or after its date—ib. 534.

Evidence will not be admitted to prove any verbal agreement respecting a *promissory note or bill of exchange*, inconsistent with the terms of the instrument. Nor to vary or add to a *contract* in writing with *seamen for wages*, nor to alter the terms of a *policy of insurance*, though the usage of merchants may be shewn in evidence to explain the terms of mercantile papers. ibid. 536, 537.

## CHAPTER XI.

### *TRIAL BY JURY.*

Having thus considered the preliminary steps required to bring a cause to a state of readiness for trial before a jury, the writs by which causes are commenced, the appearance on the part of the defendant, the pleadings on each side, and the testimony with which each party should be prepared to support his case,—let us advert to the arrangement made by the courts for the trial of causes, and the manner in which the trials are conducted. The general rule of the supreme court of Easter term, 1782, directs "all causes at issue for trial, to be entered upon a "list, in the order they stand upon the docket, to be post-"ed up in the court room the first day of the term. Such "causes upon the list peremptorily to come to trial in ro-"tation, unless cause be shewn by special affidavit for "continuance over, and upon motion two days before." The rule of court, Trinity term, 1792, orders, "that for the "future no issue joined as of a preceding term, shall be "tried in this court, unless the cause shall have been en

" tered with the prothonotary for that purpose, a certain " time before the end of the vacation preceding the term " in which it is intended to be tried." The same rule directs " that every cause shall be tried as it shall have been " entered without preference or delay." Special jury causes, however, have a day particularly fixed for them, on which if they are ready they take a preference, and the king's causes (which include all criminal prosecutions) have a right to preference if the king's attorney-general claims it. The continued causes from former terms, and the new causes set down for trial, are all copied by the prothonotary into a list, of which he furnishes a fair copy to the judges sitting, and he also hands them the issue rolls of the causes, as they come on for trial, that they may see the pleadings in their regular order. The gentlemen of the bar obtain copies of the list of causes for trial from the prothonotary. The terms of the Halifax supreme court, it will be remembered, consist of 14 days each,* and they have been appropriated by the two following general rules :—

*General rule*, " *Mich. Term*, 1825." *Halifax*, *ss.*

" It is ordered that in future the first five days of each " term of this court be appropriated to the hearing of mo- " tions and arguments on points and questions of law, to " the exclusion of all trials by jury, during that time, and " that the succeeding seven days in term commencing on " Monday in the second week, and ending with Monday " in the third week, in each term, be devoted to the trial " of civil causes by jury, to the exclusion of all motions " and arguments, except such as are immediately connect- " ed with trials." By the court, 19th April, 1825.

(Signed) W. Thomson, Cler. Cor. & Pro.

* (Opening on a tuesday, and closing on the tuesday fortnight.)

*General rule*, " *Hilary Term*, 1830."

" It is ordered by the court, that in future the *three* " *first* days in each term only, shall be appropriated to the " hearing of motions and arguments, and that the trial of " causes by jury shall commence on the first Friday in " term, on which day the petit jury shall hereafter be or- " dered to attend." By the court, 28th January, 1830.

(Signed) J. W. Nutting, Dy. Pro.

The general rule of Hilary term, 1816, requires " that " all summary causes intended for trial in each term, be " entered in the Prothonotary's office of this court, on " the Tuesday preceding the last Monday of the term " whereon the same are intended to be tried" The rule of Trinity term, 1788, orders " that in future no summary " causes shall be permitted to go to a jury, unless such " motion shall be made on or before the eighth day " of the term."

On the first 3 days of each term at Halifax, (except Trinity term in July) the law arguments are discussed. That is, on the Tuesdays, Wednesdays and Thursdays,—on Friday the petit jury come and generally try causes on that day and Saturday—and they attend again during the whole of the next week, unless on those days which are set down for special jury causes, but it unluckily happens that these generally take up 3 or 4 days. The criminal trials having also a right to preference, interfere with the chance of trying an ordinary civil cause. The last two days of the term being Monday and Tuesday are for the Summary trials without a jury. Owing to the difficulties attending these arrangements and the inconvenience of prolonging the term which is but rarely done, and the hazard and trouble of keeping witnesses and parties in attendance for a number of days with a remote contingency of trial—causes, are often vexatiously delayed, although the attornies on both sides are desirous and take all reasonable pains to bring them on.

In the action of replevin each party is equally an actor or plaintiff, and therefore either party may make up the issue and bring on the trial.—2 Tidd. Pr. 793. We have already seen that if the plaintiff does not try his cause after having given notice of trial, he must pay the defendant the costs to which the latter has been thereby subjected, unless the notice has been countermanded in time, or good cause for the delay be shewn; by the general rule. Sup. Court, July 31, 1792. Where the plaintiff was dilatory in bringing his cause on to be tried, the old course in England was for the defendant to bring on the trial by *proviso* as it was called. This course has been superseded in England by the statute (British) 14 G. 2 c. 17 which gives power to the courts to give judgment "as in cases of nonsuit" where the plaintiff has neglected to try his cause within due time.—2 Tidd Pr. 822. This act has not been re-enacted here, but the same course has been long pursued by our supreme court. After a cause has been at issue three terms, and not brought on by the plaintiff, the defendant gives him notice on the last day of term, that unless the cause be tried during the next term, a judgment as in case of nonsuit will be moved for. It was decided in Mich. term, 1832, that unless the cause had actually been called twice in court, the plaintiff should not be nonprossed.

The illness of the plaintiff preventing him from instructing his attorney, the absence of material evidence, &c. have been held sufficient excuses to prevent the judgment, but if no reasonable excuse is shewn, judgment is given for the defendant, who obtains his costs in the action. The court will sometimes put the plaintiff on terms to try the cause peremptorily at the next term. At this stage of the proceedings, on a review of the evidence each has to produce and the risks incident to trial, the parties sometimes agree to refer the cause to arbitration, and it may be done even during the progress of the trial itself. This

is done by a rule of court, signed by the attornies on each side, and may include all other disputes existing between the same parties. It is usually inserted in the rule that all proceedings should be stayed, as otherwise the reference would not have that effect, and leave is also given by it for the plaintiff to enter up a judgment as in case of a verdict. If the cause be begun, the plaintiff (if there be special bail) should take a verdict subject to be reduced by the arbitration, as otherwise the bail would not be liable.—2 Tidd. Pr. 873, 876. Sometimes when the cause is about to begin, the defendant by withdrawing his plea and giving a confession prevents further proceedings.

The judges who attend usually divide the duty by trying the causes brought before them by turns. The judge who tries the cause (as it is called) takes a written minute of the testimony offered on each side, and of such legal exceptions as are offered. If when any cause at issue is called in it's turn by the judge, the plaintiff's attorney is ready to try it, the judge orders the Prothonotary to swear the jury. Their names having been previously called over and the number of 12 being complete, or filled up at the request of the plaintiff or defendant with *talesmen* from the by standers, they are sworn several at a time ("well" " and truly to try the issue joined between the parties at" " variance and a true verdict to give." When the jury is called either party has a right to make an objection to the jury (which is called a challenge)

*A challenge to the array*, is an objection to the whole list of the jury or jury *panel*. This can only be made on the ground of some improper conduct on the part of the sheriff (or other officer concerned in nominating the jury) or on account of his being interested.

*Challenges to the polls* are objections to individual jurors. Want of the necessary qualifications of citizenship, age, mental capacity or property, a consanguinity within the ninth degree to either party, having been an arbitrator

on the same question, having declared an opinion upon it, having an interest in the suit, being at law with either party, having taken a bribe for his verdict, having been formerly a juror in the same cause,—being the master, servant, tenant, counsellor, steward or attorney, or of the same society or corporation with one of the parties;—all these are principal causes of challenge, which if substantiated will prevent the person objected to, from sitting as a juror.—2 Tidd Pr. 905, 3 B. C. 363. So a conviction for treason or felony, or for any infamous crimes is a sufficient objection to a juryman. Besides which on suspicion that a man is not indifferent, the party objecting may claim to have it decided by two indifferent men who are called triers. A juror himself may be examined on oath as to any causes of objection to him, that do not affect his moral character.—Ibid. No challenge to the array can be made on objections to the officer of the court expressly appointed to nominate the jury, (as the master of the crown officer is in the K. B.)— nor is it an objection to a special jury, that none under the rank of Esquire were drawn. A juror cannot be questioned as to his having expressed opinions before the trial, such objection must be proved by witnesses against him.—See Rex vs. Edmonds, and others, 4 Barn & Ald. 471. It is the usual course when a juror of his own accord states himself to have a difficulty through connection or delicacy.—that prevents him from sitting as a juror without doing injury

---

In the *English* practice the plaintiff is entitled to have the pleadings opened by his junior counsel and the case then stated by his senior counsel. In general the plaintiff's case is gone through first; but when the issue to be tried is on a collateral fact, the proof of which rests on the defendant as a right of way in trespass, &c. his counsel begin and have the general reply.—2 Tidd. Pr. 908. When several defendants employ separate counsel, only one can be allowed to address the jury for them.—ibid. 909. I have understood it to be the practice in some colonies to allow a counsel who produces

to his feelings, to permit him to withdraw. The jury having been sworn and counted, the plaintiff's counsel states to the court and jury the nature of the question at issue, and the evidence by which he expects to support it.† He then produces his evidence in proper order, proves his documentary testimony regularly, examines his witnesses, who are cross-examined by the defendant's counsel, and when he has produced and gone through with all the proof he has in his power to produce to establish the case, he stated in opening or at least all that he considers it necessary or prudent to offer, he states to the court that he there rests and closes his case.

At this period of a trial, if the defendant's counsel think that there is any serious defect in the evidence adduced by the plaintiff, by which he has failed to give proof of any fact material to his cause, it is usual for him to move for the opinion of the court, whether the plaintiff ought not to become *non suit*. Counsel are heard on both sides and the court (if they think the case has not been supported sufficiently to require the defendant to meet it,) will recommend to the plaintiff to become non suit. This is optional with him. By submitting to a non suit he has to pay the costs of suit, but he may afterwards bring another action for the same cause, which he cannot do, after a verdict has been given against him.—3 B. C. 376. 2 Tidd Pr. 917. If it be not considered expedient to move for a non suit, or if it be moved for, and the court think the plaintiff has made out a *prima facie* case, or if after

---

witnesses, always to have an opportunity to remark on their evidence, after as well as before they have been examined.—This course appears to be also sanctioned by the rules of courts martial.—(See Mc Arthur,) and is consonant with the course of proceeding in the ancient Roman tribunals.—(See Cic. pro. L. Flacco, &c.) as evidence, particularly oral evidence, often disapoints the party who introdnces and frequently requires to be explained and elucidated, it seems reasonable that this should be allowed.

the court has directed a non suit the plaintiff refuses to submit to it,—in any of these cases, the defendant's counsel has a right to address the jury, stating the nature of his defence and the testimony by which he intends to support it. He then proceeds to produce his evidence, and his witnesses are examined and cross-examined. If the defendant choose to rely on the weakness of the plaintiff's case, and to produce no witnesses, the plaintiff's counsel cannot reply, but when the defendant has produced any evidence, the plaintiff's counsel has the right of speaking to the jury in reply. After this the judge who tries the cause addresses the jury. He elucidates with precision the question on which they are to decide, states the applicability of the evidence adduced on each side, (frequently recapitulating from his minutes all the evidence that he considers as relevant,) and points out the rules of law affecting the question, by which they are to be governed in pronouncing their verdict. This is called the judge's *charge* to the jury in which he is said to *sum* up the evidence. When the charge is done, the jury may (if they think proper) withdraw from their box to their room, in order to deliberate and to consult with each other on their verdict, a constable is then sworn to keep them together, to suffer no person to communicate with them unless by leave of the court, and to prevent their being furnished with food, &c. except by the same permission. The jury are allowed to take with them any sealed instruments that have been given in evidence in the cause, other papers they cannot unless by consent of parties, nor can they have any papers that were not exhibited to the court. They cannot examine witnesses after they have left the court, though they may return and have them examined in open court, and so they may return to request information as to law or fact from the court. They cannot take the private statement of one of their number as evidence. At any time before the jury have given in their verdict,

the plaintiff may if he chooses become non suit. The foreman of the jury is their president and spokesman. He is usually chosen by them as soon as they have been sworn, and when they have agreed on their verdict it is written and he delivers it in open court, where it is read by the prothonotary and recorded. Unless the jury are unanimous in their opinions no verdict can be given.—Sometimes when they are long without concurring, it is agreed by the parties that a juror should be withdrawn by consent, on which the remaining 11 are discharged. This is also done sometimes before the close of a trial, and sometimes a juror is compelled to withdraw by indisposition.—2 Tidd Pr. 910. The jury are at liberty always to return a general verdict. This is shaped according to the form of the issue tried. Thus in trespass, it is either that the defendant is guilty or not guilty, and if guilty, then the verdict adds the amount of damages the plaintiff shall recover. In actions of assumpsit, &c. the verdict is usually "for the plaintiff, damages so much"—or "for the defendant."

If there are difficult questions of law entangled with the facts of the case, the jury may find a special verdict, which consists of a written statement of the facts, as the jury conceive them to have been proved, leaving it to the court to say which party is entitled to the verdict. This was introduced by the statute.—Westm. 2, 13 Ed. 1 c. 30, sec. 2. So the jury may give a general verdict, subject to the opinion of the court upon a special case, stated by the counsel on each side, by mutual agreement —3 B. C. 377, 378. If the judge "either in his direction or decisions," in the progress of a jury trial, should mis-state the law in any material point in the cause, by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a bill of exceptions, stating the point wherein he is supposed to err, and this he is obliged to seal by statute.—Westm. 2, 13, Ed. 1. c. 31.

3 B. C. 372. 1 Phillips Ev. 295 to 298. This is subject to examination afterwards under a writ of error. These bills of exceptions and the *demurrer to evidence* which admitted the facts alleged to be proved and referred the law arising on them from the jury to the judge—have fallen into much disuse since the introduction of the power of granting new trials.

*Double and treble damages.*

The act of the province 1779, 19 G. 3 c. 10, s. 2, 1 P. L. gives "*treble* rent and costs of suit" against tenants overholding. The acts of the province 1768, 8 G. 3, 4, sec. 3, 1 P. L. 137, gives treble damages and costs of suit against any persons who break the pound, or otherwise rescue cattle, or articles distrained for rent. The same act, sec. 4, gives double value of the goods distrained, besides full costs to any person whose goods are distrained under pretence of rent in arrear, when none is really due. See title "Distresses." The act of the province of 1758, respecting forcible entry and detainer, 32 Geo. 2 c. 3, sec. 2, 1 P. L. 6 gives treble damages and costs of suit against persons convicted under that act.

## CHAPTER XII.

### *OF NEW TRIALS, MOTIONS AND RULES.*

The grounds on which a verdict may be set aside, and a new trial granted, must be such as do not appear on the face of the record. Objections manifest on the record itself may form ground for *arrest* of judgment, but not for new trial. 3 B. C. 387. Grounds for moving a new trial 1. Want of due notice of trial, by which the defendant has been taken by surprise, and prevented from making any defence. 2. The want of a proper jury. 3. Misbehavior of the prevailing party, as by circulating libels in print againt his opponent among the jury. 4. Material variance between the issue and record. 5* Unavoidable absence of attorney or witness. 6† Discovery since the trial of new and material evidence. 7.‡ Discovery of a statute in point not noticed at the trial. 8. The con-

* The 5, 6 & 7, grounds are rarely sufficient as causes for a new trial. The party is bound to be prepared with his law and evidence, if regularly notified, and if evidence is afterwards discovered, which due diligence would have put him in possession of before, he is in fault and cannot have a new trial.

viction of those who were witnesses on the former trial, for perjury, or strong grounds laid to show them guilty of it. 9. The misdirection of a judge, or his improperly admitting or refusing evidence. 10. The error of a jury in finding a verdict without evidence, or contrary to it. 11. Misbehavior of a jury, as in casting lots for their verdict. 12. An excessive amount of damages found by the jury.

It is not usual to grant a new trial for the smallness of damages, nor is it regular to grant a new trial in a penal, hard or trifling action, where the verdict is for the defendant, except for the misdirection of the judge, or on a reserved point. A new trial cannot be granted in a civil action, at the instance of one of several defendants, nor for part only of the cause of action. On an issue sent from the court of chancery, the application for a new trial must be to that court. If a verdict be objected to as contrary to the evidence, it is the usual course to grant or refuse a new trial, according to the report of the judge who tried the cause. If he is satisfied with the verdict it is generally confirmed, and *vice versa* set aside if he considers it wrong. See Tidd's Pr. v. 2, 934 to 949. In the practice of our Provincial Courts, judgments are usually not signed on a verdict until the close of the term, and motions for new trials are considered to be in time till the last day of the term in which the verdict has been given. If a rule for judgment, however, be served, the motion must be made within the four days of the rule. In practice, the motion should be made, or notice of it at least given in some way by the losing party on the same day or day after the trial, as this prevents any supposed acquiescence.

### *Motions and Rules.*

The most usual mode of applying to a court, in the progress of a cause at common law is by *motion*. This is made in open court by counsel. It is sometimes preceded by a *notice* to the other side, and it must in both cases

be supported by an affidavit of the facts necessary to sustain it. The counsel applies that an order, usually termed a rule, should be made to such or such an effect, and if granted, it is said to be made absolute in the first instance. It is, however, often given with a condition thus "unless cause to the contrary be shown" within a given period, and it is then called a rule *nisi*, and if subsequently no satisfactory cause be shown against its passing, it is made absolute. Some rules are granted without motion, and are signed by the prothonotary as a matter of course. Such are rules to plead, &c. Other *rules* are granted on motion as matters of course, such as for a special jury. Rules are moved for to amend or to stay proceedings, to set them aside,—to enter judgment, to change the venue, to obtain a commission for witnesses, and for a great variety of other purposes. Affidavits are usually sworn in court, and are chiefly made by the party in the cause who applies for the rule. When a rule *nisi* is moved for, the opposite party may either shew cause against it in the first instance, or on a subsequent day. In the former case, the counsel applying for the rule has a right to reply in support of it. 1 Tidd. Pr. 504.

If the rule be made conditionally, the counsel of the party called upon may shew cause against it, on or before the day limited in it, and if necessary, produce affidavits in reply. If no cause be shewn, the rule may be made absolute as a matter of course, on affidavit of it's being served, by moving to that effect on the day next after it expires, ib. 507. When cause is shewn against a rule the court will make it absolute, or discharge it in their discretion, with or without granting the costs of the application. ib. 508.

The rule of the supreme court in hearing motions is to begin with the senior counsel, and go through the bar who are present, calling over the names to the youngest, and allowing each to make one motion only, until the whole list is gone through, and it comes again to his turn.

In hearing a rule *nisi*, all the counsel on each side are heard. Those who are to shew cause are first heard *seriatim*, and then the counsel on the other side. The senior begins, and is followed by his juniors. But on a special case, or special verdict, on a demurrer, or writ of error, &c., one counsel only, (commonly the junior) is heard on each side. [1 Tidd, Pr. 513] and a reply is given to him who began.

The rule of Easter T. 1782, sup. court, Halifax, directs "All motions to be verified by affidavit. All matters for argument before the court to be set down in a separate "paper, and in the order of the dockets, and to be taken "in course. The judges to be apprized of the case if "merely points of law, by a state of the facts two days before argument. The court will hear counsel with the "utmost patience, but will countenance no interruptions, "or admit of the point in question being spoken to more "than once by each pleader, unless *new matter* should "arise, and then only by application to the court for leave "for further argument."

In the argument of motions, if the party who replies to the side first heard in argument, should quote any case or statute, the other side are usually allowed to reply, this quotation being considered "new matter," within the meaning of the rule of 1782. Great inconvenience having arisen from the practice of bringing books of law into court and reading from them in argument, the supreme court forbade it's being done in future, and now constantly require counsel to extract into their briefs, whatever passages or cases from books they rely upon. This has produced greater attention in preparing briefs, and added much to the regularity of the proceedings.

The rule of the sup. court, Trinity T., 1792, directs that "Two days previous to the commencement of every term, "an entry shall be made with the prothonotary by the

"respective attornies interested in bringing forward the "same, of all writs of errors, demurrers, special verdicts "or causes referred, that shall be intended to be argued "in the ensuing term, of which the prothonotary shall "deliver a list to the court upon the first day of the term, "adding thereto the titles of such causes where any rules "are depending, from the preceding term, and thereupon "shall be given to the court, to hear the council of both "parties, and abstracts of each case shall be delivered "to the court by such attorney as aforesaid, four days "before the day on which it is to be argued, and the ex- "ceptions or grounds intended to be insisted on shall be "subjoined to such abstract. And all such causes shall "come on to be argued in the order in which they shall "have been so appointed, and shall not be put off with- "out a special application to the court before the day "on which it *shall stand in* the paper for argument."

### *Judges' summons and orders.*

A judge is sometimes applied to at his residence or chambers for a *summons* (or order nisi,) which being served on the opposite attorney, if he does not shew cause at the time appointed, it is made absolute by the judges granting an *order*. This is chiefly resorted to, to stay proceedings until the particulars of demand are given, or to stay any particular act, or process which has been irregularly obtained, or to amend any of the pleadings or process in a cause. The order thus obtained is liable to revision, and may be set aside on motion *if wrong*.—See 1 Tidd Pr, 515, 516, 517.

### *Petitions.*

These are more common in chancery, &c. than in the common law courts. However, prisoners may make com-

plaint in this form if ill-treated in jail, or for relief under the insolvent act,—paupers to be admitted to sue *in forma pauperis*, infants to sue by *prochein ami*, or to defend by guardian, &c.—1 Tidd. Pr. 514, 515.

## CHAPTER XIII.

### *JUDGMENTS AND COSTS.*

The judgment can only be *arrested* for some *intrinsic* cause, or error appearing on the face of the record.—After judgment on demurrer, there can be no motion in arrest of judgment, if the exception might have been taken in the argument of the demurrer, nor for any thing that is aided after verdict, or amendable by the common law.—2 Tidd. Pr. 949. At common law if any defect exist in the statement of the cause of action, it will be aided by a verdict, if the statement omitted be such as must be necessarily implied from the facts stated, and the finding of the verdict. Thus where the grant of a reversion was stated, an attornment, (then a necessary ceremony) was presumed after verdict.—1 Tidd Pr. 950. It is also a rule that the defendant cannot move in arrest of judgment where he might have pleaded the objection in abatement.

*Surplusage* will not vitiate the judgment after a verdict. If the plea of the defendant be substantially bad, a verdict in his favor will not support it.—ibid. 951. The motion in arrest of judgment in the King's bench (from

which court our practice is chiefly adopted)—may be made at any time before judgment is given, though a new trial has been previously moved for.—2 Tidd Pr. 960. But after an unsuccessful motion in arrest of judgment, a new trial cannot be moved for unless it be done early.—4 B. and C. 160.

*Amendments and jeofails.*

All mistakes (at common law) were amendable during the same term.—8 Co. 157. The declaration may be amended by adding new counts within two terms or even after, and after verdict it has been allowed to amend a declaration, by increasing the damages laid, so as to cover the amount found by the jury. Before plea there are no costs payable upon amending the declaration in form in ordinary cases, except the costs of the application, and even after the general issue pleaded, if the amendment be in substance or a special plea pleaded, the plaintiff must pay costs or grant an imparlance at the election of the defendant.—(See 2 Tidd. Pr. 750 to 764.) Before the pleadings are entered of record, any of them may be amended by leave of the court or a judge, on reasonable terms.—ibid. 753. When the proceedings are entered *of record*, they cannot be amended except as far as it is authorized by the statutes of amendment.—ibid 768.

The provincial act of 1764, 4 G. 3 c. 1. 1 P. L. 98, 99. sec. 1, directs "that for error in any record, process or "warrant of attorney, original writ or judicial, panel or "return, in any places of the same razed or interlined, "or in any addition, subtraction or diminution of words "letters, syllables, or titles found therein, no judgment, "or record shall be reversed or annulled." The judges are thereby authorized to amend all defects therein which appear to them to be the mistake or misprision of their clerks, so as to confirm the judgments,—except in "appeals, indictments of treasons and felonies, and the

" the outlawries for the same, and the substance of the" " proper names, sir names and additions left out in ori- " ginal writs and writs of *exigent*, and any other writs con- " taining proclamation."—See Eng. stat. 8 H. 6, c. 12, sec. 1 and 2.. 1 Bac. Abr. C. L. p. 95, letter C. (" The " process is as well amendable after judgment as before, " by 14 Ed. 3, c. 6. C. J. Belcher's note.) (See 2 Tidd. Pr. 768, 769.)

Sec..2. enacts " that all writs of error, appeals from " judgments in any action, real, personal or mixt, accord- " ing to the course of proceedings in this province, where- " in there shall be any variance from the original record, " or other defect, may and shall be amended and made " agreeable to such record" by the courts where the proceedings are returnable. After verdict in a court of record, the judgment not to " *be* stayed or reversed for any " defect or fault either in form or substance, in any bill, " writ, original or judicial, or for any variance in such " writs from the declaration or other proceedings."* Sec. 3, excludes all criminal proceedings whatever from the operation of this act.

The provincial statute of *jeofails*, act of 1764, 4 & 5, G. 3 c. 1, 1 P. L. 101 to 104, enacts, sec. 1, that after verdict in any court of record, the court shall give judgment notwithstanding any " mispleading, want of color, " insufficient pleading, or jeofail, any miscontinuance, or " discontinuance, or misconveying of process, misjoining " of the issue, want of warrant of attorney for the party " against whom the same issue shall happen to be tried, " or any other default or negligence of any of the parties, " their counsellors or attornies"—the judgment to " stand

---

* See 2 Tidds Pr. 961 to 961, (English stat. 5 G. 1 c. 13, 18 Eliz. c. 14, 16 & 17, Car. 2 c. 8, 1, 1 Ventr. 200. 5 Mod. 286. Cro. Eliz. 778. 5 Co. 45. 3 Co. 52, b. 1 Bac. Abr. C. L. p. 96. Let. c.—Eng. stat. 4 Ann. c. 16, 9, Ann. c. 20. s. 7. These references from C. J. Belcher's notes.)

" according to the said verdict, without reversal by writ " of error or false judgment." The same clause provides that the plaintiff's attorney shall file his warrant "the same " term he declares," and the defendant's attorney " the " same term he appears," under pain of forfeiting to the " king £5. "to be recovered by action of debt, bill, plaint. " or information."—(Eng. stat. 32 H. 8 c. 30. sec. 1 & 2.)

Sec. 2. After verdict judgment is not to be " stayed or " reversed, for any defect in form," in writs or pleadings, nor for variance between the writ and declaration, or for the want of any writ, " or for any imperfect or insufficient " return of any sheriff or other officer.—(Eng. stat. 18 Eliz. c. 14, sec. 1.

Sec 3. Judgment not to be stayed or reversed after verdict " for want of an averment of any life or lives so " a. the said person be proved to bo alive"—or for awarding " *venire facias* to a wrong officer" or a *venire* partly wrong as to the *visne* or mistake in jurors *sir name* or addition in writ or return, or the want of return or signature to one, so that a list of jurors be returned annexed, or because the plaintiff in *ejectione firmae* or in any personal suit being an infant had appeared by attorney and obtained a verdict.—(See English act, 21 Jac. 1 c. 13, s. 2.

Sec. 4. Judgment not to be stayed or reversed after verdict for want of pledges to prosecute,—want of the sheriff's name on the return of the original writ. Want of *proferts* in pleading,—omission of " by force and arms," and " against the peace"—mistake in the christian or sir name of either party,—sum of money, date of day, month, or year, " by the clerk in any bill, declaration or pleading" where it is rightly stated in the same, or any previous " writ, plaint, roll or record," whereunto a party might have demurred—nor for want of " this he is ready to verify" or "by record"—or "as it appears by record"—or for mistake in the *venue* if cause were tried by the proper jury, nor for omitting to state request of party for increase of

costs, or the consent of party to costs, " but that all such " omissions, variances, defects and all other matters of like " nature [1 Lev. 207, 1 Vent. 272] not being against the " right of the matter of the suit, nor whereby the issue or " trial are altered, shall be amended" by the court where the judgment is given or whither it is removed "by writ " of error, or by appeal."—(Eng. stat. 16 & 17 Car. 2, c. 8 sec. 1.)

Sec. 5. On *demurrer* in any court of record " the judges " shall proceed and give judgment according as the very " right of the cause and matter in law shall appear unto " them, without regarding any imperfection, omission or " defect in any writ, return, plaint, declaration or other " pleading, process or course of proceeding whatsoever, " except those only which the party demurring shall spe- " cially and particularly set down and express together, " with his demurrer as causes of the same," although it be matter of substance, if there be sufficient matter in the pleadings to give judgment upon, and no advantage to be taken of an immaterial traverse or for any of the kind of defects. &c. named in sec. 4. unless set down specially as causes of demurrer.—(Eng. stat. 4 & 5, Ann c. 16, s. 1, 27 Eliz. c. 5, s. 1.)

Sec. 6. Places judgments by confession, *nil dicit, non sum informatus*, or after enquiry of damage, upon the same footing with judgments after verdict, so that the same errors or jeofails may be amended or passed over.—(Eng. act 4 & 5, Ann. c. 16, s. 2.)

Sec. 7. Extends this act in direct terms " to all suits in " any court of record, for recovery of any debt imme- " diately owing, or any revenue belonging to his Majesty, " his heirs or successors."—(Eng. stat. 4 & 5, Ann c. 16, sec. 24.)

Sec. 8. This act not to extend to any criminal proceedings or actions on penal statutes.—Eng. stat. 18 Eliz. c. 14, s. 2, 21 Jac. I c. 13, s. 3. 16 & 17 Car. 2 c. 8, s. 4,

& 5 Ann. c. 16, s. 7. This exception does not extend to actions given by a special statute by way of recompence to any injured party.

Sec. 9 " That no dilatory plea shall be received in any " court of record, unless the party offering such plea do, by affidavit, prove the truth thereof, or show some probable matter to the court to induce them to believe that " the fact of such dilatory plea is true."—(Eng. stat. 4 & 5 Ann. c. 16, s. 11. 1 Ventr. 180.)

Arrest of judgment can only take place where some defect is shewn in the proceedings on record ; which would have been a cause of demurrer, and which is not aided by the verdict, either by the common law or statutes. 3 B. C. 394. If through incorrectness in the pleadings, the issue be joined on a fact immaterial to the cause—after verdict the court will order a *repleader*,* that is, expunge the irrelevant pleadings from the record, and make the parties plead again from the stage at which they began to deviate from regularity. ibid, 395, 2 Tidd. Pr. 953. 954. Where judgment is arrested, each party pays his own costs. Cowp. 407. If a verdict is given generally with entire damages, and any one count in the declaration proves bad, the judgment may be arrested. Dougl. 730. The grounds of arresting judgment must be drawn wholly from the face of the record, and matters of fact, not appearing on it, cannot be brought in aid in opposing such a motion. 5 Price, 547.

### *Judgments.*

Judgments the learned English Commentator defines as " the sentence of the law, pronounced by the court " upon the matter contained in the record." 3 B. C. 395. Judgment is given for the plaintiff, when the defendant confesses the action, or abandons his defence by making

* The form of a repleader is to be found in Lutwyche, 1622.

default—for the defendant when the plaintiff withdraws abandons or ceases to prosecute his demand. When a verdict is found, a demurrer decided, or a plea of nul tiel record adjudged—the party in whose favor the verdict is given, the law questions on the demurrer settled, or the question decided on the plea of *no such record*, is then entitled to a judgment in his favor. The right of moving for new trial, or in arrest of judgment however gives to the party against whom a verdict, &c. is given, an opportunity of having it's correctness discussed and reviewed before final judgment. See 2 Tidd. Pr. 962, 963.

When no legal question is depending respecting the right of the party who has obtained a verdict, default, &c. to judgment, the judgment is (in our provincial practice,) signed as a matter of course in favor of the prevailing party. See 2 Tidd. Pr. 934. When the court is equally divided in opinion, no judgment can regularly be entered.—ibid. 963. And this difficulty has sometimes arisen in our practice. (See 1 Campb. 468, 7 Taunt. 489.)

In assumpsit, covenant, case, replevin, and trespass, the judgment, when for the plaintiff, is that he recover his damages and costs against the defendant. In debt, that he recover his debt with damages and costs. In replevin, if for the defendant, a return of the goods. If judgment in other actions be given for the defendant, he can recover his costs only. The judgment must be entered by the attorney of the successful party, on the roll where the previous proceedings have been recorded, and this and the bill of costs taxed, filed with the prothonotary, who prepares a docket of the judgment which the chief or senior judge signs, on which being done the execution may be taken out. 2 Tidd. Pr. 964.

The provincial acts respecting the effect of judgments to bind the lands or goods of the losing party, and the steps required to make them effectual have already been noticed, vol. 2, p. 259.

Rule of supreme court, Mich. T. 1787.—"The court, "ordered that in future, judgments be entered and signed "in such causes as are tried within the three last days of "the term, unless notice be given in writing of an intend-"ed motion against it."

Rule of sup. court, Easter T. 1777. "It is ordered that "all bills of costs taxed. for the future, shall be filed in "the clerk's office, and kept with the records of the causes "where they belong, before any execution or executions "shall issue, on any judgment or judgments of this court."

Rule of supreme court, Mich. T. 1787. "The court "ordered that the clerk do not issue or deliver from the "office any execution until the fees and costs due on the "judgment be paid."

Rule of supreme court, Trinity T. 1787, "that the clerk "do not issue any writ, or enter any action, until the fees "are paid, or he will be accountable for the same."

Judgments are either interlocutory or final. Those which are given in the progress of the cause and do not finally put an end to the suit, are called interlocutory. Such is the judgment for the plaintiff when a plea in abatement is overruled by the court. The most usual interlocutory judgment in common law courts is, when the defendant suffers judgment to go against him by default, which is a tacit admission to the plaintiff's right to recover, but the amount of damages remains to be ascertained on a writ of inquiry by the sheriff and a jury. Final judgment is such as puts an end to the action, by giving a decision that the plaintiff shall recover his debt or damages, &c. and costs, (according to the kind of action,) or, if in favor of the defendant, by declaring that the plaintiff shall not recover in his action, but that the defendant shall recover his costs against the plaintiff. 3 B. C. 398.

*Costs.*

The king is not bound to pay, nor is he entitled to receive costs in any action brought in his name, or to his use. 3 B. C. 400. The custom house officers are exempted from paying costs where they have made a seizure and are sued for it, if they obtain a certificate of the judge or court, that they had "probable cause for making such seizure," by English act, 6 G. 4, c. 114, s. 65—2 Tidd. Pr. 1005, 923. The provincial act of 1758, 32 G. 2, c. 24, sec. 7, 1 P. L. 36, enacts "that in all actions of tres-"pass," "assault and battery," and "for slanderous words,"—if the jury at the trial, or a jury of enquiry shall give "damages under forty shillings," the plaintiff shall not recover costs beyond the same amount as the damages. If more costs be awarded "the judgment shall be void," and the defendant acquitted. It provides, however, that if the judge "at the trial," in "assault and battery," or "in trespass," "shall certify under his hand upon the back "of the record, that the assault was sufficiently proved, or "that the freehold and title of the land mentioned in the "plaintiff's declaration, was chiefly in question, or that "the trespass was voluntary and malicious, the plaintiff in "such case shall recover his full costs, though the jury "should find the damages to be under forty shillings."—The Eng. stat. 43 Eliz. c. 6 & 21, Jac. 1, c. 16, s. 6, are the basis of this enactment, which combines most of their provisions, and varies them a little. See 2 Tidd. Pr. 987—997, 3 B. C. 400. The provincial act of 1773, 13 & 14, G. 3, c. 2, sec. 1, directs the charges and expenses of executing writs of partition to be assessed "in due proportion on each se-"veral share allotted and assigned to each and every pro-"prietor." 1 P. L. 178.

The provincial act of 1787 (which regulates the fees of common law proceedings) 28 G. 3, c. 15, s. 2, 1 P. L. 262, 263, enacts, "that in all causes wherein judgment

"shall hereafter be given for the plaintiff or plaintiffs"—all the fees established by that act "shall be paid by the "defendant or defendants,"—and in all cases where judgment is given for the defendant, on *non pros, retraxit*, discontinuance or otherwise, the plaintiff shall pay the defendant's costs under the act. The common law gave no costs, and in consequence, a variety of statutes have been passed on the subject in England, since that of Gloucester 6 Ed. 1. c. 1. which was the earliest—(See 3 B. C. 399, 2 Tidd. Pr. 979 to 1029]. Our act by it's extensive words renders it perhaps unnecessary to enter minutely into the English rules on this subject.

*Executors and administrators* are free from the liability to pay costs in certain cases where they sue in the English law, because the stat. of 23, H. 8, c. 15. s. 1, has been construed not to extend to them. 2 Tidd. Pr. 1014. But there does not appear to be any expression in our act, on which a distinction can be maintained between them and persons suing in their own right, as regards the liability to pay costs when defeated.

*Paupers* also are enabled by English statutes, 11 H, 7. c. 12 & 23, H. 8, c. 15, to sue without paying costs, though they have not this privilege if defendants. Our act of 1787 having made no exception in their favor, it is most reasonable to conclude that it tacitly repeals these ancient laws, if indeed they can be considered as a part of the old statute laws of England which were applicable and introduced into our provincial system, of which strong doubts may be entertained. The reduction of costs in law proceedings to a moderate standard, which ours certainly is, when compared with law expences in the mother country, is a much greater boon to the poor, than the narrow and perhaps mischievous privilege of suing, as it is accorded by the English acts just alluded to. See 3 B. C. 400, 1 Tidd. Pr. 93, 94.

---

The practice however of suing *in forma pauperis*, does exist here, but I know of no decision to establish it.

The same act of 1787, 28 G. 3, c. 15, sec. 4, 1 P. L. 264, requires the clerk of the court to examine every bill of cost with the fee table, and that one of the judges, on the clerk's certifying it to be correct, should allow and sign it, before it shall be charged against the plaintiff or defendant. The 5th section directs any attorney on receiving the costs due on any actions, if required, at the time of payment, (or within 6 months after if demanded), to give a bill of the items with a receipt. It further requires that before he shall take out an execution, he shall file a copy of the taxed bill of costs in the office of the clerk of the court. (The original taxed bills of each attorney are annexed together every term, and filed before execution is allowed to issue on them). If the cause is in the supreme court, the act requires him (sec. 5.) before issuing execution to "file the judgment roll in the proper office" —and to endorse upon the execution "the real debt due." The costs of issuing the commissions to examine witnesses abroad, and those attendan' on taking their depositions under the interrogatories are directed by the provincial act of 1791, 31 G. 3, c. 4, s. 1, 1 P. L. 284, to be "regu-"lated by rule and order" of the courts from which they issue. This provision leaves it discretionary with the the court to grant or refuse those costs to the successful party in the suit, according to the circumstances. This enactment is intended to prevent any expense of this kind, if not necessarily incurred, from falling on the loser. The tables of fees under our acts will be all given together under the head of "Fees."

The provincial insolvent debtor's act, 1763, 3 & 4 G. 3, c. 5, sec. 10, 1 P. L. 93, gives *treble* costs, with the penalty of £50 against sheriffs, or their officers, &c. who offend against that act. The provincial act of 1796, 36 G. 3, c. 4, 1 P. L. 368, enacts that in "actions of tres-"pass *quare clausum fregit*, wherein the title of lands is not "chiefly in question," if the notice before action be not

proved on the trial to have been given according to the act, the plaintiff "shall recover no more costs than damages." As to the costs in actions against justices of the peace, constables, &c. v. 1, p. 132, this vol. p. 105 to 108. See also prov. act of 1814, 54 G. 3, c. 15, 2 P. L. 121, 122, 123. The prov. act of 1826, 7 G. 4, c. 3, s. 26, 3 P. L. 243, gives *treble* costs to a defendant for whom judgment is given on non suit, discontinuance, demurrer, or verdict, where he is sued for any thing done by commissioners of highways, or under their order, in pursuance of that act.

## ADDENDA.

To page 102, 6th line, add—" and so does the cholera " act of the same session, c. 14, s. 2. Both passed for " one year."

To page 131—My notes of McDonald *vs.* Kidston, are too imperfect to introduce.

Mitchell *vs.* Ring is given in 2d vol. p. 257, in note.

In Mitchell *vs.* Raymur, an execution had been in the sheriff's hands a little before the attachment, but he did not receive positive directions to levy immediately under the execution, but under the attachment he did.—Held that this execution did not bind personal property against the attachment.

In Hartle *vs.* Hartle, absent debtor.—A vessel of defendant had been attached by several creditors. The defendant returned to the province and confessed judgment to the first attacher, who thereupon levied his execution for his debt and costs in full, and the subsequent attachers endeavored to obtain a rule against the sheriff (who had acted under an indemnity, but the court upheld the course pursued by the first attacher, deciding that a judgment obtained under these circumstances was regular, and that the first attacher under the absent debtor law was entitled to his costs, before the subsequent attachers could come in for any thing, contrary to the rule in attachments not under that act.

The following rule on the subject of trials at Halifax, has been passed since the text of page 209 was written, " Rule of supreme court, Mich. term, 1832. The court " taking into consideration the great hardship which " suitors in this court are liable to, in consequence of the " impossibility of getting through the trials of all the

" causes upon the docket in the term of 14 days,—the
" common limit of our present term: ORDERED, that this
" court will, every ensuing term commence with the
" docket of *jury* causes, *on the first Monday* in term, and
" will go once only through the docket, but will *extend*
" the term (if necessary,) *until all* the causes have *once*
" been *called*."

By the court,—31st Oct. 1832."

J. W. NUTTING, Dy. Proth.

To page 138.—Since the text was printed, a friend suggested to me that the supreme court is named in the old editions of the province laws, which on comparing them I find to be correct.

---

ERRATA.—Page 27, line 25, for *and if died* read *and if he died*. P. 75, line 12, for *denied* read *demised*. P. 87, line 1, should be at the foot of the page. P. 108, line1, for *second*, read *2d. two pence*. P. 128, line 9, *Am.* read *Ann*. P. 134, line 26, *abaning* read *abandoning*. P. 136. line 3, of the note, for "*to have subject*" read "*to have been subject*."

# INDEX.

Ab
Ab
Ab

Ac
Ac
Ac
Ac
Ac
Ac

Ac
Ac
Act

Act
Ac
Ad

Ad
Ad
Afl

Ag
Ag

Ali
All
An
An
An
An
An
An
An
An
Ap
Ap
Ap
Ap
Ar
Ar
A
Ar

# INDEX.

A. PAGES.

Abatement, 103, 159, 162
Abettors, 113
Absent persons, 42, 79, 81, 98, 99, 147.
——— debtors, 133 to 145
Acceptance, 112
Accession, 5,
Accident, 25, 31, 85, 86
Accord, 165
Account, action of, 71, 100, 109
Accounts, of executors and administrators, 41
Accounts against deceased, 45
Acknowledgment, 103
Actions, 4, 32, 40, 44, 65 to 90, 92, 96, 120, 157
Actions, limitation of, 97 to 104
Acts of Parliament, 198
Administrators, 38, 39, 43, 46, 72, 111, 112, 114, 128, 166, 187, 232
Admiralty, 103
Advertisement, 43, 79, 202
Affidavit, 126, 138, 148, 162, 184, 220
Aged persons, 172
Agent, 113, 114, 126, 138, 139, 140, 190
Alien, 33, 38, 162
Allegation, 48
Ambassador, 128
Ambiguity, 206
Amendment, 5, 6, 7, 78, 120, 224
Amends, 105
Ancient deeds, 203
Animals, 3, 113,
Annuity, action of 72, 103
Answer in chancery, 200
Appeal, 41, 80
Appearance, 139, 143, 154
Appendages, 2
Appraisement, 93, 131, 149
Arable land, 86
Arbitrator, 211
Army, 34, 35, 37, 129, 172
Arrest, 125 to 130

PAGES.

Assault and battery, 66, 100, 105, 112, 166, 194, 231
Assent of executor, 47
Assignment, 19, 111
Assumpsit, 68, 70, 109, 161, 165, 229
Attachment, 89, 126; 130 to 146.
Attestation, 37, 205
Attornies 115 to 122, 127, 128, 172, 190
Attorney General, 121, 208
Auction, 19, 20, 21, 81, 111, 114, 146
Auditors, 72
Authors, 6, 7
Award, 167

B.

Bail, 126, 146, 150, 151, 152, 187
bond, 111, 149
Bailiff, 72, 109.
Bailment, 23 to 32, 112
Bankrupt, 111, 144, 145
Barristers, 117
Best evidence, 193
Bill of exceptions, 215
exchange, 71, 111, 112, 161, 206
lading, 22
particulars, 161
sale 19
Bond, 40, 41, 70, 71, 111, 115, 149, 161, 162, 168
Brief, 178
Buildings, 2

C.

Cape Breton, 39, 58, 118
Capias, 125, 126.
Capture, 5
Carriages, 92
Carrier, 4, 21, 30, 31
Cattle, 27, 67, 72, 92
Caveat, 48
Cestui que trust, 109
Challenges, 211, 212

Chancery, 7, 21, 28, 87, 109, 110, 134, 200
Character, 67
Chief Justice, 53, 127, 173, 229
Child 67
Chose in action 111
Churchwardens, 108
Circuit courts, 54 to 64
Citation, 40, 42 48
Civil law, 2, 5, 10, 11, 22, 24, 27, 28, 38, 71, 127
Clerk of crown, 121
peace, 119
Colchester, 59
Commissioners to take affidavits, 127
Commission, to examine witnesses, 184
Commissioners court, 63, 64
Commerce, 89
Common Pleas, 57 to 65, 139
Common, 68, 75
Condition, 167
Confession, 162
Confusion, 5
Consanguinity, 11, 211
Consequential damages, 67
Consideration, 11, 12, 70, 71
Consignee, 21, 31
Constable, 93, 101, 108, 122, 167
Continuance, 103, 158, 185
Contracts, 11, 68, 70, 103, 110, 111
Contribution, 46
Copartners, 4, 109, 112, 137, 147
Copyrights, 6, 7
Copies, 193
Corn, 93
Coroner, 126, 177
Corporation, 113, 119
Costs, 83, 105, 106, 157, 171, 210 213, 216, 229, 231, 232, 233
Council, H. M. members of 172
records of 200
Counsel, 120, 171, 190, 197, 212,
Counts, 157
Court house, 129
Courts, see 'Supreme court,' &c.
Covenant, 70, 72, 86, 103, 110, 165, 166, 229
Coverture, 165, 167, See Feme Coverte
Creditor, 8, 9, 17, 19, 26, 40, 43, 47, 48, 53, 96, 101, 103, 104, 114, 126, 144
Crier 122
Crop, distraining, 94
Custom house officers, 102, 107, 172, 231


D.


Damages, 4, 53, 66, 67, 68, 70, 75, 76, 96, 105, 112, 119, 230, 231
Damages, double and treble 96, 216
Damage feasant, 91, 96
Death, 8, 10, 113, 160, 192
Debt, action of 70, 72, 100, 103, 110 111, 165
Debts, 19, 20, 26, 27, 41, 43, 104, 96, 114, 126
Deceit, action of 72
Declaration, 139, 147, 156 to 159
of dying person, 194
Decree, 41
Deed, 12, 70, 71, 100, 147, 161, 201, 203
Default, 79, 158, 159, 160
Defects in articles sold, 13
Defendant, 109
Delegation of authority 50, 51
Delict, 68, 112, 113,
Delivery, 10, 15, 16, 21
Demise, 70
Demurrer, 168, 169, 170, 227
Deposit, 23
Depositions, 182
Detinue 69, 100, 165
Devastavit, 128
Dilatory pleas, 162
Disclaimer, 105
Discontinuance, 159
Disseizin, 109
Distress, 69, 80, 90 to 96, 112, 216.
Distribution, 41, 44, 45
Documentary evidence, 182, 198 to 206
Domicile, 39, 137
Dormant partners, 112, 114
Dower, 45, 75, 99
Duresse, 167


E.


Earnest, 15,
Ejectment, 74, 75, 98, 109, 112, 161
Elections, 59
Elisors, 177
Enginemen, 172
English creditors, 126
Escape, 146
Escheat, 200
Evidence, 107, 141, 166, 180 to 206
Exchange, 13

Executions, 19, 75, 76, 96, 130, 143
Executors, 38, 46, 72, 77, 103, 104, 111. 112, 114, 128, 166, 232.
Exemptions, 118, 128 to 130, 172.
Exoneretur. 153
Expectancy, 4

F.

Factor, 22, 111
Fairs, 22
False imprisonment, 67, 100, 112
Fees, 117, 175 176
Felony, 3
Feme coverte, 33, 38, 48, 67, 77, 79, 98, 99, 103, 113, 119, 162, 187
Fiat, 126, 138
Fiction, 67, 69
Fines on jurors, 174, 176.
Fines, see penalties
Fires, 25, 85, 86
Fish, 4
Fixtures, 2, 85
Foreclosure, 28
Foreign judgments, 199
laws, 202
Forfeiture, 84, 95, 97
Forgery, 195
Fraud, 20, 29, 68
badges of 18
Frauds, statute of 14, 16, 17
Fraudulent gifts and sales, 8, 17, 19,
Freeholders, 172
French law, 22, 27,
Funeral, 38, 43, 45

G,

Game, 4,
Gaming, 167
Gardens, 85, 90
Gazette, 43, 79. 232
General court, 53
Assembly, 59, 101, 130, 172
issue, 83, 165
Gifts, 7, 8, 10
Governor, 39, 53, 180, 198
and Council, 41, 53
Government agents, 114
Grant from the crown, 102
Grain, 92, 93
Guardian, 72, 119, 187

H.

Halifax, 39, 54, 63, 64, 176, 209
Hay, 93
Hearsay, 194
Heirs, 40, 46, 77, 85, 114
Highways, 92, 94
commissioners, of 102, 108, 234
Hiring, 28, 29
Horse, 26, 92
Husband, 23, 38, 48, 67, 110
Hypotheca, 26

I.

Idiot, 119
Imparlance, 148
Implements, 92
Imprisonment, false 67, 100, 112, 165
Improved land, 78, 79
Inanimate things, 3
Incorporeal, 75
Indemnity, 153
Indorsee, 12
Indorser, 111
Infant, 33, 38, 77, 79, 98, 99, 112, 113, 119, 162, 167, 187
Injunction, 7, 87
Injuries, 67, 68, 110, 111, 112
Innkeeper, 29
Insolvent estates, 44
debtors, 19, 20, 31, 129, 151, 233
Insurance, 206
Intestate estate, 41, 114
Inventory, 40, 43
Issue, 168, 169.

J.

Jamaica, 205
Jeofails, 120, 224
Joinder of plaintiffs, 110 to 112
of defendants, 118
Joint contract, 110, 147
debtors, 147
Judge of probates, 39, 43, 48, 119
Judges, 53, 58, 113, 126, 127, 146, 152, 161, 213, 214
Judgments, 43, 45, 228 to 230
Judgment in account, 72
detinue, 69
partition, 77, 79, 82
absent debtor cases, 143
by default, 160
interlocutory, 161, 230
final 230,
of inferior courts, 200
proof of 199
arrest of 223, 226, 228

Judgment, defects in, 226
" action on, 163
Judicial acts, 113
Juries, 78, 83, 172 to 178, 230
Jurisdiction, species of 50 to 53
concurrent, 88
over absent persons, 135
of civil courts of common law, 49 to 64
of judge of probates, 39, 43, 48, 119
pleas to, 162
Justification, 166
Justifying bail, 151, 152
Justices of peace, 37, 57, 76, 78, 80, 101, 106, 118, 126, 127, 167

K.

King, 53, 96, 97, 102
King's counsel, 121

L.

Landlord, 75, 85, 90 to 96, 100
Lapse, 47
Last illness, 45
Law of nations, 11
Legacy, 40, 46, 47, 48, 103, 129
Legitimacy, 191
Letting moveables, 28
Libel, 166
Lien, 46. 131, 140
Lights, 68
Limitation of actions, 97 to 104, 141, 166, 167
Livery stable, 92
Livestock, 146
Loan, 19, 25
Local actions, 157
Lord's day, 129, 146
Lunatic, 119, 200, see 'mental incapacity'

M

Mandate, 24
Manufactures, 6, 16, 85, 89.
Market overt, 22
Marriage, 11, 19
Master of Ship, 111
Members of Assembly, 130
Mental incapacity, 33, 38, 79, 98, 99, 119, 186, 200, 211
Mesne process, 58, 124
Mesne Profits, 75, 99
Militia, 118, 129
Mills 85, 92
Mines, 84
Ministers, 172, Minors, (see 'Infant,')
Misnomer, 162
Models, 176
Mortgage of Chattels, 26, 28, 43, 45, 95
Motions and rules, 177, 213, 217, 218, 219

N.

Naval yard, 172
Negligence, 26, 29, 32, 40, 44, 85, 86, 113, 114, 119
New trials, 217
Next of kin, 40, 48
Nonpros, 159, 210
Non est inventus, 138
Note of hand, 71, 99, 111, 161, 206
Notice, 20, 78, 93, 94,
" of trial, 171
" of action 105 to 108
Nudum pactum, 8, 12, 71
Nuncupative will, 34, 36
Nurses, 45
Nuisance, 68, 88, 110, 112

O

Oaths, 42, 76, 129,—see 'Affidavit,'
Oath of witness, 186, 189,
" of juror, 211
Occupancy, 5
Original writ, 124
Ordnance, 172
Overseers of Poor, 108
Ownership, 53, 70
" qualified, 4, 69
Oyer, 161

P.

Paintings, 6
Parol contract, 70
Parties to suit 109, to 115, 128.
Partition 76, 162
Pasture, 86, 92
Paupers, 232
Pawnbroker, 4, 26, 27
Paying money into court, 107, 163
Pedigree, 195
Peers, 128
Penal action, 97, 227
Penalties, 40, 44, 97, 120, 129, 162, 201
Perishable goods attached 137, 146
Perjury, 129

Personating bail, 152
Petitions, 48, 221
Physicians, 45, 172
Pictou, 39
Plaintiff 109
Plea, 161, 162, 178
Pledges 26, 27
Poor 108
Possession 73, 109, 191
Postmasters 32
Pound 90, 96
Power of attorney 36
Prescription 97 to 104
Presumption 191
Principal & agent 113, 114
Priority of attachments 131
Prisoners 98, 153, 159
Prisonor of war 36, 181
Privilege 118, 130
Prize agents 143
Probate 34, 39, 43, 204
Process 124
Prochein ami 119, 187
Proclamations 202
Promissory note 71, 99, 111, 161, 206
Prothonotary 119, 121, 124, 161, 173 175, 177, 229
Public creditors 101
officers 101 to 104, 113, 167, 198
rights 195

Q.

Qualification of judges 54, 58, 59
Qualities of plea 168
Quarantine 102

R

Real actions 73, 90, 98, 112
estate 68, 98, 102, 111, 131, 145, 229
Records 225
Redemption 27
Registers of deeds 119, 172
Registry 43, 119, 131, 201
Release of action 112, 165
to witness 189
Religion 186
Render 151, 152
Rent 46, 70, 75, 90 to 96, 110, 131, 191
Renunciation 39, 112
Repairs 85
Repleader 228
Replication, &c. 168
Replevin 69, 90, 91, 99, 108, 111, 112, 129, 165, 204, 229
Rescue 72, 96
Revocation 34
Rules of evidence, 189 to 196

S

Sale 13
Sailor 34, 35, 103, 129, 206
Scire facias 103, 148, 163
Scotch law 27, 196
Secretary provl. 172
Security for goods attached 137
Seduction 67
Service of process 125, 146
declaration 159
plea 161
Set off 163, 164
Several pleas 167
Ship 21, 31, 111, 203
Sheriff 19, 76, 78, 80, 90, 93, 96 102, 118, 121, 125, 126, 131, 146, 149, 150, 167, 173, 174, 200, 204, 230, 233
Signature 37, 205
Slander 99, 100, 105, 112
Smith 92
Soldier 34, 35, 37, 129
Solicitor General 121
Special Juries 175
pleas 165
property 4, 20, 69
Stamps 205
Stoppage in transitu 21
Sub-agents 114
Subpœna 180
Suggestion 113, 147
Summary suits 125
Summons 125
(Judge's) 221
Sunday 129, 146
Supreme court 53 to 57, 78, 81, 83 109, 127, 139, 183, 207
Surgeons 45, 172
Surveyor General 172
Surviving partner 112
executors 114

T

Tailor 92
Talesmen 174, 177
Taverns 29
Tenants 2, 75, 79, 90 to 96
by curtesy 77, 83
Joint 4, 72, 76, 77, 84, 109, 110, in common do do do

Tenant in dower 83, 84
for life, 70, 77, 84
for years 70, 75, 85, 86
Tender 168, 166, 167
of amends 105, 106, 107
Terms 54 to 64
Teste 125
Timber 83, 86, 87
Title deeds 1
Title to personal property 13
Tools 92
Tort 68, 112, 113
Transitory actions 157
Transmutation 5
Travellers 29, 92
Treasurer 101, 172
Treble costs 107, 233, 234
Trees 112
Trespasses 99, 110, 112, 113, 229 231
Trespass vi et armis 66, 96, 99, 105 108, 165, 166
quare clausum fregit 73, 75, 99, 105, 106, 110, 176
on the case 67, 87, 88, 89 96, 99, 109, 110, 112, 229
for mesne profits 75
Trial by jury 171, 207 to 216
by record 170
of absent debtor causes 140
of prisoner's causes 159
Trover 69
Trusts 8, 19, 46, 109, 187

U

Undersheriff 118, see 'sheriff.'
Undertenant 92, see 'tenant.'
United States Law 6, 8, 19, 22, 27 28, 31, 87, 88, 133, 137, 144
Usury 167

V

Variance 153
Vats 85
Vegetables 3
Venire facias 172, 177
Venue 157, 173
Verdict 215
Views 176
Voir dire 189

W

Wagers 12
Wages 103
Wainscot 85
War, articles of 202
Warehouse 22
Warrant of attorney 119
to confess 120
of distress 80, 93
from justice 108
Warranty of goods 13
Waste 46, 83, 85, 86
action of 76, 83 to 88, 112, 176
Way 88, 191
Wharf 31
Wife 9, 33, 28, 48, 67, 110
Wills 33 to 43, 204
Widow 40, 48, 75, 76, 83, 87, 99
Witnesses 36, 37, 42, 128, 181
absence or sickness of 172, 182
out of the province, 183
expences of, 181
competency, 186, 187, 188
credit, 188
swearing, 186
examining, 189, 196 to 198
Wreck, 25
Writs, 58, 69, 76, 77, 78, 84, 87, 90, 91, 93, 118, 123 to 145, 172

END OF VOL. III.

12, 176

, 99
31
f 172,

183

7, 188

o 198

, 87,
, 172